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Preface

More than 25 years ago, in the preface to the first edition I wrote,

> In this book emphasis is laid on the further need for the draftsman to develop an obsession to draft so as to be readily understood. His task is not only to determine the law, but also to communicate it.

Succeeding editions have remained true to the spirit of those sentences, although the text has developed and expanded in the light of my own experience and the very considerable benefit of my association and friendship over the years with other drafters in various countries.

Legislative Drafting was written particularly with the aim of providing help to those who come fresh to the task of legislative drafting, but my hope is that it may also be a source of ideas and may prompt a review of stylistic practices that may have been taken for granted for too long. There is absolutely no drafting jurisdiction that cannot benefit from a review of the status quo. A good drafter is never wholly satisfied with a completed draft; it is always capable of improvement. Similarly, drafting styles and practices are always capable of improvement.

In the preface to the third edition, I listed what I saw as signposts along the way to intelligibility and efficacy. As I look at them some years later I think they remain valid and are worth repeating. Improvement of drafting quality requires—

- greater attention to structure at all levels;
- an obsession to draft so as to be understood, but without the sacrifice of precision and accuracy;
- a continuing questioning, evaluation and improvement of stylistic and other drafting practices;
- a readiness to accept change where a benefit is demonstrated;
- acceptance that all possibilities are not foreseeable and a readiness to confer discretion where appropriate;
- the provision of adequate human and technological resources;
- adequate planning and resources for consolidation and other programmes for keeping the statute book available in revised and up to date form; and
- resistance by drafters to unreasonably short time constraints.

In this edition, the text has been extensively rewritten and to some extent restructured. Perhaps the greatest change is found in chapter 3 on Style. This has

been completely recast and although the emphasis remains on pursuing a clarity of style that communicates effectively, the chapter is now based on the prescription of 29 guidelines. In other chapters, there is additional material on gender-neutral drafting (chapter 3), the role of legislative drafters (chapter 7), supplementary aids (chapter 8), format (chapter 9) and the implementation of international conventions (chapter 14). There is a new chapter on Powers and Duties (chapter 11).

I have been concerned that in previous editions too many of the attributed forms contain stylistic practices or other elements that conflict with what is recommended in the text. For this reason, the proportion of forms and examples attributed to a source has been reduced and that for which I am responsible has been increased. With attributed forms, I have taken the liberty of presenting them in the style and format recommended and consistently used in the text. The examples of forms for amending legislation have been developed and additional forms in a brief and simpler style are included.

As with previous editions I have had much help from other drafters. I am very grateful indeed to them. They are, of course, not responsible for the opinions expressed or the defects. My very special thanks and my love go to my wife Judith who throughout the years has made this book and much else possible.

Havelock North, New Zealand — GARTH THORNTON
March, 1996

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in an economic use of parliamentary time if the various Acts are amended in one Bill. The design of a Bill amending more than one Act must ensure that the amendments and their respective commencement provisions are not assembled and presented in a jumble. Amendments to different Acts should be presented in separate Parts. If the amendments are both minor and numerous, it may be desirable to present them in a schedule. This course is frequently and conveniently followed in the case of consequential amendments.[28]

28 As to amendment schedules, see p425.

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Chapter 1

Words

INTRODUCTION

Communication is of the essence of every society. A society cannot exist as a social community unless its members can communicate with one another. So far as human societies are concerned, language is the most important medium of communication, particularly so far as the regulation and control of the society itself are concerned. Sounds, such as sirens or whistles, or sights, such as traffic lights or non-verbal road signs, may play a significant part in communication but there can be no doubt that language is the communication medium on which the functioning of society as we know it depends.

The regulation of society is the field in which the legislative drafter toils; the task is to frame the communication of policy decisions having legal consequences to members of society. It is true that the drafter has a minor though responsible part to play in the earlier stages before policies are finally determined and ready to be expressed in legislative form, but the major task is in the field of communication. On the basis of policy instructions, the drafter must survey the relevant law as it exists and then decide what is to be communicated and how. The medium is written language.

There are important differences between spoken and written language. We talk, we listen, we read and we write for much of the time we are awake. In everyday speech we can usually understand others and make ourselves understood without difficulty. We both see and hear the person who is talking to us and the communication value of the actual words is supplemented by visual and vocal aids. A facial expression or bodily gesture, for example a raised eyebrow, movement of the head, or a wave of the hand, frequently makes a visual contribution to the communication of meaning. The manner of speech and modulation of the voice may make a vocal contribution. 'I understand a fury in your words, but not the words,' Desdemona said in the face of Othello's impassioned words. Many ambiguities which might otherwise arise are either dispelled by visual and vocal supplements to the words or are quickly and easily resolved by immediate question and answer.

It is more difficult to make ourselves understood and to understand others when speaking on the telephone. The vocal aids to communication are still present but the visual aids are not. The resolution of difficulties of communication by immediate question and answer plays an even more important role in preventing communication failure.

Written communication is a much more difficult matter. The words stand alone; we see nothing but the written page and hear nothing at all. The absence of vocal aids and many kinds of visual aids is a serious handicap, but it is the permanence and finality of written language when compared with speech that constitutes an even more serious hurdle to successful communication. The errors and ambiguities which in speech are corrected and resolved immediately are in the case of written language much more difficult, sometimes impossible, to correct and resolve. An ambiguity in speech may be cured in perhaps 10 or 20 seconds by a question and an answer but to cure a similar ambiguity in a statute may require nothing less than amending legislation.

The contrast between speech and written language is both striking and meaningful to drafters.[1] The very permanence which makes it difficult to clear communication blockages in the case of written language enables more exact and complex matter to be communicated because the text can be re-read. Also, written language does have some advantages compared with spoken language. Visual aids, such as capital letters, punctuation marks, italics, diagrams, paragraphing and other formatting marks, may supplement words.

The legislative drafter is, or must aim to be, a craftsman in the use of language, a role shared with many people in many trades and professions—authors, journalists, advertising copywriters, politicians, priests and others. It has sometimes been said that words are the tools of the drafter's trade but this metaphor is unacceptable. A tool is an implement used to shape or work raw material. Words are more than this. They are the raw material with which the drafter works, inextricably bound up with his or her thought processes and quite lacking in the passivity, stability and fixity of purpose recognised in a chisel or a hammer.

The use of language is not and cannot be an exact science. Despite the riches of the immense vocabulary of the English language,[2] it has tremendous potential for vagueness, ambiguity, nonsense, imprecision, inaccuracy and indeed all the other horrors recognised by the legislative drafter. Great thinkers and writers have long been aware of the imperfection of language and the frustrations resultant from its use.

Anthony Burgess has put the difficulties facing the drafter beautifully:

> Language has, in fact, many of the qualities possessed by human beings themselves: it tends to be emotional when pure reason is required, it is sometimes unsure of what it means, it changes form, meaning, sound. It is slippery, elusive, hard to fix, define, delimit.[3]

Plato's Seventh Epistle contains this passage:

> No intelligent man will be so bold as to put into language those things which his reason has contemplated . . . if he should be betrayed into so doing, then surely not the gods but mortals have utterly blasted his wits.[4]

Unfortunately, the legislative drafter has no choice; blasted wits must be collected and drafts must be produced which are as straightforward as the material allows

1 See David Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge, 1995) at p291.
2 The second edition of the *Oxford English Dictionary*, published in 1989, contains 20 volumes, weighs about 50 kilos, and defines over half a million words. It is said to contain more than 2.4 million quotations.
3 Anthony Burgess, *A Mouthful of Air* (Vintage, 1993) p287.
4 Quoted by Stephen Ullman, *Semantics: An Introduction to the Science of Meaning* (Oxford, 1962) at p116.

and are so clear that the full intended meaning is conveyed in such a way that it cannot reasonably be misunderstood.

The practising drafter needs every available aid and there is inestimable value in the study of

(a) the nature of language and how it works,
(b) the nature of words and their combination into sentences,
(c) linguistic changes, ie how time and social forces influence meaning and usage.

An absorbing and continuing interest in linguistics (the scientific study of language) is a desirable, perhaps essential, quality for a drafter. A continuing interest because the science of linguistics is very far from standing still. It is surging with vigour.

WHAT IS LANGUAGE?

Language is a system of vocal or linguistic symbols used in a particular society of humans as a means of communication.

Anthony Burgess has described language as:

> a system of signs, arbitrary in form and only to be understood in terms of the whole system which is a given language. Language is also a structure whose parts can be understood only in relation to each other.[5]

Language may be contrasted with speech which is the actual use at a particular time of vocal symbols by an individual for the purpose of conveying information or expressing some other image from the mind of the speaker. Language is the system or the code. It goes beyond the individual to society as a whole and is essentially a social institution, because unless the verbal images stored away in the minds of the individual members of society are substantially the same, they cannot communicate. The symbols are arbitrary in that they have no relation to what they signify yet they are conventional in the sense that they are accepted by the speech community. Language is a set of useful symbolic conventions.[6]

At the same time it must be recognised that language is personal. Just as the experiences of each person within a community will be different, so each person's language will differ to some extent. Communication between two persons requires an overlap of the field of linguistic experience of each.

Speech is the act of the moment, the response of the moment to stimuli acting upon an individual, but language has not this ephemeral character. It is a system which does change, but changes more slowly.

One aspect of linguistics which has interested those engaged in semantics (the scientific study of the meaning of words and word combinations) is the relationship between thought and language.

It is quite wrong to regard our thoughts as something distinct and separate from the host of verbal images stored away in our minds and language merely as the vehicle for the expression of those thoughts. That was the conventional view but it is now regarded as overly simplistic. The opposite view, that language controls

5 Anthony Burgess, *A Mouthful of Air* (Vintage, 1993) p15.
6 See Ray Jackendoff, *Patterns in the Mind* (Basic Books, 1994) Chapter 4.

thought, is held valid by some scholars but proof appears impossible. Thoughts and language are inextricably bound together for much, although not all, thought involves the use of verbal images or symbols. Francis Bacon said:

> Men imagine that their minds have command of language; but it often happens that language bears rule over their minds.[7]

In one of an important series of articles entitled 'Language and the Law', Glanville Williams wrote:

> Language is perhaps the greatest of all human inventions. Most people think of it merely as the chief means of communication, but it is much more than that; it is the chief medium of thought.[8]

An illustration of the close association between thought and language is found in the practice which many people find useful of jotting down thoughts as an aid to the development and distillation of those thoughts. The jotting down process is more than just the making of a record; it aids and is part of the thinking process. Others think best aloud. However, verbal images play no part in some thought. The example sometimes given is that of the chess player pondering future moves. As part of the thinking process, some people have a capacity to visualise developments in a non-verbal manner. An example might be the planning of a garden.

A consequence of the close association of thought and language is that the language of a speech community will to a large extent reflect and depend on the life experience, present and past, of the members of that community. The actions and thoughts of an individual are related to his or her language habits and these are related to the social and cultural environment. In all but exceptional cases this environment will exercise a moulding influence on and fix the limits of thoughts.

Randolph Quirk has referred to the correlation between language and the independently existent world which is essential to communication in this way:

> the simplest, shortest, least technical, least momentous texts have a structure involving profound interactions between language and the world, between individuals and the culture in which they operate.[9]

The relationship between language and the environment in which a proposed law is to have effect is always of great practical importance to the legislative drafter because of the risk that communication will fail. It is especially so in circumstances where the language of legislation is not the language of a society which the law is to regulate. The law may contain, and indeed may rely on to make it meaningful, concepts or mental images which are unknown to the society concerned and may be virtually impossible to translate adequately into the mother tongue of that society.[10]

7 Quoted at p19 of Simeon Potter, *Language in the Modern World*. An interesting discussion of the relationship between thought and language is found in Max Black, *The Labyrinth of Language* (Pelican, 1972) p83.

8 61 LQR, p71.

9 Randolph Quirk, *Words at Work* (Longman, 1986) pp10, 19.

10 There is an interesting article by S. A. Wurm entitled 'Aboriginal Languages and the Law', 6 Annual Law Review, University of Western Australia, p1. See also Graeme J. Neale, 'Legal Language Across Cultures. Finding the Traditional Aboriginal Owners of Land' (1981) 12 FL Rev 187.

A written law is the concern of four separate groups of people and should be comprehensible, or at least capable of explanation, to all of them. These are: first, the individuals who comprise the legislature; second, the persons whose duty it is to administer the law; third, the members of that section of society which is to be regulated by the law; and fourth, the members of the judiciary who may have the final duty of interpreting the law. If the drafter and the members of all four groups are not members of the same speech community and do not share the same, or substantially the same, culture, the possibility of a failure of communication is real.

Language is a system of signs consisting of vocal or linguistic symbols, but most people think of language as consisting of words rather than other linguistic units. The next step is to examine the nature and function of the word.

WORDS

Until recently, Aristotle's definition of words as the smallest significant units of speech was accepted by linguists. Modern scholars refer to semantic units at or below the level of words as morphemes.[11] A morpheme is the minimum meaningful unit of speech. For example, the word 'bookcase' consists of two morphemes— 'book' and 'case'. The word 'bookcases' consists of three morphemes— 'book', 'case' and 's'. A morpheme is known as a free morpheme if it is capable of standing alone as an independent form or word. Thus 'book' and 'case' are free morphemes.[12] A morpheme is known as a bound morpheme if it cannot stand alone as an independent form or word, eg 's' in 'bookcases'. A word may consist of one morpheme (eg 'book', 'very') or it may consist of more than one morpheme (eg 'bookcase').

Simeon Potter defines the word as a conventional or arbitrary segment of utterance, a minimum free form, consisting of one or more morphemes.[13] By minimum free form he means a form which can stand by itself and yet act as a complete utterance.

Our usual concept of the word is as a unit of meaning, a distinct unit in the system of symbols that is language. Although words usually perform their function of communication through an arrangement of words in a structural pattern, they do enjoy a measure of independence on the printed page and in the dictionary. Stephen Ullmann wrote:

> The vocabulary thus gives the impression of a vast filing system in which all items of our experience are docketed and classified.[14]

The filing system yields a meaning or meanings for each word stored in the mind. Words are units of language and language is a system of symbols for communication. Words can be therefore symbols for things or ideas but they are only symbols. The only connection between the word and the thing or idea which that word symbolises is our knowledge of the connection.

Symbols must be interpreted or they fail to communicate; and so the concept of meaning is important.

11 See Stephen Ullmann, *Semantics: An Introduction to the Science of Meaning*, p26. Ullmann quotes Hockett's definition of a morpheme as 'the smallest individually meaningful element in the utterances of a language'.

12 See Simeon Potter, *Language in the Modern World*, p62.

13 Ibid, pp62, 214.

14 Stephen Ullmann, *Semantics: An Introduction to the Science of Meaning*, p39.

The meaning of words

The communication of meaning is an essential function of language and it is natural to ask what is meaning. There is a vast literature on the meaning of words and contemporary thinking has not reached, and is unlikely to reach, agreement on the answers to problems associated with this subject.

The traditional view is that meanings are ideas or concepts capable of being transferred in the form of language from the mind of a source to the mind of a receiver. But what is a concept? Also, there are certainly many words that do not evoke an idea or concept in the mind, eg 'for', 'which' and 'nothing'. Similarly, visual images in the mind are not an essential part of meaning, although they, themselves, do have meaning.

One valid point evident from the 'mental images' approach to meaning is the attention drawn to the indirectness of the meaning relationship. 'When God had created all the animals he still had to find names for them.'[15]

Leech has written 'the meaning of a linguistic expression is precisely that knowledge which enables one to use it appropriately in linguistic communication, whether in every day or specialist contexts.'[16]

Understanding that the connection of language and reality is indirect makes it easier to accept and remember the axiomatic but absolutely fundamental principle that words have no 'proper' meaning and no 'absolute' meaning.

A word means what members of a society understand it to mean at a given time. The meaning or meanings of a word may be relatively stable and constant at a particular time, but the connotations or ideas generated in particular contexts may vary. Different members of society may attribute somewhat different connotations to a word. As Lord Diplock has pointed out in a House of Lords judgment 'words mean whatever they are said to mean by a majority of the members of the Appellate Committee dealing with the case, even though a minority may think otherwise'.[17]

Glanville Williams classifies as a common error 'the idea that words are somehow important of themselves, and irrespective of their symbolic function'.[18]

The same error is endemic in politicians. Not uncommonly they appear unaware that it is the enforcement or operation of legislation which achieves things; the words of the legislation achieve nothing. The confusion of words with action may lead to a greater degree of interest in how a Bill looks and may be presented, than how the Bill will work after it is passed and comes into operation.

To speak of the vocabulary as a filing system containing words and mental images all neatly docketed and classified is helpful in one sense but misleading in another for its conception is of words in a pure state in which their meanings are unadulterated and untarnished by the contact of words with one another. Words, like people, however, are gregarious and tend to be found together influencing and changing the meanings of one another by the company they keep.

The change may be for better or worse and may be temporary or permanent. The effect of context on the meaning of a word may be compared with the effect of environment on the social conduct of a person. And in this sense context must be considered in a broad fashion to extend beyond the few preceding and succeeding words.

15 Black, *The Labyrinth of Language* (Pelican, 1972) p210.
16 Leech, *Semantics* (Pelican, 1974) p204. See also Glanville Williams 'Language and the Law' 61 LQR 71 at 73; Z. Chafee, 'The Disorderly Conduct of Words', 20 Can BR 752, 41 Col LR 381.
17 See *Carter v Bradbeer* [1975] 1 WLR 1204 at 1205.
18 Glanville Williams, 61 LQR at p74.

Stamp J made the point that words derive colour from their context in *Bourne (Inspector of Taxes) v Norwich Crematorium Ltd* [1967] 2 All ER 576, a revenue case in which he had to decide whether in a particular section human corpses should be considered to be 'goods or materials'. He said:

> English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you would have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language.

In *Towne v Eisner* Holmes J expressed much the same thought with a delightful metaphor:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used.[19]

Vagueness of words

Most words in daily use have meanings with 'blurred edges'.[20] A central core of meaning may be ascertained but the fringes of meaning are indeterminate. There is also much overlapping. This is not true of some words, for example numbers, chemical formulae and certain technical terms the meaning of which has a distinctive constancy and exactness. Nevertheless, it is certainly true of most words and it is also important to remember that words consisting of technical terms may be every bit as imprecise and fuzzy as other words. Stephen Ullmann described the meaning of words in this way:[21]

> The sense is visualised by modern thought as a series of concentric circles or zones, of varying determinateness: their inner core is more or less definite, whereas their outer fringes are vague, unstable, and essentially 'open' awaiting supplementary clarification from the context.

One result of the vagueness and instability of word meanings is the conclusion that no two words have identical significations. Meanings generally overlap. It is said that complete synonymy does not exist and in the general use of language this is true although in technical language there are exceptions. 'Few words have exact synonyms. The overtones are almost always different.'[22] A distinction also exists between words considered independently and words used in association with other words in a particular context. In the first case there may be other words which approximate in meaning and these are the kinds of approximations to be found in dictionaries of synonyms.

However, when a word is used with other words, it becomes far less likely that another word of identical meaning exists. The word derives colour from its context

19 *Towne v Eisner* 245 US 418 (1918) at 425.

20 The expression 'blurred edges' is used by Wittgenstein in *Philosophical Investigations* (Oxford, 1953) and is quoted by Stephen Ullmann, *Semantics: An Introduction to the Science of Meaning*, p117.

21 Stephen Ullmann, *Words and their Use*, p41.

22 Lord Reid in *Brutus v Cozens* [1973] AC 854 at 861.

and the exact shade it assumes is unlikely to be matched if another word is substituted. The absence of true synonymy is one of the results of the inexactness of language.

If for practical purposes the principle is accepted that complete synonymy does not exist, two very important consequences follow for a drafter.

(a) The word or phrase which most exactly conveys the intended meaning in the intended context must be diligently sought and found. The habit of using dictionaries, synonym dictionaries and good usage guides in the search must be developed. The demon sloppiness must be conquered.
(b) One word only must be used for one intended meaning, otherwise an inference will arise that a change in meaning is intended. The prime cause of changing words mid-stream is carelessness, but the intention may be stylistic improvement. In any event the drafter must find the best word and stick with it.

The sources of vagueness and inexactness in words are numerous. Three of the most important are

(a) the generic character of many words,
(b) their readiness to derive colour from their surrounding context,
(c) their capacity to evoke emotional responses.

In many cases all three of these sources may contribute to the vagueness of a particular word in context.

The generic character of many words is of great practical importance to the drafter. Words commonly denote classes of things or events bound together by distinctive features common to all objects within that class. Each object within that class will possess the common distinctive features and a number of non-distinctive features. The identification of the distinctive features may leave copious room for argument of the kind frequently before the courts.[23]

Problems of classification arise even, perhaps especially, in the case of common, familiar words. The motor car is so much a part of contemporary life that one would imagine the distinctive features are patently obvious. But perhaps they are not. Is the possession of four wheels a distinctive feature? At what seating capacity does a motor vehicle cease to be a motor car and become a bus? Is a petrol- or diesel-powered engine an essential element? Need the vehicle be in working order?[24]

In many cases the central core of meaning is so familiar and the mental image which the word in a pure state evokes is so clear that vagueness seems unlikely. Take the word 'shop' for example. One would not expect to encounter much difficulty in identifying the essential characteristics of a shop. The likely image that comes to mind is of some kind of a structure containing goods for sale. This image is not supported by two cases. In one, an open site used for the business of selling caravans was held to be a shop while in the other a market place stall constructed of tubular steel framework of upright supports and horizontal bearers bolted together, with a permanent awning, electric light and illuminated sign was held not to be a shop.[25] The position may be further complicated in contexts where 'shop' is used as a verb.

23 See the examples quoted by Glanville Williams at 61 LQR, pp189 et seq.
24 See *McNeill v Ritchie* 1967 SLT (Sh Ct) 68.
25 See *Warley Caravans Ltd v Wakelin* (1968) 66 LGR 534; *Greenwood v Whelan* [1967] 1 QB 396, [1967] 1 All ER 294.

The drafter is frequently obliged to use vague terms such as motor vehicle, ship, shop, writing, goods, machine, factory, family, relative, premises, animal, building (and parts of a building are just as troublesome, eg roof, floor, wall).[26] Experts are not generally of much assistance in solving classification problems. Solan points out that:[27]

> Categorisation at the margins becomes fuzzy for experts, just as it does for the rest of us. More significantly, expertise is irrelevant to most of the problems of categorisation that face us in everyday life, and in the legal context in particular.

Set out above are a few examples of the type traditionally classified as concrete nouns. Despite the room for argument, at least the intended reference in these cases does have physical existence. Where the concept of a word is abstract in character and the meaning obscured by a burden of case law, the problems of identifying the distinctive features are even more troublesome. Words like deceit, fraud, discrimination, mens rea, natural justice, negligence, possession, public policy, provocation, obscenity are but a few examples.

The generic nature of words is seen in words performing an adjectival and adverbial function in just the same way as in nouns. Where is the line to be drawn between drunk and sober, near and far, sane and insane, reasonable and unreasonable, rich and poor, few and many, slow and quick, short and tall? These are all terms of relativity and their context must provide the yardstick. Compare a tall ant with a short elephant.

The second great source of vagueness in words is their readiness to derive colour from their surroundings. The colour will vary according to the circumstances of their use, the context, the personality of the speaker or writer and the nature of the audience being addressed and the general purpose of the communication. This is so, not only in the case where the word in question has a number of distinct meanings (a circumstance known as polysemy which will be discussed under 'Ambiguity of words'), but also where the essence or core of the one meaning has various aspects. For example, take the very ordinary word 'line'. This word will evoke a different image in the mind of the stationmaster, the printer, the palmist, the telephonist, the draughtsperson, the shopkeeper, the tennis player and the fisher. The one core meaning possesses various aspects.

The surroundings of a word are particularly relevant to fringe meaning. Where a word is used in legislation, the scope and purpose of that legislation are of great importance. In *Soil Fertility Ltd v Breed*, the word 'parcel' was considered in a case arising from a prosecution under the Fertilisers and Feeding Stuffs Act 1926 and a pallet consisting of 20 bags of fertiliser of an aggregate weight of one ton was held to constitute a parcel. Lord Parker LCJ said:

> 'Parcel' is nowhere defined. It is clear from the regulations ... that there may be a number of packages making up a parcel, but as it seems to me a parcel may consist of a single package. Equally, as it seems to me, the bags loaded on a pallet constitute a parcel, and it may be that if five tons was stacked as a unit in this shed, it would be possible to say that that five tons was a parcel. It may be that the legislation is deliberately vague in the

26 As an example of the problems which may arise in the interpretation of apparently plain words, see *Dyson Holdings Ltd v Fox* [1976] QB 503, [1975] 3 All ER 1030 (considered and distinguished in *Helby v Rafferty* [1978] 3 All ER 1016, [1979] 1 WLR 13). See also David Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge, 1995) at p169.

27 Lawrence M. Solan, *The Language of Judges* (University of Chicago, 1993) at p97.

> matter, in order that common sense should prevail, according to the circumstances of every case.[28]

Emotional factors may also contribute to vagueness in words. Some scholars have emphasised the separateness of two functions of language, that of conveying information and that of expressing or exciting emotions. But this separation is more apparent than real. It is a matter of degree for even the most objective and cold use of language is likely to have some emotive content. In the cold print of a statute book, a law may evoke little if any emotional response from some readers. However, when the law is considered as it affects real people in a particular situation, the same law may have a very different effect. Similarly, a Bill which in Parliament excites little reaction from one side of the House may arouse the strongest feelings of fury, incredulity, dismay and concern from the other. It is quite wrong to set a standard in legislation based on emotional effect. In Western Australia, the following gem, which was enacted in 1892, remains on the statute book:

> No person shall bathe, unless in proper bathing costume, near to or within view of any public wharf, quay, jetty, bridge ....[29]

The worst offenders are likely to be abstract terms the meaning of which is in any event likely to be blurred. Words and phrases such as 'nationalisation', 'privatisation', 'freedom of speech', 'offence of a political character', 'socialism', 'exploitation', 'racial discrimination', 'neo-colonialism', 'immoral', 'offensive', 'indecent', 'profanity', 'multi-national', 'impropriety' are full of emotion. Moreover, the emotional effect of this kind of word is often a passing response to a temporary situation. In legislation words with an emotional impact are to be avoided or if this is not possible they must be used with discretion.

To sum up, language is intrinsically vague and imprecise. Words have 'blurred edges', various aspects of meaning and evoke emotional responses. To different people, the same word may mean different things. One can only echo S. K. Hiranandani who in an address quoted Montesquieu:

> It is essential that only such words should be used by the law-giver as are bound to produce the same notions in the minds of all men,

and added the words: 'Here is a task for a superman!'[30]

The extent to which it is possible in drafting laws to overcome the vagueness of words is no more than a matter of conjecture. Undoubtedly, the first step in that direction is the attainment of an awareness that words have no proper or absolute meanings, only an everyday meaning or meanings complete with 'blurred edges'.

The stipulation of meaning by definition provides in some circumstances a valuable means of removing undesirable vagueness from a word, but definition must be recognised as a palliative with a limited success rate and possibly unpleasant side effects.[31]

Before passing from the topic of vagueness, mention should be made of the technique of deliberate vagueness. This might be expressed in other words as the

28 *Soil Fertility Ltd v Breed* [1968] 3 All ER 193 at 196.
29 Police Act 1892 (WA) s104.
30 S. K. Hiranandani, 'Legislative Drafting—An Indian View' 27 Mod LR 1, 2.
31 As to definitions, see pp 144–154.

deliberate choice of a vague word instead of a more particular word or a provision laying down precise standards or rules. Words like 'satisfactory', 'necessary', 'reasonable', 'substantial', 'forthwith' and 'nearby' are typical. A good example is the use of the word 'near' in s6(3) of the Road Traffic Act 1988 [UK]. In this provision a motorist may be required to provide a specimen of breath 'at or near the place where the requirement is made'.[32]

The kind of difficulty that such words can encounter is illustrated by the consideration given to 'economic' in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768.

Ambiguity of words

Ambiguity is of two kinds. The first may be termed grammatical or syntactical ambiguity and results from combining words which are unambiguous taken separately in such a way that the meaning of the words together is ambiguous. This is a matter of syntax and will be considered in Chapter 2.

The second kind of ambiguity arises from the word itself and not from its use with other words. It arises when a word has more than one meaning, a circumstance which is known as polysemy.[33] A moment's thought or a glance at a dictionary serves as a reminder that polysemy, or multiple meaning of words, is common in our language. This is not necessarily a bad thing for it is economic if one symbol can serve to convey more than one meaning, and in all but a few cases the context will make clear the sense in which a word is being used. Nevertheless, a drafter must exercise a continuing care to ensure that the potential ambiguity of words with a multiple meaning is nullified by the context in which they are used.

If an ambiguity cannot readily be removed by the context, consideration should be given to amplification of the word to the minimum extent necessary. If that cannot conveniently be done, a definition may be desirable.[34]

One source of polysemy which is likely to be more troublesome than others to the legislative drafter was indicated many years ago by a great semanticist of the last century, Michel Bréal, who wrote:

> In every situation, in every trade or profession, there is a certain idea which is so much present to one's mind, so clearly implied that it seems unnecessary to state it when speaking.[35]

The result of this process is that a word of general meaning will be immediately assumed by the members of some group within a society to signify a more specialised and perhaps technical meaning. The legal profession has its share of such words, eg the first meaning to be attached to the word 'issue' by a common lawyer would be the specialised meaning of a point in a dispute between two parties, while the chancery lawyer would think of issue as sons and daughters. The more general meaning of outflow or outgoing is again adopted in another specialised sense by the philatelist who refers to an issue of stamps or the merchant who issues a bill of exchange. The words 'action', 'suit', 'right', 'charity', 'accident', 'agent', 'income', 'assignment', 'merger' provide other examples.

32 As to 'substantially', see *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1982) 48 ALR 625.
33 Where two or more words have the same sound (for example 'principal' and 'principle') this is known as homonymy; it is not a problem so far as drafting is concerned.
34 See Black, *The Labyrinth of Language* (Pelican, 1972) pp170 et seq.
35 Quoted by Stephen Ullmann, *Semantics: An Introduction to the Science of Meaning*, p161.

A drafter frequently must draft legislation to regulate particular social groups and so comes to be initiated into the technical nomenclature of the social group concerned. It is quite proper, indeed necessary, to use technical terms in legislation regulating technical matters and there is comfort in the maxim of statutory interpretation that technical words will be construed in a technical sense.[36] However, if the word has a general sense as well as a technical specialised sense, the maxim is only capable of application where the context makes it clear that the word is used as a technical term.

Instability of words

Language is sometimes referred to as if it had life and people tend to talk loosely of 'our living language'. By this they mean to emphasise that the language of yesterday is not that of today and will not be that of tomorrow. New words come into use, words change their meanings and words fall into disuse. There is certainly an impermanence about words and word-meanings, but to endow language with a life and existence of its own is misleading.The metaphor may detract from an appreciation that the word is only a symbol and is not directly connected with the meaning it is used conventionally to convey.

Every age is of course different from those which preceded it. Its needs for communication are different and to meet those needs its system of symbols must change. Language does not change because it has life, but because those who use it have life and because their society is constantly changing. Semantic change and the coining of new words are the ways whereby language keeps up with social change and the passage of time. 'The English language absorbs, rejects, and adapts elements of vocabulary as it goes along.'[37] Burchfield asserts that it is best to assume that no single word in the language is a stable, unchanging and immutable legacy from the past.[38]

To keep up with social and technological needs arising from the passage of time, legislation should happily employ new words when necessary. However, the drafter's desire to write in 'ordinary' language does not justify the use of words so new that they have not attained a respectable stability of meaning. But this may happen quite quickly, particularly so in the case of words introduced as the result of technological change. The computer age has spawned many (byte, laptop, software) and other technology is also responsible for many others (cellphone, fax, laser, photocopier). Examples of new words properly used are 'know-how' in the Income and Corporation Taxes Act 1970 [UK], 'video' in the Video Recordings Act 1984 [UK] and 'hijack' in the Aviation Security Act 1982 [UK].

Words may change their meaning in a variety of ways. The two most obvious of these are specialisation or narrowing and its converse, extension or multiplication of meaning. 'Science' is an example of narrowing of meaning from its former meaning of knowledge in general. 'Intercourse' is another example of a word with a narrower connotation today than before. Elizabeth Barrett Browning wrote in a letter, when she was on honeymoon in 1846: 'After two months of uninterrupted intercourse he loves me better every day ... and my health improves too.'[39] 'Paper'

36 F. A. R. Bennion, *Statutory Interpretation* (2nd edn) pp831–839; Farwell LJ in *Mason v Bolton's Library Ltd* [1913] 1 KB 83 at 90.
37 Robert Burchfield, *The English Language* (Oxford, 1985) p113.
38 Ibid, pp116 et seq.
39 Quoted at p123 of Godfrey Howard, *The Good English Guide* (Pan Macmillan, 1993).

is an example of a word which has extended its meaning to cover newspapers, documents, learned dissertations and examination questions. Another example of extended meaning is seen in the construction of 'family' in *Dyson Holdings Ltd v Fox* [1976] QB 503.

There are other categories of semantic change. The metaphorical use of words leads to such terms as 'black' market and 'cold' war. Abstract qualities such as 'youth' may be concreted, and sometimes a word may deteriorate from former strength, eg 'awful'. New life may be injected into an old rare word like 'patrial' as occurred in the Immigration Act 1971 [UK].[40] The status of a word may change. For example a slang word may become respectable and accepted. 'Mob' and 'dropout' are examples.

Semantic change is one important aspect of the fluidity and instability of the vocabulary we use. The practical application for the drafter is twofold.

First, the etymology or history of a word is a totally unreliable guide to word meaning. Etymology may be as misleading as it is fascinating and the drafter must reject seductive but fallacious suggestions that the original meaning of a word is its 'correct' meaning and therefore to be preferred to deviant later meanings.

Secondly, a word which appears to be in a fluid state should be avoided if possible. The obsolescent word may be obsolete when the law comes to be interpreted. The word of the moment, the vogue word of today, may not signify the same meaning tomorrow. Indeed it may not signify any meaning at all.

Despite some criticism of the decision, *Dyson*'s case (supra) establishes that where a word is used in a popular and not a technical sense, the presumption arises that the word is intended to bear the current meaning during the life of the legislation and not the meaning at the time of enactment—all the more reason to avoid patently unstable words.[41]

40 Since repealed. See also Chapter IX, 'Etymology and Meaning' in Simeon Potter's *Our Language*.

41 For another example see *DPP v Jordan* [1977] AC 699 at 719 and also see D. J. Hurst, 'Palm Trees in the House of Lords—Some Further Thoughts on Boland's Case' [1983] Stat LR 142.

Chapter 2

Syntax

INTRODUCTION

Sense is communicated not only by the dictionary meaning of words but also by their arrangement in sentence patterns. A sentence is more than just a series of words. It is a structure or pattern in which the component words are grouped in a particular way. The nature of the grouping contributes to and in most cases controls the sense conveyed.

Palmer describes a sentence as 'the largest unit to which we can assign a grammatical structure'.[1] It is a sentence that is recognised as a complete thought or statement able to stand independently in speech or writing.

Syntax is the study of sentence patterns, the study of words working in association with one another. It deals with the way words and related groups of words are customarily arranged to form larger constructions such as phrases and clauses to make sentences. Thus, the concern of syntax runs from the word to the sentence. Syntax is defined by the *Shorter Oxford English Dictionary* (1993) as 'the order of words in which they convey meaning collectively by their connection and relation'.

The word 'relation' in this definition is especially significant because syntax is not only concerned with word order but also with the relationship between the groupings of words in the sentence. The construction of sentences is essentially concerned with relative values and functions. The sentence that is right, T. S. Eliot wrote, is one 'where every word is at home, taking its place to support the others'.[2]

Traditional grammar

Grammar—A Nasty Experience. This is the heading which begins a grammar book published some years ago, and undoubtedly there are many drafters whose experience of grammar in their schooldays was equally nasty.[3] English grammar was to most of the writer's generation dull and confusing but its validity was accepted without question. As Cattell says, 'The grammar book had something of the awesome infallibility of the Bible.' One may not have known what useful purpose it served, but one knew it had to be treated with respect.

1 F. R. Palmer, *Grammar* (Pelican, 2nd edn) p68.
2 T. S. Eliot, *Little Gidding* (Faber & Faber).
3 N. R. Cattell, *The Design of English*.

Traditional grammar was, in fact, not infallible. On the contrary, it was to some extent misconceived. The fundamental error was that grammar was seen as a set of rules that had to be obeyed. There was no understanding that correctness is no more than what the speech community accepts as correct at the time. In fact, most of the rules had foundations of straw such as the assumption that the rules applicable to Latin grammar were of universal application and were suitable for application to the English language.[4] There was a tendency also to endeavour to apply the rules of logic to language and this was a mistake. Teaching centred around the traditional eight parts of speech and too much attention was paid to form while inadequate attention was paid to function.

Classification of words according to parts of speech failed to take proper account of the capacity of many English words of the same form to perform more than one function. Emphasis on part of speech classification tended to overshadow any constructive study of the arrangement of groupings of words in structural patterns to form sentences.

In more recent times, grammarians have seen that the English language has its own unique grammar and have turned from prescribing what is correct to describing how sentences work. Prescription is out, description is in. During the same period, the teaching of grammar in schools has declined in many places with dubious results.

For nearly 30 years, a revolution surrounding grammar has raged and scholars remain locked in violent disputation. The development of transformational generative grammar on the basis of Chomsky's work has captured the minds of many scholars, but Burchfield has pointed out that its weakness lies in its failure to produce a grammar that can be 'consulted and cherished as an aid to the disentangling and ascertainment of the language that lies about us'.[5]

Notable landmarks along the way to the general acceptance of descriptive grammars were the publication in 1972 of a comprehensive descriptive grammar by Randolph Quirk and three colleagues and in 1985 *A Comprehensive Grammar of the English Language* by Quirk, Greenbaum, Leech and Svartvik.[6]

The significance of syntax

If grammar is now essentially descriptive rather than prescriptive, does the drafter need to get involved? The answer is certainly yes.

Legislation is inevitably a formal or standard use of language and what is acceptable and what is not acceptable will be decided in that context. Those parts of a society which are likely to draft, enact, read, administer or judicially interpret legislation will be the real arbiters of what is a suitable form of language in the relevant context. Judgments will still be made and will be based largely on clarity and effectiveness. The drafter must draft according to the syntactical rules and practices conventionally accepted for formal communications. An understanding of those conventions requires an understanding of sentence analysis.

An ability to understand and analyse the elements of a sentence will facilitate the birth of well-formed sentences and the gift of succour to ailing ones. To achieve that, the drafter must be able to recognise:

4 See *Cattell*, pp2 et seq; *Palmer*, pp15–27. For interesting historical accounts of English grammar, see *Burchfield*, supra, and David Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge, 1995) pp190–197.

5 *Burchfield*, supra, p154.

6 Published by Longman.

(a) the function of the elements, whether words, phrases or clauses, that together compose a whole sentence; and
(b) the classes of words and groups of words (classified according to function not form) that make up those elements.

It is the misfortune of many legislative sentences to be obliged to communicate complicated meanings. In such cases the sentence patterns are unavoidably complex and the careful arrangement of the groupings of words in the sentence pattern is absolutely vital. The inappropriate placement of words or grouping of words is a major cause of uncertainty of intended meaning. For the drafter, one of the prime purposes of the study of syntax is to detect, analyse and remove ambiguity.

No cut and dried rules may be prescribed for the avoidance of syntactic ambiguity. The most this chapter can hope to do is to shed a little light on sentence structure, to emphasise that sentence structure is concerned with the relationship of the constituent groupings of words in the sentence and to indicate a few syntactic ambiguities and other errors to which the drafter is most prone.

Of course, compliance with syntactical conventions is just a beginning. A sentence may be well-formed and unobjectionable grammatically but may, nevertheless, be clumsy, inelegant, too complex, too long, and too difficult to understand.

THE LEGISLATIVE SENTENCE[7]

Subject-predicate relationship

A legislative sentence is structurally no different from a sentence in any other domain. The framing of legislative sentences offers the same possibilities for communication and is subject to the same limitations as other sentences. George Coode asserted more than a century ago that legislation should resort to 'the common popular structure of plain English'.[8]

The core of all sentence patterns of the kind likely to be used by the legislative drafter is the subject-predicate relationship. Two descriptive terms describe the subject-predicate relationship: the topic and the comment upon it.[9] G. H. Vallins has referred to the subject as the text and the predicate as the sermon.[10] Sentence patterns that do not have a subject and a predicate are common, for example single words such as 'Rubbish!' or 'Wow!' spoken as a response, or 'Who?' asking a question. Sentence patterns of this kind need not concern the drafter, however.

The importance of establishing the two main elements of the sentence, the subject and the predicate, is very great. Simeon Potter has written:

> If I utter a defective sentence it is probably because, for some reason or other, I have failed to keep these two things clear in mind. In order to put it right, I have only to ask

7 See Simeon Potter, *Our Language*, Chapter VIII; Simeon Potter, *Language in the Modern World*, Chapter VI; G. H. Vallins, *Good English*, Chapter II; Sir Ernest Gowers, *The Complete Plain Words* (3rd edn by S. Greenbaum and J. Whitcut) Chapters 9–13; Harry Fieldhouse, *Everyman's Good English Guide* (Dent, 1982) p154; C.K. Cook, *Line by Line* (Houghton Mifflin,1985) ppxiii–xx, 139–159.

8 George Coode, *On Legislative Expression* reprinted in E. A. Driedger, *The Composition of Legislation* (2nd edn) pp317 et seq.

9 See Barbara M. H. Strang, *Modern English Structure*, p70.

10 G. H. Vallins, *Good English* (Pan) p13.

> myself the simple questions: What am I talking about? What have I to say about it? Or, in other words: What is my subject? What do I predicate of that subject?[11]

The subject may not always be readily apparent in a complex sentence, particularly when one or more modifying elements precedes it. In such a case, it is necessary to first find the verb and any phrase that contains the verb. The predicate is associated with the verb and the phrase that contains it. What remains is the subject. In cases where the verb is an active form, the subject may be identified by questioning 'what' or 'who' in front of the verb. The answer will be the subject. It must be remembered also that a sentence element, whether subject or predicate, may be a single word or a phrase or clause.

More elaborate structures are built upon the foundation of subject and predicate. A sentence may have more than one subject and more than one object or complement but the predicate must always contain a verb. Both the subject and the predicate are subject to modification in many ways. Modifiers are secondary constituents consisting of words, phrases or clauses describing or qualifying other elements of the sentence.[12]

> The major functional unit of speech, the sentence ... is the linguistic expression of a proposition. It combines a subject of discourse with a statement in regard to this subject. Subject and predicate may be combined in a single word, as in Latin dico; each may be expressed independently, as in the English equivalent, I say; each or either may be so qualified as to lead to complex propositions of many sorts. No matter how many of these qualifying elements (words or functional parts of words) are introduced, the sentence does not lose its feeling of unity so long as each and every one of them falls in place as contributory to the definition of either the subject of discourse or the core of the predicate.[13]

Understanding that the basic subject/predicate structure constitutes the core of the sentence is of immeasurable importance; it is the gateway to successful sentence construction. With a continuing awareness of the core, the drafter builds on such modifications to the core as may be required. The importance is just as great in construing legislation. The first task must be to penetrate the structure of the sentence and isolate the core. Having done that, the next task is to determine what modifies what.

Elements of the sentence

Traditional terminology is open to criticism but is sufficient for present purposes. Some readers may find the following brief summary unnecessary and should pass on, but others may find it useful to refresh knowledge acquired years ago.

The **subject** of a sentence is the noun, or word or group of words performing the function of a noun, about which something is stated in the predicate. The subject identifies the thing or quality or person that is the theme or topic of the sentence.[14]

11 Simeon Potter, *Our Language*, p91.
12 See E. A. Driedger, *The Composition of Legislation* (2nd edn) pp4 et seq.
13 Edward Sapir, *Language*, p36 (quoted by Simeon Potter, *Our Language*, p91).
14 The text uses the following abbreviations: S = subject; P = predicate; V = verb; O = Object; C = complement.

S P
Schedule 1 has effect.

S P
The Commissioner may be represented by counsel at the hearing of the application.

The **predicate** of a sentence is a statement about the subject or the subject's action, experience or state of being. A verb is the central necessary element of a predicate and the predicate may contain an object or a complement or more than one object or complement.

S P
This Act *binds the Crown.*

S P
The Commissioner *must keep a register of limited partnerships registered under the Act.*

The **object** of a sentence is a word or group of words that receives the mental or physical action conveyed by the verb and performed by the subject of a transitive verb.

S V O
This Act binds *the Crown.*

A **complement** is a word or a group of words that adds to the meaning or completes the sense of a subject or a verb.

S V C
This Act commences *on 1 January 1996.*

A **phrase** is a group of related words functioning as a sentence element but without either a subject or a predicate or a subject and a predicate.

without delay
in this section
in accordance with the regulations

A **clause** is a group of related words that contains a subject and a verb. A clause may be a sentence but may not be. For example, a subordinate clause is incomplete in itself and must be combined with another clause to form a sentence. A clause is said to be subordinate if it begins with a word indicating that the clause has a subordinate relationship to another clause. A subordinate clause can never stand alone. In the second example below, 'if a suspect so requests' is a subordinate clause.

This Act binds the Crown.
If a suspect so requests, the police officer must provide a cup of tea.

When endeavouring to analyse the elements of a sentence, it is important to look beyond single words for subject, verb, object or complement. A phrase or a clause may serve as such.

S V C

At least half of the members of a health and safety committee must be employees of the mine.

Some knowledge is desirable about the kinds of words that may make up the sentence elements. The main thing to remember is that classification of words depends on function not form for one word may perform different functions and be classified differently according to the context. For example, many nouns also perform an adjectival function; the noun 'town' serves as an adjective in 'town hall', 'murder' in 'murder trial', 'meat' in 'meat loaf' and countless more. Many words (eg 'design', 'report', 'mine') perform the functions of both verbs and nouns.

A **verb** states the action or state of being of the subject.

The tenant *notifies* the landlord that the roof is leaking.
The Mines Safety Act 1959 *is repealed.*
A body corporate *is* a person.

A **noun** indicates persons, places, things, qualities, feelings, and ideas.

magistrate, Perth, machinery, danger, fear, democracy

A **pronoun** functions in the same way as a noun but refers back to a noun without naming it. The noun to which it refers is called its 'antecedent'.

she, they, their, this, everyone, it

Adjectives describe or modify nouns or pronouns. A phrase or a clause may also perform an adjectival function.

reasonable grounds for appeal
a suspect *in a police station*
a suspect *who has been arrested*

Adverbs describe or modify verbs, adjectives or other adverbs or groups of words.

A person who *knowingly* or *recklessly* gives false information commits an offence.

The suspect must be given such information as is *reasonably* necessary in the circumstances.

A **preposition** relates the noun or pronoun which it introduces to other words. It is always part of a phrase.

An exercise *of* the power to defer
an entry *in* a record book
except for an appeal made orally

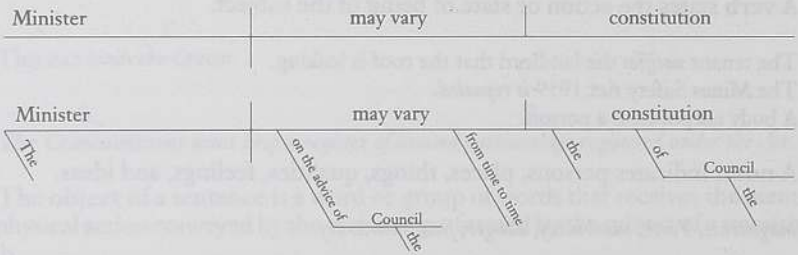
Conjunctions join elements of a sentence, They serve a connective purpose and may be coordinating such as *and, or, but,* or subordinating such as *if, unless, after.*

An inspector *or* a health officer may intervene.
If an arrested person is granted bail, that person must report when required.

Diagram forms

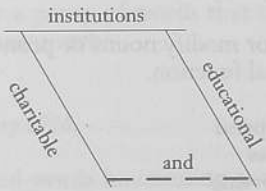
For many people, the use of a visual technique representing the structural patterns and groupings of words in a sentence is of considerable value in clarifying structure and revealing ambiguities. On those occasions when a drafter feels some doubt as to the structure of a sentence or part of a sentence, a little time spent on analysis by diagram will almost certainly assist.

Some people may prefer to develop a personal style of diagramming. The simplest but very basic method is that adopted in the examples below, ie by indicating sentence elements by an abbreviation separated by a vertical line.

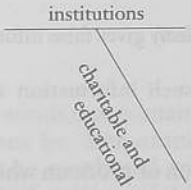


Ambiguity is revealed in attempting to represent a phrase such as 'charitable and educational institutions'.

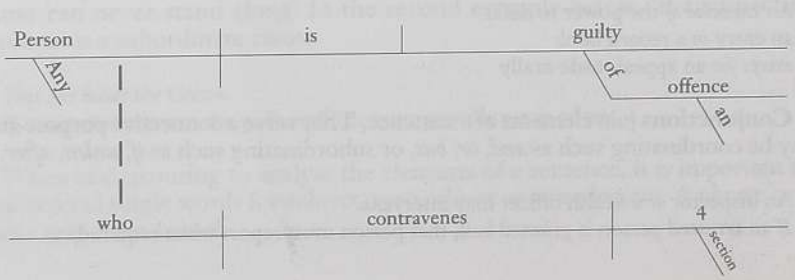
If two classes of institutions are referred to, ie either 'charitable' or 'educational', the form would be



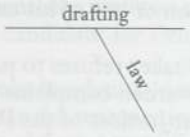
If the institutions are of one class, ie 'charitable and educational', the form would be



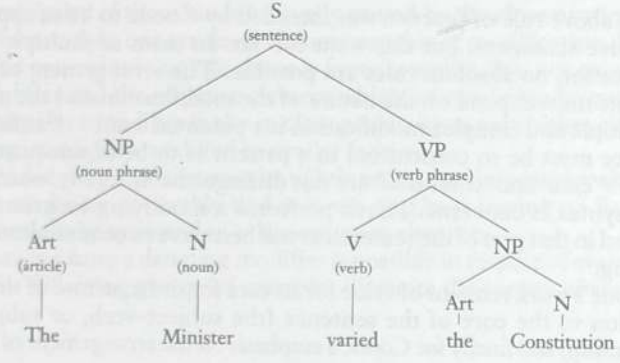
A slightly more complex sentence in diagram form is shown below—



It is important in the use of diagram forms to diagram according to function and not in accordance with traditional part of speech classification. For example, a noun functioning as an adjectival modifier must be shown according to its function as a modifier while a verb form functioning as a substantive must be diagrammed as a substantive. Thus:



Some may prefer to follow the tree-pattern approach to diagrams. For example



Coode's analysis[15]

George Coode's reference to 'the common popular structure of plain English' has been mentioned earlier in this chapter. His pamphlet 'On legislative expression or the language of the written law', which was first printed as part of a report to Parliament in 1843, is a notable landmark in the study of the structure of the legislative sentence.

His aim was to make 'a very few intelligible and simple rules, which any person capable of dividing grammatically a sentence of his native language would be competent to apply'.

Coode's conception of the legislative sentence was declared in this way: The expression of every law essentially consists of, first, the description of the legal Subject; secondly, the enunciation of the legal Action. To these, when the law is not of universal application, are to be added, thirdly, the description of the Case to which the legal action is confined; and, fourthly, the Conditions on performance of which the legal action operates. Coode's terms 'legal subject' and 'legal action' are recognisable as coinciding broadly with the subject-predicate relationship with which we are familiar.

By 'case', Coode referred to the circumstances in which or the occasions when the law was intended to operate. The 'condition' according to Coode was a statement of something that must be done before the law becomes operative.

The essence of Coode's advice was that these four elements in the sentence should be placed in the following order

15 Coode's analysis of the legislative sentence is discussed by E. A. Driedger at pp2–4 of *The Composition of Legislation*. See also E. L. Piesse, *The Elements of Drafting* (8th edn, by J. K. Aitken) pp18 et seq and Robert C. Dick, *Legal Drafting* (2nd edn) pp58 et seq.

1. Case
2. Conditions
3. Legal Subject
4. Legal Action

Here is an abbreviated version of one of his examples

(Case)	Where any Quaker refuses to pay any church rates,
(Condition)	if any churchwarden complains thereof,
(Subject)	one of the next Justices of the Peace,
(Action)	may summon such Quaker.

The above rule of practice was intended by Coode to be of application to all legislative sentences, but this went too far. In cases of multiple and complex modification no absolute rules are possible. The arrangement of the sentence elements must depend on the nature of the modification and the meaning.

Multiple and complex modification is a potential source of ambiguity and the sentence must be so constructed in a pattern as to be of unequivocal meaning. Coode's 'case' and 'condition' are not distinguishable in any meaningful way so far as syntax is concerned. Each performs a modifying function and must be arranged in that part of the sentence as will best serve to communicate the intended meaning.

Coode's work remains of value for its care for the structure of the sentence, its attention to the core of the sentence (the subject-verb, or subject-predicate relationship) and finally for Coode's emphasis on the arrangement of the modifying clauses in the best position.

SENTENCE PROBLEMS

Problems with modifiers

A modifier is a word or group of words that makes the meaning of other words more exact by limiting, restricting or describing them. By the process of modification, we can build upon the foundation of the core subject-predicate relationship until the sentence structure is adequate to communicate a complex meaning. The term modifier is a particularly useful one. It serves as a collective label for words and groups of words performing a comparable function.

Nouns, pronouns and other words performing a noun function may be modified adjectivally by single words, phrases and clauses. Verbs and words performing an adjectival or adverbial function also may be modified adverbially by single words, phrases and clauses. The pattern or structure of a sentence must be such that the relationship of the modifiers to the elements they modify is apparent and unambiguous. In other words it must be clear what the modifiers modify and what they do not modify.

An old general rule, which is far from providing a complete answer but does provide a starting point, declares that: 'words or other units that are most closely related should be placed as near to each other as possible, so as to make clear their relationship'.[16]

16 *Gowers*, p91.

A modifier should therefore be arranged as near as possible to the element it modifies so that it logically and naturally connects to that element. This advice seems straightforward enough, but it does not solve the problem that occurs where two or more modifying elements (which may be words, phrases, or clauses or any combination of them) modify the same sentence element and therefore have a similar claim to be near to it. A sentence with too many modifying elements may be beyond repair and may be a candidate for demolition and reconstruction in smaller packages.

A modifier may be said to be misplaced or to 'dangle' when it may be construed as modifying some other element in the sentence in addition to or as an alternative to the element intended to be modified. A modifier is said to be 'squinting' if it can refer both to the sentence element before the modifier and also to the element following it. Ambiguity of these kinds is usually caused by the close proximity to the modifier of more than one sentence element capable of modification. In this situation, the old general rule set out above is found wanting. It is not enough to arrange the modifier and the sentence element which is intended to be modified in close proximity if the modifier is also in close proximity to some other element capable of being intelligibly modified in similar fashion.

The wayward dangling modifier must be tightly secured to the sentence element intended to be modified; preferably tied in a non-slip knot leaving no flapping loose ends that might be attracted to other sentence elements.

Ambiguity arising from a dangling modifier is possible in respect of every kind of modifier. The following groups of examples illustrate the variety of available hazards:

1 ADJECTIVES

Adjectives may only modify nouns or words performing noun functions. So we can first look at the problem without complications with an example in which one adjective may be construed as modifying either one or two nouns.

public hospital or school

Readers tend to read a modifier as modifying the nearest word or word group that the modifier can properly modify and it is clear that 'public' modifies 'hospital'. But does it also modify 'school'? An ambiguity is apparent. If 'school' is not intended to be modified, a change in word order can remove the ambiguity by placing the modifier after the first noun.

school or public hospital

If 'school' is intended to be modified, the ambiguity is best removed by repeating the modifier.

public hospital or public school

A similar ambiguity may be seen in the following phrases:

a registered dentist or medical practitioner
a charitable institution or society
a married woman or man

an elected member or office-bearer

In most cases, the ambiguity can be removed by a change in word order or repetition of the modifier. If necessary, an adjectival modification can be rephrased as a subordinate clause. For example, the ambiguity in

every public or charitable hospital, school and research institution

can be removed as follows:

every hospital, school and research institution that is public or charitable

2 ADVERBS

Adverbs can modify verbs, adjectives and adverbs and also phrases and clauses performing adjectival or adverbial functions. Serving so many functions, adverbs are at serious risk of forming dangerous liaisons. Unless carefully tied down, they may not always choose their immediate company with suitable discrimination and the results can be confusing, even humiliating.

In the past, grammarians were wont to produce complicated rules urging the placing of adverbial modifiers before the element modified in some cases and after the element in others. In particular, the practices of splitting infinitives and separating the auxiliary parts from the base of the verb were condemned.

Fortunately, descriptive works founded on usage instead of prescriptive theoretical niceties have done much to reduce the influence of such foolish rules. But they nevertheless persist in the minds of many people who, often subconsciously, still prefer other constructions, even if artificially contrived, to those involving a split infinitive or a split verb form. This preference is a common cause of ambiguity.

A better approach is to ignore such follies and concentrate on constructing an unambiguous, readily intelligible sentence. Reed Dickerson's advice on this point is excellent—

> However offensive it may be to many persons, the split infinitive makes clear beyond all doubt what the adverb modifies. The same is true of other split verb forms. There can be no doubt, for example, as to the meaning of 'shall promptly require'. The draftsman, therefore, should not hesitate to split an infinitive or other verb form if to do otherwise would create the significant possibility of ambiguity.[17]

In all circumstances, an adverb must be so placed that there can be no possible doubt which word or group of words it is intended to modify. Note the ambiguity in the following sentence:

> Upon the lodging of notice of appeal, the Commissioner must require the appellant *immediately* to submit returns.

Is the Commissioner immediately to require the appellant to submit returns upon the lodging of notice of appeal, or is the appellant immediately to submit the returns?

17 Reed Dickerson, *The Fundamentals of Legal Drafting* (2nd edn) pp101–102.

If the Commissioner is to be immediately obliged to act, the adverb would fit naturally between the auxiliary and the base of the verb.

> Upon the lodging of notice of appeal, the Commissioner must *immediately* require the appellant to submit returns.

If the appellant is to be obliged to act immediately, this form is suitable:

> Upon the lodging of notice of appeal, the Commissioner must require the appellant to submit returns *immediately*.

A similar degree of ambiguity would be present in the above example if the adverbial phrase 'without delay' were substituted for the adverb 'immediately'.

Freedom to set aside the old rules against splitting verb forms does not constitute a licence to construct unwieldy, awkward sentences. The further an auxiliary is separated from the base of the verb, the greater recall effort is required from the reader. The following use of adverbial clauses is common but open to objection:

> The Minister may, not later than 6 months after the commencement of this Act and after consulting the Council of Sport and such other bodies as the Minister considers desirable, on his or her own initiative or upon the request of any person claiming to be aggrieved, issue a restraining order ...

The adverb 'only' is particularly subject to ambiguity. Sir Ernest Gowers pointed out that 'only' is a capricious word.[18] Its position is generally a matter of emphasis but 'only' can be a source of ambiguity in some contexts. For example

> The chairman of the council only may authorise expenditure exceeding $1000.

This sentence is capable of two constructions. The first is

> Only the chairman of the council may authorise expenditure exceeding $1000.

The second is

> The chairman of the council may only authorise expenditure exceeding $1000.

3 PARTICIPLES

Mild amusement and ambiguity can result from the careless use of an unattached participle. Participles are particularly prone to stray.

For example

> No person shall enter or remain in a bathhouse suffering from a communicable disease.

> No person shall take part in the handling of food suffering from a discharge of the ear.

18 *Gowers*, p95. See also the delightful entry concerning 'only' in Fowler's *Modern English Usage* (2nd edn) p418 and Brian Foster, *The Changing English Language* (Pelican) pp225–226.

The ambiguity is rather more serious in the following examples:

> The council must provide linguistic services to public authorities and individuals writing in the Kigogo language.

In the above example, it is not clear whether the council must provide linguistic services to public authorities writing in the Kigogo language or only to individuals writing in that language.

> Mining in a national park, the environment must be restored to its former state when mining is completed.

The environment is not of course doing the mining. The problem is caused by a combination of ellipsis and a passive construction. The intention is better expressed as follows:

> Persons mining in a national park must restore the environment to its former state when mining is completed.

> The Minister may, by notice in the Gazette, exempt charities and societies performing educational functions from the requirements of section 6.

In the above example, it is unclear whether the power to exempt extends to charities other than those performing educational functions. The alternatives are better expressed as follows:

> The Minister may, by notice in the Gazette, exempt societies performing educational functions and charities from the requirements of section 6.

> The Minister may, by notice in the Gazette, exempt societies and charities from the requirements of section 6 if those societies or charities are performing educational functions.

4 PHRASES

Ambiguity is possible when a phrase follows two nouns both of which the phrase is capable of modifying. For example

> a teacher or student of mathematics
> a doctor or bachelor of laws
> an officer or member of the legislature

The possibilities of ambiguity are considerable when the sentence contains successive phrases and the second phrase is capable of modifying either the original noun which precedes the two phrases or a noun in the first phrase. For example, consider the ambiguity in this clause:

> Every owner of gold bullion in New Zealand must ...

Does the phrase 'in New Zealand' modify 'gold bullion' or 'owner'? The ambiguity is cured in these forms:

> Every person in New Zealand who owns gold bullion must ...
> *or*
> Every person who owns gold bullion held in New Zealand must ...

In the next example, ambiguity arises when two phrases follow two nouns and the question is whether the phrases refer to one or both of the nouns.

> The corporation must not borrow money except from the central bank or any other person with the approval of the Minister.

Is the approval of the Minister necessary in the case of a loan from the central bank? The ambiguity can be easily removed by a change in word order.

In the next example, a phrase may be construed as modifying either of two verbs:

> The Commissioner may require a statement of all expenditure incurred by the person including gifts made to any other person during such periods as may be specified in the notice.

The phrase 'during such periods' is capable of modifying the verb 'incurred' or the verb 'made'. The insertion of a comma after 'person' in each place where it occurs would suggest that the phrase modifies 'incurred'. On the other hand the insertion of a comma after 'person' only where it first occurs would suggest that the phrase modifies 'made'.

It is not, however, sound practice to rely exclusively on punctuation to convey meaning and rearrangement of the sentence is the better course. This point is very important. The temptation to cure an ailing sentence by a dose of commas must always be resisted. If 'during such periods' is intended to modify 'expenditure incurred', the following form is suitable:

> The Commissioner may require a statement of all expenditure incurred by the person during such periods as may be specified in the notice, including gifts made to any other person.

If the intention is that 'gifts made' be modified, then this form fits the purpose:

> The Commissioner may require a statement of all expenditure incurred by the person, including gifts made to any other person during such periods as may be specified in the notice.

5 CLAUSES

A clause performing a modifying function is as likely to cause ambiguity as other kinds of modifiers if the relative pronoun fails to relate the clause clearly and unmistakably to its antecedent. In a legislative sentence there must always be an antecedent for a relative pronoun and there must be no doubt as to its identity. As a general rule, the relative pronoun should follow the antecedent as closely as possible.

The same problem that we have encountered above with other modifying elements emerges where there is another possible antecedent in close proximity to the intended antecedent. For example

An inspector and a special inspector who is nominated by the mine owner must ...

In this form, it is doubtful whether the modifying clause 'who is nominated by the mine owner' modifies 'inspector' as well as 'special inspector'.

Successive modifying clauses may also lead to ambiguity.[19] For instance

A police officer who has arrested a person who has reported the commission of an offence shall ...

A factory which contains equipment which is owned by an alien shall ...

In both these examples the antecedent of the second relative pronoun is unclear.

Similar opportunities for ambiguity exist in the case of elliptical clauses. For example

A pupil must not, on the ground of religious belief, be excluded from or placed in an inferior position in any school, college or hostel provided by the council.

It is doubtful whether the clause '(that is) provided by the council' modifies 'hostel' only or also modifies 'school' and 'college'. If the former, then the sentence would be better rearranged in this form:

A pupil must not, on the ground of religious belief, be excluded from or placed in an inferior position in any hostel provided by the council or in any school or college.

If the latter:

A pupil must not, on the ground of religious belief, be excluded from or placed in an inferior position in any school, college or hostel where the school, college or hostel is provided by the council.

In the following sentence, the final clause is ambiguous.

The council must publish a Swahili newspaper or magazine concerned with the Swahili language and African affairs.

It is not clear whether the elliptical 'that' that may be understood as beginning the clause '(that is) concerned with the Swahili language and African affairs' has as its antecedent 'newspaper or magazine' or just 'magazine'.

The ambiguity in the following construction is curable by removing the ellipsis.

chairman means the chairman of the council appointed under section 9 of the Vegetable Growers Act.

To make clear that the chairman and not the council is appointed under section 9, 'who is' may be inserted after 'council'.

19 For the use of commas to distinguish non-defining (or commenting) clauses from defining (or restrictive) clauses, see p38.

Incomplete and fused sentences

INCOMPLETE SENTENCES

Drafters of course know that a complete sentence requires a subject and a predicate and in addition that a sentence must not be just a subordinate clause. Other writing permits some laxity but a legislative sentence cannot stray in such matters. A lengthy subordinate clause, perhaps coordinated with a second subordinate clause, may cause the imprudent drafter to overlook the incompleteness of a sentence. An example such as the following looks very obviously incorrect but drafters so often work in haste that the unthinkable must be thought about and avoided.

> After consulting about the proposed curriculum with every body of persons that the Minister considers representative of school teachers and unless in the course of those consultations the Minister decides to withdraw the proposal.

COMMA SPLICES AND FUSED SENTENCES

A comma splice occurs when two or more consecutive main clauses are joined only with a comma. The practice is unacceptable because it causes the reader to read the sentence more than once to extract its sense.

> The manager must report every accident causing serious injury to the inspector, the inspector must investigate every such accident within 7 days.

> A statutory authority must prepare an annual report not later than 30 June in each year, it must then submit the report to the Minister not later than 31 August.

The solution is to convert the clauses into separate sentences or, if they are sufficiently related in content, to coordinate them with a semi-colon. Other possibilities are the use of a coordinating conjunction such as *and* or *but* and the conversion of one of the clauses into a subordinate clause. The substance will determine which of these techniques offers the best solution. In most instances it will be the close relation of the two clauses that have beguiled the drafter to error and a semi-colon will do nicely.[20]

> This section does not apply to an application under section 23; it does apply to an application under section 24.
> *not*
> This section does not apply to an application under section 23, it does apply to an application under section 24.

A fused sentence occurs when two main clauses are presented consecutively and are not joined by any conjunction or punctuation mark. They make little sense on first reading and impose an irritating strain on a reader. As with comma splices it is the close relation of the two clauses that is likely to encourage error. The available solutions are the same as those available to treat comma splices.

20 As to the presentation of two sentences in one subsection or section, see p78.

> Words in the singular include the plural and words in the plural include the singular.
> *not*
> Words in the singular include the plural words in the plural include the singular.

FAULTY REFERENCE OF PRONOUNS[21]

The function of a pronoun is to act as a substitute for a noun or noun-equivalent. A pronoun has no meaning except that derived from the noun or group of words performing a noun function for which it stands. The noun or noun-equivalent for which a pronoun stands is known as its antecedent and the relation of a pronoun to its antecedent needs to be obvious and certain.

Sir Ernest Gowers has written:

> Legal language, which must aim above all things at removing every possible ambiguity, is more sparing of pronouns than ordinary prose, because of an ever-present fear that the antecedent may be uncertain.[22]

Uncertainty of reference of pronouns may certainly lead to astonishing sentences; none more so perhaps than this example from the Old Testament (2 Kings 19:35):

> and when they arose early in the morning, behold, they were all dead corpses.[23]

Nevertheless, a drafter should not feel obliged to avoid the use of pronouns provided that the pronoun has a clearly identifiable antecedent which is unambiguous. An artificial avoidance of pronouns produces unnatural and stilted sentences.[24]

The following sentence illustrates a quite unnecessary avoidance of the pronouns 'they' and 'their':

> The Commission may make proposals to the Minister for an order under this Act if at any time the Commission are satisfied that
> (a) the Commission have sufficient experience of the system,
> (b) the Commission have the necessary resources and facilities, and
> (c) no pollution will result from the operation of the Commission's system.

The sentence is better thus

> The Commission may make proposals to the Minister for an order under this Act if at any time they are satisfied
> (a) they have sufficient experience of the system,
> (b) they have the necessary resources and facilities, and
> (c) no pollution will result from the operation of their system.

21 As to pronouns generally, see *Gowers*, pp111 et seq; Fowler's *Modern English Usage*, p481; Harry Fieldhouse, *Everyman's Good English Guide* (Dent, 1982) pp223 et seq; S. Greenbaum and J. Whitcut, *Longman Guide to English Usage*, p568.

22 *Gowers*, p113.

23 This example is given by G. H. Vallins in *Good English*, p73.

24 But see the discussion on gender neutral drafting at pp74–77.

The use of pronouns is not difficult. It does, however, require care. Ambiguity caused by faulty reference is almost always no more than the result of carelessness.

The most common problem concerning the use of pronouns arises where there are two possible antecedents. For example

> In the event of the council giving notice to the corporation of its intention to purchase the property, *it* shall immediately deliver to the Registrar all documents relating to the property which are in its possession.

The italicised 'it' may relate to either the council or the corporation. In cases of this kind it is best to remove the ambiguity by repeating the antecedent.

Here is another example—

> The corporation must maintain proper records and a list of bad and doubtful debtors in accordance with the best commercial standards and must forward *them* at the end of each financial year to the Credit Commission.

Does 'them' relate to 'list' or to 'records and a list' or even to 'debtors'?[25]

Communication may be impeded if a pronoun is placed in an initial subordinate clause which precedes a clause containing the pronoun's antecedent. Such a sentence pattern does not necessarily lead to ambiguity; however it does impose a needless strain on the reader. For example

> If it has reason to suspect that any vehicle or container contains any food
> (a) which is intended for sale for human consumption, or
> (b) which is in the course of delivery after sale for human consumption,
> the council may examine the contents of the vehicle or container.

This sentence is improved if 'it' is replaced by 'the council'. It is improved further if it is reconstructed as follows:

> The council may examine the contents of a vehicle or container if it has reason to suspect that the vehicle or container contains any food
> (a) which is intended for sale for human consumption; or
> (b) which is in the course of delivery after sale for human consumption.

Note the ambiguity in the following sentence which also arises from a doubt as to the intended antecedent.

> If he so requires, there shall be paid to the Chairman of the Committee such remuneration as the Secretary of State may determine.

Does 'he' refer to the chairman or to the Secretary of State? If the antecedent replaces 'he' (and at the same time removes the gender reference), the problem is solved.

If a pronoun is too far away from its antecedent, the task of identifying or recalling the antecedent may impose an unnecessary and irritating burden on the reader. The longer the sentence, the more likely it is that such a difficulty will appear.

25 This is a wretchedly ambiguous sentence. In addition to the faulty use of a pronoun, it is not clear whether 'in accordance with the best commercial standards' modifies 'records' in addition to 'list'.

Constructions should be avoided which use 'it' or 'they' in a vague sense without identifiable antecedents. Expressions such as 'it is lawful for' and 'it is an offence for' should be rephrased more directly. For example

> The Minister may grant a licence ...
> *not*
> It is lawful for the Minister to grant a licence ...

Care must be taken to avoid sheering away from the tricky pronoun to the deceptive pronominal equivalent. Phrases such as 'the said person', 'such person' and 'that person' have just as great a potential for ambiguity.[26] For example

> An inspector may require
> (a) a person to whom a certificate or licence has been issued under this Act;
> (b) a person who has been registered under this Act;
> (c) a servant, agent or employee of any *such person*,
> to furnish such information as ...

In this example the antecedent of 'such person' in paragraph (c) is far from clear. If the intention is to refer to the persons mentioned in both the preceding paragraphs, para (c) would be better expanded this way—

> (c) a servant, agent or employee of a person referred to in paragraph (a) or (b),

Subject–verb disagreement[27]

The number of the subject determines the number of the verb. That appears to be a nice straightforward general rule but other elements in a sentence can easily confuse the writer's appreciation of subject–verb agreement.

For example, a single subject may be followed by a plural modification that immediately precedes the verb.

> Each of the hospital boards is required to submit an annual return.

A plural modification may ensnare the careless into treating it as part of the subject. A single subject remains a single subject taking a singular verb despite plural modification introduced by *with*, *together with*, *in addition to*, *as well as*, *no less than*, *including*, *other than*. The error is avoided in the following example:

> A deputy member as well as the appointed members is required to hold a professional qualification.

Collective nouns are usually accepted as singular, but when used in a sense where the elements of the whole rather than the whole are emphasised, they may take a plural verb. Legislation uses many of these words: committee, council, corporation, government, majority, and staff are examples. English legislation customarily uses

26 As to 'such' see p106 and Fowler's *Modern English Usage*, pp601 et seq. As to 'said', see p92.
27 See C. K. Cook, *Line by Line* (Houghton Mifflin Company) pp75 et seq.

the plural form of verbs following such words. Other jurisdictions more often favour singular verbs in similar circumstances. Neither usage can be criticised. It is a question of where the emphasis is to lie.

Some care is needed in the case of compound subjects. Two singular nouns coordinated by *and* take a plural verb form.

A district inspector and a special inspector are eligible for re-appointment.

A complication occurs when singular and plural subjects are joined by *either ... or*, *neither ... nor*, or *not only ... but also*. In these cases, the verb agrees with the subject nearest to it.

Either a magistrate or 2 justices of the peace are able to grant bail.

Pronouns, including the relative pronouns *who*, *which* and *that*, take the number of their antecedent. However, the pronouns *what*, *all*, and *none* do not always take a singular verb, although some purists may disagree. It is acceptable to take the number from the context rather than the antecedent as in the following example:

None of the defendants need appear at the preliminary hearing.

Problems with negatives[28]

An affirmative statement is usually more direct and straightforward than a negative one and is therefore easier to understand. When a sentence can be expressed either way it should be expressed affirmatively. For example

Every payment of money by the Council must be authorised by a prior resolution.
not
A payment of money must not be made by the Council unless it has been authorised by a prior resolution.

Employers who employ apprentices must ...
not
Employers, other than those who do not employ apprentices, must ...

Negatives should not be avoided when it would be artificial or circuitous to do so. There are no better words for the prohibition of smoking than **No Smoking**.

Double negatives are very troublesome. The standard rule is that two negatives cancel each other out and produce an affirmative meaning. They are better avoided. Multiple negatives are confusing to use and even more confusing to understand. Drafters should spare their readers such puzzles.

28 See pp54, 60.

PUNCTUATION[29]

Four general rules

Punctuation is now recognised as a mechanical aid serving to make the relationship of the parts of a sentence more readily apparent to a reader. It is a device of syntax—a means, supplementary to word order, of suggesting the groupings of words in a sentence and thus revealing its structural pattern. The purpose of punctuation is to assist the reader to comprehend more quickly the intended meaning by providing sign-posts to sentence structure.

Punctuation was not always regarded in this light. It developed because of the inability of written language to indicate certain qualities of speech, for example the pause or accent denoting emphasis, or the rising inflection distinguishing a question from a statement. Punctuation was thought to be a matter of significance only to the speaker of written language, advising him as to his breathing and the length of his pauses. It is said, for instance, that when the Greeks began to punctuate their writings, their system of dots showed the proper places for breathing and accent.[30] Similarly in Anglo-Saxon times 'a system of light punctuation was developed from the marking of liturgical chants and was designed to help with the public reading of a text'.[31]

The role of punctuation has changed through a process of development. Punctuation for sense has replaced punctuation for sound; and today it is generally accepted that the function of punctuation is to 'denote quality of connection, rather than length of pause'.[32] Unfortunately, in some countries, the law has failed to keep pace with this development; thereby depriving itself of a useful, if subsidiary, aid in the struggle for unambiguous communication.[33]

It is a curious paradox that judges, whose entire reading is punctuated and who write carefully punctuated judgments, should have considered themselves obliged to proclaim that the punctuation in carefully punctuated statutes is no part of the law. The disinclination of English courts 'to pause at these miserable brackets', and at other equally wretched marks of punctuation, rests largely on the traditional view that the early statutes did not contain punctuation and, to some extent, on the fact that punctuation is not regarded in the United Kingdom as part of the text alterable only by amendment.[34] This view of early statutes was attacked

29 On punctuating amending legislation, see pp414–416. On punctuation generally, see G. V. Carey, *Mind the Stop* (Pelican), and E. Partridge, *You Have a Point There*; C. K. Cook, *Line by Line*, pp98–107; David Crystal, *The Cambridge Encyclopedia of the English Language* (supra) pp278–283. For an excellent punctuation handbook guaranteed to cause laughter, see Karen Elizabeth Gordon, *The Well-Tempered Sentence* (Ticknor and Fields, 1983).

30 David Mellinkoff, *The Language of the Law*, pp152 et seq.

31 *Burchfield*, supra, pp24–25.

32 Graves and A. Hodge, *The Reader Over Your Shoulder*, p94.

33 As to the traditional position in England, see *IRC v Hinchy* [1960] AC 748, [1960] 1 All ER 505 but see also Lord Reid's later statement in *DPP v Schildkamp* [1971] AC 1 at 10. The dissident approach evidenced by a note in 75 LQR at 29 was endowed with judicial authority by the learned author in *Slaney v Kean* [1970] 1 All ER 434 at 441 and *Marshall v Cottingham* [1981] 3 All ER 8 at 12. It appears that punctuation is considered in Scotland: see *Alexander v Mackenzie* 1947 JC 155 at 156. In *Hanlon v Law Society* [1980] 2 All ER 199 at 221, Lord Lowry adopted with approval what had been said in *Alexander*'s case and perhaps the battle has now been won. The refreshing view, in favour of taking punctuation into account, taken by the Law Commission in their report on 'The Interpretation of Statutes' (Law Comm No 21 p25), was adopted by the Renton Report on the Preparation of Legislation (Cmnd 6053 para 19.14).

34 See Fry LJ in *Duke of Devonshire v O'Connor* (1890) 24 QBD 468 at 483.

vigorously by an American scholar, but in any event a disinclination to take punctuation into account in matters of construction is easy to understand in relation to times when punctuation was thought of as a sort of stage direction.[35] It is less easy to understand in modern times.

However, to take a practical view, it is suggested that the drafter in punctuating legislative drafts should not be affected by the question of whether the courts are prepared to look at punctuation or not. Punctuation is of value but its value must be kept in proper perspective. It is very wrong to imagine that punctuation is a panacea for all the ills of the wayward sentence. 'Punctuation is normally an aid, and no more than an aid, towards revealing the meaning of the phrases used, and the sense that they are to convey when put in their setting.'[36] Moreover, a sentence which is intelligible or unambiguous only with the benefit of punctuation is probably a badly constructed sentence requiring surgery rather than stitchery. Although punctuation should be used to indicate the structure of a sentence, it should not be relied on in legislation to convey meaning.

Exact principles cannot be described for punctuation practice, but four rules should normally be followed.

1. Punctuate sparingly and with purpose

Every punctuation mark must serve a purpose or be discarded. Unnecessary punctuation is a distracting irritant.

2. Punctuate for structure and not for sound

The only question to be asked when sitting in judgment on a doubtful mark is whether it assists in illuminating the structure of the sentence.

3. Be conventional

Although a measure of individuality is permissible in the punctuation of most forms of prose writing, the drafter should adhere to conventionally accepted usage. In drafting legislation there can be no place for the virtuoso of the comma. 'Correct punctuation permits individuality only to the extent that communication of thought from writer to reader is aided, not impeded.'[37]

4. Be consistent

Punctuation can only assist the reader to recognise structural patterns quickly if usage is consistent. This is so particularly with respect to commas. A haphazard and inconsistent approach to the use of commas can very easily destroy all the value of punctuation. It is also very desirable that practice should be consistent regarding marks which are to introduce and separate series of paragraphs. Inconsistency is certainly the most common error in the field of punctuation.

35 See David Mellinkoff, *The Language of the Law*, pp157 et seq.
36 Sir Robert Megarry V-C, in *Marshall v Cottingham* [1981] 3 All ER 8 at 12.
37 Harry Shaw, *Errors in English and Ways to Correct Them* (3rd edn) p177.

The comma[38]

Commas serve two distinct but related purposes: to **separate** and to **enclose**. The purposes are related because pairs of enclosing commas separate what is enclosed from its context.

A sure touch with the comma can only be based on a complete understanding of the syntactical relationships of the words and word groupings in a sentence.

It is possible to formulate certain rules of practice for the insertion or omission of commas in the circumstances of various sentence structures, but the existence of similar structures does not in every case automatically require a comma or commas. Every instance requires the exercise of a particular discretion. A comma must serve a clearly identifiable and necessary purpose. It should never obscure the flow of meaning conveyed by the sentence. Commas are crafty creatures skilled at secretly infiltrating draft legislation. Once in, they may be expected to breed like rabbits.

1 SEPARATING COMMAS

(a) A comma may separate an introductory modifying clause or phrase from what follows.

When the amount of compensation payable is determined, the Minister must issue a certificate ...

Notwithstanding subsection (1), the Board may exercise its powers ...

If a person has been registered under this Act because of a false or fraudulent representation or declaration, the Board must cause the name of the person to be removed ...

If the introductory clause is short, a comma is not necessary but is acceptable.[39]

(b) A comma may separate items in a series (whether words, phrases, or clauses).

A person who wilfully alters, suppresses, conceals, destroys, or refuses to produce a register commits an offence and is liable ...

livestock means cattle, horses, goats, sheep, and pigs.

After making provision for bad and doubtful debts, depreciation of assets, contributions to staff and superannuation funds, carry-over into the next financial year, and such other provisions as are customarily made by banks, the Board must consider the allocation of the year's profits.

A comma is usual between a series of two or more coordinate adjectives preceding a noun if the comma can be inserted between them without affront to

38 On the comma, see *Gowers*, pp155 et seq; *Shaw*, pp185 et seq; Fowler's *Modern English Usage*, pp587 et seq; *Gordon*, pp24–55.

39 Karen Elizabeth Gordon's entertaining book, *The Well-Tempered Sentence*, gives the example: 'In utero her son-to-be sulked.'

the intended meaning. A comma should not be placed between the final adjective and the substantive. For example

> charitable, philanthropic, and benevolent purposes.

The last two items of a series are generally separated by '*and*' or '*or*'. This is the case in the above examples. Many writers do not place a comma after the item immediately preceding the 'and' or 'or' but the need apparent in the following example for a comma in that position to prevent ambiguity suggests that the practice has merit. The comma after 'director' in the example below makes it clear that 'director' and 'employee' are separate items and do not refer to a person who is both a director and an employee.

> **officer** means a secretary, manager, executive, director, and employee

If each item in a series is joined to the next item by 'and' or 'or', they should not be separated by commas. For example

> A person who wilfully alters or suppresses or destroys or refuses to produce a register commits an offence ...

(c) A comma may separate long, independent (ie not subordinate or modifying) clauses joined by coordinating conjunctions such as ***and, but, for, nor, or, so, yet.***

This is a permissive usage, not a mandatory rule. Coordinate clauses should not be separated by a comma if

- the clauses are short
- separation is undesirable in the interests of clarity
- the two clauses have the same subject and are reasonably short.

A comma would serve no purpose in the following examples:

> This Act may be cited as the Dogs Act 1996 and comes into operation on 1 April 1997.

> This Act comes into operation on 1 January 1997 and expires on 31 December 1998.

On the other hand, in the following example the comma after 'Bank' serves to separate the two independent coordinate clauses:

> The chairman and managing director is responsible to the Board for the execution of the policy laid down by the Board and for the control and management of the Bank, and the general manager is responsible to the chairman and managing director.

(d) A comma may separate words or numbers in order to facilitate communication.

> In 1996, 16 subsidies may be granted.

> No liability attaches to a member of the Board, the Board or the registrar ...

2 ENCLOSING COMMAS

Enclosing commas only operate in pairs. If one is omitted, the other is at best useless and at worst misleading.

(a) Commas may enclose non-restrictive (sometimes known as non-defining or commenting) modifying phrases and clauses.

A non-restrictive modifying phrase or clause does not limit the meaning of the sentence. It gives additional information, but not information which is vital to the core of meaning of the sentence. By way of contrast, a restrictive or defining phrase or clause cannot be removed without altering the core of meaning.

> All the assets of the banks to which this Act applies, *which banks are listed in Schedule 2*, are on the commencement of this Act to be returned to the shareholders.

In the example above the non-restrictive clause provides the information that the identity of the banks to which the Act applies may be ascertained by reference to Schedule 2. This information is not essential to the core meaning of the sentence, ie that certain assets are to be returned to shareholders on the commencement of the Act. Enclosing commas are therefore desirable. Similarly

> The America's Cup Act 1996, *which is referred to in this Act as the principal Act*, is amended by ...

On the other hand the clause in the following example beginning 'who attends' is a restrictive clause essential to the core meaning and therefore enclosing commas would be erroneous.

> A person *who attends an inquiry to give evidence or produce documents* is entitled to be paid reasonable expenses.

(b) Commas may enclose parenthetical expressions interpolated as interruptions to the main stream of communication in the sentence.

Included in this category are the expressions **however**, **as the case may be**, **if any**, **therefore**, and **for example**.

Commas intended to enclose interpolations must do so accurately so that the sentence would flow smoothly if the commas and the enclosed matter were omitted. For example

> The Sovereign or the Governor-General may exercise the power as if the Sovereign or the Governor-General, as the case may be, had been present at the meeting.

See page 43 for the use of parentheses for a similar purpose.

(c) Commas may enclose modifying phrases and clauses if the enclosure appears to illuminate the structure of the sentence.

This frequently occurs in the case of an adverbial phrase or clause placed between the auxiliary and the base or other part of the verb.

The Minister may, by order published in the *Gazette*, amend Schedule 1.

No person shall be required, in obedience to a summons under this section, to go more than 20 miles from his place of residence unless ...

The Board must, within 2 months of receiving an application made under this section, serve on the applicant notice of the proposed date of hearing.

Modifying phrases beginning with a participle may benefit from enclosure within commas. For example

The Council may make rules exempting any class of registered persons, including persons training as dispensing opticians, from the provisions of this section.

(d) Commas may enclose nouns in apposition, so long as they are not defining in character.

An applicant for a bursary must give notice of application to the Chairman of the Bursaries Committee, the Director of Social Welfare, not later than 1 April in each year.

3 UNDESIRABLE COMMAS

(a) A comma should not separate subject and verb, verb and object, verb and complement, or preposition and object unless words between them require enclosure by commas.

The comma should be omitted from each of the following examples:

All deeds and other instruments requiring the seal of the Society, must be signed and sealed in the presence of 2 members of the Executive Committee.

Section 6 of the principal Act is amended, by repealing subsection (3).

The Director, may
(a) inspect any machinery or plant in the tunnel area; and
(b) carry out construction works in that area.

(b) A comma should not separate parallel words, phrases or clauses joined by coordinating conjunctions except in the manner described in paragraph 1(c) above.

The comma before *and* should be omitted from each of the following examples:

The corporation shall consist of such members as are provided for by its constitution, and the existing members of the unincorporated society shall be the first members of the corporation.

A taxpayer must file a return, and pay tax by 30 June in each year.

A taxpayer must, before 30 June in each year, pay provisional tax, and final tax.

(c) Commas must not set off restrictive or defining phrases or clauses.

The commas should be removed from the following:

> A person, who is registered as an optometrist, must obey the code of practice issued by the Council.

> Every copy of a judgment, that is sealed by the court, is as valid as the original judgment.

> All the assets of the banks, which are scheduled assets subsisting upon the effective date, vest in the Corporation on the effective date.

(d) A single comma is wicked if the context permits either enclosing commas or no commas.

For example

> The Principal Registrar on the application of a person whose application for a licence has been refused, must inform the person of the reasons for the refusal.

In the above example either the comma after 'refused' should be omitted or, preferably, another should be inserted after 'Registrar' to complete the enclosure of the modifying group of words. The essential point is to be sure whether the purpose of the comma is to enclose some words (in which case it will need a friend).

(e) Two related sentences concerning the same subject may not be coordinated by a comma (but may be coordinated by a semi-colon).[40]

> Strict compliance with the forms in Schedule 2 is not required; substantial compliance is sufficient.

Only if a conjunction is introduced to the example, would a comma be appropriate.

> Strict compliance with the forms in Schedule 2 is not required, but substantial compliance is sufficient.

The semi-colon

The semi-colon is a mark of coordination. Its function is to show a relationship between elements of a sentence, usually main clauses, which a complete break into separate sentences would tend to obscure.

In legislation the semi-colon is useful for two principal tasks:

(a) To coordinate within one sentence two independent clauses that have a relationship close enough to render it desirable that the clauses be joined in one sentence yet remote enough to mark the coordination by a semi-colon rather than by a conjunction.

40 As to spliced commas, see p29.

The utility of the semi-colon in legislation must be considered in relation to discussion in chapter 4 on sentence unity. It is there stressed that a sentence must have a unity or coherence of thought and it is also suggested that a subsection, or a section not divided into subsections, should not ordinarily contain more than one sentence.[41] Here are two examples of the proper use of the semi-colon:

> Any land held by the Council in trust for a special purpose may be sold or exchanged notwithstanding the terms of the trust; but the proceeds of any such sale, and the land or money obtained by any such exchange, are to be subject to the same or similar trusts as the land so disposed of.

> The employer must cause a copy of the notice of fire precautions to be displayed in a prominent place at or near any workplace affected by the notice; the copy must be clear and legible.

(b) To coordinate a series of paragraphs, subparagraphs or listed items.[42]

The semi-colon's function of coordinating the elements of a series may be contrasted with that of the dash and the colon which are used to introduce the first of the series. Thus:

> The mine manager must report to an inspector any occurrence of—
> (a) an outbreak of fire above or below ground; or
> (b) the breakage of a rope, cable, chain, or other gear by which persons are raised or lowered; or
> (c) an inrush of water from old underground operations or any other source.

Driedger suggests that where the paragraphs are 'of tabular character' the semi-colon is appropriate and where the division into paragraphs is 'for the purpose of facilitating the reading and construction' a comma is used.[43]

The following example illustrates the use of commas in the manner authorised under Driedger's classification:

> A person aggrieved by the action of a building authority—
> (a) in rejecting plans,
> (b) in fixing or refusing to extend any period, or
> (c) in imposing or refusing to vary any conditions,
> may appeal to the Buildings Appeals Tribunal within the time and in the manner prescribed in the regulations.

However, the suggested distinction is in many cases a fine one. In most Commonwealth jurisdictions paragraphs (a) and (b) in the example above would be followed by a semi-colon. Consistency is achieved by adopting the general practice of using semi-colons to coordinate series of paragraphs and subparagraphs. Nevertheless, where words following the series of paragraphs apply to all of the paragraphs, as is the case in the example above, commas should win the day.[44]

41 See p78.
42 As to the practice of paragraphing, see pp61–65.
43 See E. A. Driedger, *The Composition of Legislation* (2nd edn) p186.
44 But see p63 as to 'sandwich' clauses.

The colon and the dash

Although the colon and the dash perform separate and additional functions in general usage, in legislation they are used only as introducers—an indication that something pertinent is to follow. Fowler's description of the function of the colon is appropriate to the legislative use of both marks. He calls it 'that of delivering the goods that have been invoiced in the preceding words'.[45]

The principal use is for the formal introduction of paragraphs, subparagraphs, tabulations and the like. For example

> **car** does not include—
> (a) a goods vehicle;
> (b) an omnibus;
> (c) a motor cycle; nor
> (d) an invalid carriage.

> The corporation must forward to the Minister the following:
> (a) notice of the address of the registered office; and
> (b) a copy of the constitution.

Either mark is permissible. Of course in the interests of consistency, one should be chosen in preference to the other and adopted for general use. They should not be used together (ie :—).

The dash is often used to enclose matter of a distinctly parenthetic nature. This usage is not appropriate in legislation.

A different approach to introducing paragraphs, lists and suchlike is favoured in the legislative format recommended by the Law Commission in New Zealand.[46] Their view is that no introductory mark is warranted and draft legislation published by the Commission contains no such introducers.

The full stop

The full stop (also known as the period) is the appropriate mark of termination for every legislative sentence whether in a section or a subsection. As a mark of termination the full stop presents a contrast to the comma and the semi-colon which as we have seen are marks of coordination.

The full stop is also used after standard forms of abbreviation (eg N.Z., U.K., p.m., Dec.). It is now less commonly used when the first and last letters of the word abbreviated are used (eg Dr, Mrs, Ms). Full stops are not generally used in acronyms such as UN, OAU, OECD, and BBC.[47]

Full stops should not be used after headings, titles, chapter numbers, tables, symbols of currency, and abbreviations or symbols for weights and measures. Many jurisdictions still insert a full stop after section numbers in legislation but this serves no discernible purpose

45 Fowler's *Modern English Usage* (2nd edn), p589.
46 See 'The Format of Legislation', NZLC R 27.
47 See p90.

Parentheses

Parentheses are marks of enclosure or separation sometimes known as brackets.

A parenthesis (which is the term used to refer to what is within parentheses) consists of an illustration, explanation or additional, related information or comment which is injected to a sentence but is not essential to the core meaning of the sentence. Fowler's advice on this subject, as on many others, cannot easily be surpassed. He says:

> A parenthesis is a convenient device, but a writer indulges his own convenience at the expense of his readers' if his parenthesis is so long that a reader, when he comes to the end of it, has little chance of remembering where he was when it began.[48]

The relationship of parenthetic material to the sentence-element to which it pertains determines the necessity and nature of suitable punctuation. In legislation the options are no marks of punctuation, enclosing commas, or parentheses. Dashes are not favoured. It is really a question of the degree to which the parenthesis intrudes on the remainder of the sentence. If the flow of the sentence is uninterrupted or little interrupted then no punctuation may be preferable. If the degree of interruption is rather greater but not marked, enclosing commas will be suitable, and in cases where the intrusion is significantly marked, parentheses are best used.

Parentheses have an obvious advantage over commas because they are directional and so do not admit of the confusion which preceding or succeeding non-directional marks may cause in the case of the comma. As parentheses are alternatives to commas as marks to separate parenthetic material, a comma should not precede parentheses.

It is important to remember to insert the second of a pair of brackets. This is strangely easy to overlook.

The following examples illustrate proper usage of parentheses:

> Section 72 of the Oranges Act (which provides for the licensing of orange exporters) does not apply to ...

> The Minister of Agriculture (in this section referred to as the Minister) may by order provide that the licensing provisions of this Act shall apply from a date specified in the order (in this section referred to as the operative day) and must specify in the order ...

In the following example the phrase enclosed in parentheses is not truly parenthetic in character. It does not explain or comment; it restricts.

> The Commission shall be a Commission of Inquiry under the Commissions of Inquiry Act 1989, and the provisions of that Act (except sections 2 and 4A and sections 11 to 15), as far as they are applicable, shall apply accordingly.

Parentheses are also conventionally used to enclose letters or numbers designating items in a series (eg (a), (b), (c)). The practice of enclosing further bracketed material within brackets (illustrated in the preceding sentence) tends to be difficult to read.

48 *Fowler*, p435.

The use of parentheses does not of itself affect the punctuation of the sentence. Within and without the parentheses, the ordinary rules should be followed.

The apostrophe

The apostrophe is a troublesome creature, much given to appearing where it is not wanted and occasionally not appearing where it should. Part of the difficulty is that the fairly simple general rules are subject to exceptions in the case of some words and part is because the apostrophe performs several quite distinct functions.

First, let us state the principal general rule. An apostrophe is used to show ownership or possession. In the case of singular noun or a plural noun that does not end in *s*, the possessive is shown by adding 's. The same practice applies in the case of indefinite pronouns such as *anyone*, *everyone*, *somebody*, *anybody*.

the secretary's duties
children's parents
everyone's responsibilities

In the case of a plural noun that ends in *s* ownership or possession is shown by adding an apostrophe after the *s*.

A drafter deserves several weeks' holiday from time to time.

An employer has a prime responsibility to ensure workers' safety.

The second usage is for the plural of certain abbreviations (*MP's, QC's, the 1980's*). This usage is diminishing and drafters can safely ignore it and settle for *MPs*, *QCs*, and *the 1980s*.

A third usage of apostrophes is to indicate contractions. Most of these appear in informal language not found in legislation eg words like *can't*, *doesn't*, *who's*. However, *it's* as a contraction of *it is*, and *o'clock* instead of *of the clock* may perhaps find their way furtively into legislation.

The contraction *it's* meaning 'it is' must not be confused with the possessive personal pronoun *its*. The pronouns *its*, *hers*, *yours*, *theirs*, *ours* are a possessive form and should never be embarrassed by the burden of an apostrophe. The following forms are correct:

It's a serious offence to insert an apostrophe in a personal pronoun.

The society must comply with its responsibilities.

An explicable error that is commonly seen in shop and stall signs (and surely never in legislation) is the insertion of an apostrophe in the plural form of a noun ending in a vowel. Words like *tomato's* , *video's* , *cheese's* would be much happier without the '.

The general rules stated in this chapter are subject to extensive exceptions but the exceptions are too extensive to be dealt with here.[49]

49 See Godfrey Howard, *The Good English Guide* (Pan Macmillan, 1993) p27.

The hyphen

A hyphen is used to indicate that two (or more) words or part-words are linked together to form a compound word. Style books and dictionaries offer inconsistent advice and many compound words are widely seen both with and without hyphens. The trend is to use hyphens less than was formerly the case, but this trend should not deter drafters from using hyphens in contexts where they will banish ambiguity or otherwise assist readers. For example, the presence of two adjectival modifiers before a noun may cause ambiguity. The question may arise whether one of the modifiers modifies the noun or the other modifier. Consider the phrase 'small disputes court'. Either the disputes or the court may be small. The insertion of a hyphen between 'small' and 'disputes' removes the ambiguity.[50]

In many instances, the practice of using hyphens following prefixes such as 'co', 're', 'over' and 'sub' has been abandoned in recent years and it seems probable that this tendency will continue. Compound words that begin life joined with a hyphen are likely to cast off the hyphen once they become sufficiently accepted as one word, eg teapot, subcommittee.

The key to the effective use of hyphens is to consider users. If a hyphen will assist users, there can be no objection to inserting it. As is the case with other stylistic practices, it is important that the practice of drafters within a jurisdiction should be consistent.

In essence, drafters should

consider users
be consistent.

50 *Howard*, p207 refers to the distinction between 'extra-marital sex' and 'extra marital-sex'.

Chapter 3

Style

STYLE AND THE PURPOSES OF LEGISLATION

The purposes of the two preceding chapters have been to explain the nature of language and to study the arrangement of words into the patterns or structures we call sentences. Words, it has been emphasised, are no more than convenient labels adopted by the convention of society and connected to the objects or things they are intended to signify only through the mind. Language as a medium for communication has been seen to be inexact, and attention has been drawn to the instability and the intrinsic vagueness and ambiguity of words. In Chapter 2, the possibility of ambiguity arising from defective sentence structure has been noted; in particular we have observed problems of ambiguous modification and faulty reference.

An understanding of these matters is basic, and an appreciation of their importance is a necessary foundation for the consideration of style that is the purpose of this chapter. We now study, in a wider and less technical fashion, the manner or style of expression that best suits the purposes of the legislative drafter. In part, this is the study of attitudes for the object is to establish how the drafter is to approach the business of word choice and sentence structure. Style is not a gloss, not something applied at a late stage like icing on a cake; it is an inherent quality. This chapter will identify the qualities of language relevant to the easy and accurate communication of legislative material, and identify also those qualities likely to lead to communication failure or difficulty.

One consequence of the inexactness of language is that the drafting of laws, using language as a medium, cannot aspire to be an exact science.[1] Accordingly, so far as style is concerned no absolute judgments may be passed; no arbitrary line can be drawn between 'good style' and 'bad style'. Style is a relative matter and the same criteria applicable to all prose writing are equally appropriate to the drafting of legislation. Good style must fit the purpose of the communication, and the degree to which the manner of expression achieves the purpose is the sole measure of the quality of the style.

1 See *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 842 (Lord Simon of Glaisdale).

Purposes of legislation

If style is to be measured having regard to the purpose of the communication, the essential purposes of legislation must be identified. Such a consideration raises questions which cannot, of course, be answered adequately in the space of a few lines, but, in very general terms, it may be said that legislation has as its purpose the establishment in written form of rules for the regulation and control of future social conduct. In particular, restraints are imposed on individuals and groups of persons and the exercise of various freedoms is regulated. On the other hand, important rights and benefits are conferred or protected. In essence, the principal purposes of legislation are

- to *establish* and *delimit* the law; and
- to *communicate* the law from the lawmaking authority to society and in particular to the persons affected by it.

Communication of legislation

Legislation is communication of a very special kind. The framework of society depends in large measure on it and much that is dear to the heart is frequently affected—liberty, perhaps even life, commercial and industrial relations between persons, property, marriage, taxes, indeed all aspects of human conduct within society.

Communication cannot be considered in a vacuum; it occurs only where the substance of the communication is transmitted to some person or persons. Successful communication depends on the reception of what is transmitted and for this reason one purpose of legislation is stated above to be the communication of law to society. But this statement cannot be accepted as sufficient. Indeed, to speak of communicating anything to society is to adopt the dangerous practice of personifying the label attached to an abstract concept.[2] It is not society that lives, it is people, and it is to people that the law must be communicated.

The people to whom the communication of a law is relevant may be classified in three broad groups. Drafters cannot afford to lose sight of the interests and standpoints of any of them.

1. The lawmakers
2. The persons who are concerned with or affected by the law
3. The members of the judiciary

Communication to the lawmakers

The principal members of this group are the members of the Parliament or other lawmaking authority. The term 'lawmaker' is used in a wide sense in this context to include all who have a hand in the preparatory and legislative process, that is to say the officials who participate in its development and other persons to whom the legislation in draft form is submitted for consultative purposes. In a very

2 Stuart Chase in *The Tyranny of Words* at p15 has written a delightfully mocking tilt at the common tendency to personify what is abstract. 'Here in the centre is a vast figure called the Nation—majestic and wrapped in the Flag. When it sternly raises its arm, we are ready to die for it. Close behind rears a sinister shape, the Government. Following it is one even more sinister, Bureaucracy. Both are festooned with the writhing serpents of Red Tape.'

practical sense, the draft is communicated to these persons. On enactment the law may be said to be communicated by the lawmakers.

Communication to persons concerned or affected

This group may be said to receive the communication transmitted by the lawmakers. Its members are concerned to construe the law but do so non-definitively. The group contains three distinct sub-groups.

First, the persons who are personally affected by the law (for example, the persons obliged by a law to pay a tax).

Secondly, the persons who advise and assist those persons affected by the law (for example, the accountants, tax consultants and legal advisers advising taxpayers).

Thirdly, the persons, usually public officials, who are charged by the law with the duty of administering and enforcing it (for example, the officers of the tax department).

Communication to the judiciary

This group may also be said to receive the communication. Its members are concerned to construe the law definitively, although the construal made by a particular court may be subject to review and possible reversal by a higher court.

Style should help communication

The style which is appropriate to any particular enactment will to some extent depend on the identity of those people in the groups to whom the law will be communicated, particularly the identity of the people in the second group, ie that containing the persons affected by the law.

Although there are many laws, such as road traffic laws, which are applicable to the conduct of all the persons who make up a society, most laws are of narrower application and regulate the conduct only of a segment of society. Such a segment might comprise those who are tenants, or practise a particular profession, or engage in a particular trade or activity, or are liable to pay a particular tax, or are to be members of a statutory body with advisory functions.

It is unrealistic to believe that all laws should, or indeed could, be drafted in language and in a style which is familiar and instantly intelligible to that mythical person who in days gone by used to be referred to as the man in the street. Even excellent drafting does not remove the need for careful study to understand much legislation. Nevertheless the drafter must in each case endeavour to draft in such a way that the law is successfully communicated to the persons who make up the three groups.

Legislation having a high technical content or even legislation necessarily using a few technical terms may not be fully understood by groups 1 and 3, at least without technical explanation. This is inevitable. A law to regulate mining may properly contain words such as 'adit' and 'winze' that convey nothing to most of us. What is vital is that the words be chosen and a style adopted which those whose interests are affected (ie group 2) should be able to comprehend without unnecessary difficulty. Technical purposes are likely to require technical words and technical law may still be good law, even if unintelligible to most people, so long as it achieves ready communication with those who matter so far as that law

is concerned. The careful use of definitions may assist the non-technical to comprehend.

A licence to use technical unfamiliar language in a particular context is always subject to significant limitations. The drafter must achieve a sufficient understanding to be confident that the technical language is being used accurately and is unambiguous. It is easy to forget that technical terms are also prone to ambiguity and vagueness.

TRADITIONAL LEGISLATIVE STYLE—IS IT REALLY A PROBLEM?

In recent times, the calls for laws to be drafted in 'Plain English' have become more clamorous. Some jurisdictions have accepted the challenge and accepted 'Plain English' as a policy objective.[3] Other drafters have adopted a defensive attitude to the implied criticism inherent in such calls and consider it unfair and frequently simplistic. All competent drafters subscribe to the golden rule of the plain English movement 'write clearly for your audience'. Many drafters believe that some disciples of the movement underestimate the difficulties; some drafters overestimate the difficulties!

No drafter who has time to give the matter some thought could possibly feel satisfied with the quality of his or her product. All drafters know that the communication process fails frequently and they are aware of their share of the responsibility for such failures. Inadequate instructions and lack of time are the familiar defences. Very few would deny that there is plenty of room for improvement. This needs to be and is usually acknowledged openly and the way should be open to encourage helpful criticism of drafting style. Scholars in linguistics and communication techniques have so much yet to learn and drafting techniques are so inadequate that drafters must remain permanently dissatisfied with their products. Judicial criticism of laws contains at times a bonus of good fun, too. For example here is Lord Harman in tremendous form:

> To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side where I find myself, I am glad to say, at the same point as that arrived at with more agility by Lord Denning MR.[4]

The following extracts are just an example, but an instructive one, of other criticism.

3 Parliamentary Counsel's Office in New South Wales adopted plain English as a policy as far back as 1986. Plain English drafting is discussed in papers by Wallace and Thornton, Conference Papers of the 9th Commonwealth Law Conference (1990) at pp175 and 183; see also Turnbull (1990) 11 Stat LR 161; B. A. Garner, *The Elements of Legal Style* (Oxford, 1991); V. R. Charrow and M. K. Erhardt, *Clear and Effective Legal Writing* (Little Brown, 1986); M. Faulk and I. M. Mehler, *The Elements of Legal Writing* (Macmillan, 1994).

4 *Davy v Leeds Corpn* [1964] 3 All ER 390 at 394, [1964] 1 WLR 1218 at 1224. See also R. E. Megarry, *Miscellany at Law*, pp349 et seq.

> Laws should be written with more emphasis on making readers understand what the law commands and with less emphasis on controlling the judges by rigid grammatical constructions. Judges are more likely to be controlled by clear statements of purpose.[5]

> One of the things that annoys readers in legal writing is the tireless repetition of words that do not need to be repeated.

> Legislation which is unnecessarily difficult to understand is a derogation from the democratic right of the citizen to know by what law he is governed.[6]

> Some of the typical sections of modern Acts are a veritable cobweb of words and in the forest of their verbosity, the reader dare not enter, or, if he enters, he is apt to get lost in no time.[7]

> Many statutes emerge from the parliamentary process obscure, turgid, and quite literally unintelligible without a guide or commentary.[8]

> With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference.[9]

> In sum, the complaints about legal language are directed at both its style and its unintelligibility, and these are separate objections. It is a mistake to assume, as many do, that style is faulty only when it clouds meaning, for there is a cry of anger in these protests against style itself. 'Said dog did bite aforementioned leg' will offend the critics though its meaning is clear.[10]

> Even with devices of layout and graphology, the syntactic complexity—probably more than the technical terms—renders legislative texts incomprehensible to all except the specialist reader and increases the possibilities for uncertainty.[11]

ARE SHORT SIMPLE ACTS THE ANSWER?

Demands for short simple Acts establishing purposes and principles which the judiciary can interpret in a liberal manner with a purposive approach have from time to time been made. Such Acts which lack detail but depend for their effect on concepts and principles have been referred to as 'fuzzy' law. Fuzzy law drafting is not new; it has long been used in various contexts large and small. Its use in a limited fashion may be illustrated by the following provision which is typical of many in common use.

> A person who knowingly or recklessly furnishes to the Minister a return that is false or misleading *in a material particular* commits an offence.

5 F. Conard, 'New Ways to Write Laws', 56 Yale Law Journal 458, 473 (reprinted [1985] Stat LR 62).
6 Lord Simon of Glaisdale, Hansard, Vol 336, p954.
7 P. M. Bakshi, *An Introduction to Legislative Drafting*, p35.
8 S. Atiyah, *Law and Modern Society*, p127.
9 D. Mellinkoff, *The Language of the Law*, pvii.
10 Robert W. Benson, 'The end of legalese: the game is over', NYU Rev L & Soc, Change XIII 519 at 522.
11 John Gibbons (editor), *Language and the Law* (1994, Longman) p25.

Such a provision leaves it to the courts to decide whether a particular return is false or misleading 'in a material particular'. Similar fuzziness may be of wider application, for example in a statute that requires directors to act 'honestly', or employers to 'take reasonable care to ensure the health and safety' of employees, or licensees to 'use their best endeavours' to do something or other.

Drafting of this kind is acceptable under certain conditions. However, it is essential that it be used only when the instructing body are aware of the consequences and agree to that approach. It can be very useful to rely on a simple general proposition if the proposed law is intended to affect a broad range of alternative circumstances and it is difficult or impossible for the details of them all to be foreseen or described.

The unadorned fact is that Ministers and the officials and others who influence and advise Ministers generally insist on a much higher degree of comprehensiveness and certainty than can be provided by 'short simple Acts' or fuzzy law unsupported by detail. Drafting of legislation very frequently is the result of intense pressures applied by pressure groups such as trade unions, employer groups and so on and they want to see what they want expressed in detail. Those who instruct drafters will not generally accept vague broad principles, doubts and uncertainty and do not ordinarily take pleasure in the thought of judicial lawmaking. This is not necessarily because they distrust the judges but because they think it better that the law should be comprehensive, clear and certain before it reaches the judges.

Considerable importance is given to the advantages of certainty. Those affected by or otherwise concerned with a law want to know as soon as that law is in operation where they stand in relation to it. They do not want to endure the trouble, delay and expense of litigation. Citizens should not have to spend money going to court in order to determine their rights or obligations.

A contrary viewpoint is that expressed by Sir William Dale who has argued that it is an illusion that drafting in detail achieves certainty; it inevitably leaves gaps, and, as time passes, growing uncertainty.

The reality is that there is a place for statements of principle and a place for detail and the context will generally stipulate the balance. There are some contexts in which a broad statement of principle or purpose is desirable and valuable and there are others in which detail is desirable. For example, in legislation for the protection of workers a general duty of reasonable care may be appropriate and this will best be done by a statement of principle in general terms. On the other hand, legislation for the control of dangerous drugs may require a detailed list of such drugs. Detailed legislation is much more likely to be necessary in coercive legislation or legislation that might infringe human rights.[12]

Drafters are often powerless when faced with instructions to draft a highly-tangled and complex web of provisions. Experience gives no confidence that Ministers and their advisers will be persuaded (at least to the point of action) by Sir John Donaldson's dicta in *Merkur Island Shipping Corpn v Laughton* [1983] 2 WLR 45 at 66, 67:

> When formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: 'Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed?' Having to ask such questions would no doubt

12 See J. F. Burrows, *Statute Law In New Zealand* (1992) p63.

> be frustrating for ministers and the legislature generally, but in my judgment this is part of the price which has to be paid if the rule of law is to be maintained.

The quality of the drafting is not always the cause of communication failure. Difficulties may also arise from the imprecise or complex nature of the concepts that the drafter has endeavoured to communicate. 'Fuzziness is an inescapable characteristic of the concepts that language expresses.'[13]

In brief, drafting 'short simple Acts' stating general principles does not provide a general solution to the problems of lawmaking although there is a place for a statement or statements of principles and purposes in most legislation. Such statements do not necessarily lead to 'short simple Acts'. Detail is desirable in some contexts. The proper balance may not always be easy to reach and will depend on the subject-matter. There is a trend towards more open-textured drafting than in days gone by, carefully structured drafting but without intricate and complex relationships and cross-references.

THE PURSUIT OF CLARITY

Simplicity and precision—a tension and a balance

The purposes of legislation are most likely to be expressed and communicated successfully by the drafter who is ardently concerned to write clearly and to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood, in other words to communicate successfully, requires the unremitting pursuit of clarity by drafters. Clarity, in the legislative context, requires simplicity and precision.

When considering the two concepts of simplicity and precision, the 'and' that joins them is important because neither concept must be sacrificed at the altar of the other. What is simple will often be precise, and what is precise will often be simple but one does not follow from the other. The concepts are related but the relationship is not one of cause and effect.

The demands of each concept call for compromise. In evidence to the Renton Committee, the Faculty of Advocates said—

> The solution here must ... lie in a compromise between the precision of technical language and the ready comprehensibility of the ordinary use of words... . The words used should be reasonably simple ... the sentences should be reasonably short.

A law which is drafted in simple but imprecise terms will be uncertain in the scope of its application and for that reason may fail to achieve the intended legal result. Vague general purposes may very well lead to the administration of the law being left in the hands of the bureaucrats who may or may not have the same vision of its purposes shared by the members of the legislature. Litigation does not lead to a satisfactory resolution of the problems for it is concerned with the particular resolution of one dispute. An imprecise law may contain the seeds of many different disputes.

A law which is drafted in precise but not simple terms may, on account of its incomprehensibility, also fail to achieve the result intended. The blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along

13 Jackendoff, *Semantics and Cognition* (1983) p117.

the way to obscurity. An emphasis on detail may omit or obscure the broader issues and unintentionally leave these to be resolved by the bureaucrats and the courts.

The complexity of much of the material that the legislative drafter is compelled to distil and communicate is unavoidable. To some, complexity of material offers a challenge; to those of less stern stuff, it appears to offer the ultimate cop-out. But that is an illusion for 'Everything that can be thought at all can be thought clearly. Everything that can be said, can be said clearly.'[14]

The tension between complexity of material and simplicity of expression must be recognised and a reasonable balance achieved. The style adopted must be as simple and readable as the intended communication permits.

Beware the allure of abstract words

Before considering how the quest for clarity can best be pursued, we should make a positive effort to ensure that our respective feet remain firmly fixed to the ground. Any treatment of style will hoe ground that has been cultivated many times before; it will use words that are familiar but abstract, words such as: simple, concise, orderly, direct, elegant, precise, verbose, pompous, obscure, complex, tautologous, ambiguous. Each one of this round dozen abstract terms conveys an imprecise meaning with blurred edges. Because the significations a person attaches to abstract terms are the product of his or her own life experiences, there is grave danger that writer and reader may achieve only partially successful communication. This is a result of the use of such abstract words as labels for slightly different mental images.

Despite their acknowledged dangers, abstract words are seductive. There is a touch of magic in them. We use them with verve and panache, yet their lack of precision may beguile us into such laziness of thought that we do not always have a clear idea of the exact meaning we intend to convey. Put more crudely, we run the risk of not knowing what we are talking about.

Although the use of abstract words necessarily involves some risk of communication failure, they are both necessary and valuable to enable us to denote qualities or characteristics in general. Like the motor car, they are of great value and can cause great harm.

Sign-posts along the way to clarity

The goal is elusive but some general guidance rules lead in the right general direction. The rules are presented in list form in three groups. The first are general in character, the second applicable to sentences and the third to word choice. Discussion then follows. The content of some rules is discussed elsewhere and page references are given in those cases. Compliance will not necessarily produce clarity although it will increase the chances! The rules are of general application but George Orwell's dictum taken from his famous essay 'Politics and the English Language' is in point: 'Break any of these rules sooner than [do] anything barbarous.'

The pursuit of clarity—general rules

1. Write simply but precisely.
2. Draft for users with their various standpoints always in mind.

14 Ludwig Wittgenstein.

3. Be very clear about the purposes of the legislation and make sure that purpose is manifest.
4. Organise material logically, and chronologically where appropriate, at every level (ie the whole statute, Parts, Subparts, sections, schedules).
5. Consider the use of supplementary aids to facilitate communication (diagrams, examples, notes, etc).
6. Develop consistency of style and approach.
7. Revise the text with simplicity and precision in mind (as often as circumstances permit).
8. Test the draft in relation to comprehensibility.

The pursuit of clarity—rules for drafting sentences

9. Draft in the present tense.
10. Avoid long sentences, particularly if unparagraphed.
11. Prefer the active voice to the passive.
12. Prefer the positive to the negative.
13. Avoid double negatives and beyond.
14. Follow conventional word order.
15. Don't split verb forms unnecessarily.
16. Paragraph with restraint and care.
17. Avoid subparagraphs and sub-subparagraphs.
18. Avoid nominalisations.
19. Use cross-references with restraint.
20. Punctuate conventionally and with restraint.

The pursuit of clarity—word choice

21. Omit unnecessary words.
22. Prefer the familiar word.
23. Choose the exact word.
24. Avoid archaic and legalese words.
25. Avoid non-English expressions.
26. Avoid emotive words.
27. Use informal and recently coined words with discretion.
28. Use one word and not more if one word will do.
29. Use words consistently.

General rules—comment

1. Write simply but precisely

Facets of this major rule are elaborated in the rules that follow. The word 'simple' has been described as a 'soft, frilly, pouting, question-begging, almost a sly and sneaking word'.[15] True, it is an abstract word of inexact and multiple meaning; nevertheless its various facets of meaning conspire to produce a compound effect well understood by most people in most contexts. No single word will do as well

15 C. S. Lewis, *Studies in Words*, p180.

to denote the separate qualities which contribute to simplicity in the sense that it is here used. They are economy, directness, familiarity of language and orderliness.

The connection between simplicity and intelligibility is manifest, but that between precision and intelligibility is in some respects less obvious. Like simplicity, precision is an abstract word commonly used to denote various senses.

In the sense of certainty or definiteness, it may fairly be said that the quest for precision has contributed to the unfortunate obscurity of much statute law. The pursuit of this aspect of precision has led to unsuccessful attempts to foresee all possible contingencies. This has caused great complexities in the law.

On the other hand, when the word precision is used in the sense of exact or accurate expression, its causal relationship with intelligibility is clearer.

In that sense, the term has much in common with economy, an aspect of simplicity, for both demand the removal of that which serves no essential purpose.

The needs of precision go beyond those of economy, however. Economy and precision both require that no unnecessary words be used, and precision also requires that the words chosen express accurately and unequivocally the meaning intended to be communicated. The drafter must distinguish between two processes.

- The drafter must know exactly what he or she wants to say. The problem must be analysed and the response to it must be planned.
- The drafter must say exactly what he or she means. When the draft is complete, the drafter must look at it as objectively as possible in order to assess whether what has been said means exactly what was intended or more or less than intended.

These two processes are frequently confused. Shoddy drafting is often the consequence of shoddy thinking.[16] Muddy concepts are incapable of precise expression.

2. Draft for users with their various standpoints always in mind

Refer pages 47–49.

3. Be very clear about the purposes of the legislation and make sure that purpose is manifest

Refer pages 154–158.

4. Organise material logically, and chronologically where appropriate, at every level

Refer pages 139–141.

It would be difficult to exaggerate the role which orderliness can play in making the complex seem uncomplicated or if not uncomplicated then at least much less difficult to understand than otherwise might be the case. The concept is important in relation to the structure of sentences, sections, Parts, Schedules and Acts.[17]

For the present purpose, it will serve to do no more than to emphasise that whether we are considering the unit of the sentence or a larger unit, an orderly approach is an invaluable aid to intelligibility. However dull the subject-matter,

16 'When a Man's Thoughts are clear, the properest words will generally offer themselves first', Swift.
17 As to sentence structure, see pp16–21; as to the design of Acts, see pp 138–142.

and even the most enthusiastic of drafters must admit that some of the subject-matter that comes before them is dull, if the material is dealt with in a planned manner and in logical sequence, and chronological sequence where appropriate, the writing will flow and be more readable and thus more readily comprehensible.

It is quite impossible for writing which lacks orderly structure to be simple or elegant. Strunk and White go so far as to say 'The first principle of composition is to foresee or determine the shape of what is to come and pursue that shape.'[18]

5. Consider the use of supplementary aids to facilitate communication

Refer pages 158–166.

6. Develop consistency of style and approach

Consistency is a virtue that drafters are prone to undervalue, probably because it is time consuming to achieve. It has value at a number of levels.

- every draft must be consistent and in harmony with the common law and statutory context into which it must fit. Refer pages 132–133.
- a consistent approach to similar problems should be taken by all drafters within a jurisdiction and by the same drafters at different times. Such an approach should not of course stifle development and improvement of earlier approaches. Refer pages 83–84.
- consistency in word choice and usage is desirable.
- consistency is desirable in stylistic practices such as numbering, spelling, capital usage and presentation.
- consistency is desirable in the level of penal sanctions.

7. Revise the text with simplicity and precision in mind (as often as circumstances permit)

Refer pages 143–144.

8. Test the draft in relation to comprehensibility

Refer pages 173–174.

Rules for drafting sentences—comment

9. Draft in the present tense

Refer page 103.

10. Avoid long sentences, particularly if unparagraphed

One Australian jurisdiction has a rule of practice that aims for legislative sentences with a maximum of around 30 words and suggests that a sentence of more than 5 lines should be regarded with suspicion as being too long. The justification for this approach is that the short-term memory of users cannot cope accurately with a large quantity of material.

18 *Strunk and White*, p14.

Although it is easy to accept the proposition that a short sentence is easier to comprehend than a long sentence, the obvious problem is that complicated material, perhaps a proposition that is subject to numerous and extensive qualifications, cannot be communicated in one short sentence. If only short sentences are acceptable, then a series of short sentences will be necessary and they may not be easier to comprehend than one longer sentence. A series of short sentences may involve needless repetition or tiresome and confusing cross-references or both. Communication may be hindered not assisted by a short sentence precept if it is applied without restraint.

For example, here are four short sentences each of which contains a single proposition—

> (1) Subject to subsections (2) and (3), the Legislative Council may by resolution prescribe the rate of levy.
>
> (2) The rate of levy prescribed under subsection (1) shall be based on the value of construction works.
>
> (3) The rate of levy prescribed under subsection (1) shall not exceed 0.35 per cent of the value of construction works.
>
> (4) The rate of levy prescribed under subsection (1) shall come into effect 30 days after the publication of the resolution in the Gazette.

Compare the following single sentence

> The Legislative Council may, by resolution coming into effect 30 days after publication in the Gazette, prescribe the rate of levy which shall be based on and shall not exceed 0.35 per cent of the value of construction works.

One sentence of fairly simple structure has replaced four short sentences, needless cross-references have been eliminated and a tighter, more economic structure has speeded up comprehension. The reader no longer has four subject-predicate structures to contend with; there is one and that one is not modified to the point of obscurity.

Sentence length has some validity as a criterion for intelligibility but is subject to limitations. As Joseph Williams has written—

> What counts is not the number of words in a sentence, but how easily we get from beginning to end, while understanding everything in between.[19]

Williams argues that it is not length of a sentence or the number of clauses in it that we ought to worry about. Rather it is long sentences without shape.[20] To understand a sentence, the reader must understand and recognise its structure. The first essential step must be the identification of the subject-predicate relationship, because no matter how extensively modified they may be, the subject and predicate form the heart of the sentence, declaring its subject and what is said about it. In general, it is the complexity of modifications of the subject or predicate,

19 Joseph M. Williams, *Style: Towards clarity and grace* (University of Chicago Press, 1990) p25.
20 *Williams*, p136.

or both, which tends to obscure the structure of the sentence and thereby make communication more difficult.

The challenge facing the drafter is to arrange and present the material in such a way that everything possible is done to expose sentence structure.

One of the most difficult stylistic problems facing the drafter every day is to decide how much to include in a sentence. The example given above illustrates that breaking things down into a series of short sentences may inhibit communication but the pitfalls in the opposite direction are even more alarming.

Too much must not be stuffed into one sentence. The subject or predicate, or both, must not be loaded with modification to the extent that the reader cannot quickly and easily discover the essential syntactical relationships in the sentence. Phrases and clauses should not be permitted to intrude unnecessarily. It is not enough that intricately organised clauses and other sentence elements are grammatically well formed and unambiguous. The structure of the sentence must be clear and the intended meaning of the sentence not so complex that it cannot be comprehended in one span of attention.

Let us look at another example, a long rambling sentence from an old statute:

> Where it is shown to the satisfaction of a Justice of the Peace that entry on or into any land, premises or thing is reasonably required by the Authority for the purpose of the exercise of a power conferred by this Act or any other Act administered by the Authority but that entry has been refused or the entry is opposed or prevented, or in any case where such land, premises or thing is unoccupied and access cannot be obtained or a notice required by this Act cannot be served without undue delay or difficulty, the Justice may, by warrant in the form prescribed by regulations made under this Act, authorise the Authority by its officers together with such other persons as are named in the warrant, or any police officer, to enter upon the land, premises or thing, using such force as may be necessary, for the purpose therein specified and any such warrant shall continue to have effect until the purpose for which it was granted has been satisfied.

The first impression given by this sentence is that it is overloaded at the front end and as a result the core structure of the sentence is obscured. The reader must embark on a voyage of exploration before discovering that the essence of the sentence is to permit a Justice of the Peace to grant a right of entry in certain circumstances. Two alternative remedies might be considered. The various preconditions to the issue of a warrant could be presented more clearly in a paragraphed form and this device would assist in illuminating the sentence structure. Alternatively, the preconditions could be removed to a separate sentence.

The rear end of the sentence also calls for comment. In a complex sentence, the addition of a second coordinate subject-predicate structure is likely to reduce the level of comprehensibility and a separate sentence would be an improvement. Here is the section presented with the help of some paragraphing and in two subsections instead of one.

> (1) Where it is shown to the satisfaction of a Justice of the Peace that entry on or into any land, premises or thing is reasonably required by the Authority for the purpose of the exercise of a power conferred by this Act or any other Act administered by the Authority, but
> (a) entry has been refused;
> (b) entry is opposed or prevented; or

(c) in a case where such land, premises or thing is unoccupied, access cannot be obtained or a notice required by this Act cannot be served without undue delay or difficulty,

the Justice may, by warrant, authorise

(aa) the Authority by its officers together with such other persons as are named in the warrant; or

(bb) any police officer,

to enter upon the land, premises or thing, using such force as may be necessary.

(2) A warrant granted under subsection (1) shall

(a) be in the form prescribed by regulations;

(b) specify the purpose for which the land, premises or thing may be entered; and

(c) continue to have effect until the purpose for which it was granted has been satisfied.

One criticism that can be made of the form above is that the initial modification, despite the assistance of paragraphing, is so long and complex that too much is required of the reader before reaching the sentence core. The existence of two series of paragraphs in subsection (1) is also a hindrance to easy communication. A remedy would be to bring the essence of the sentence forward to the beginning so that the reader immediately knows what is at the heart of the sentence even if the scope and qualifications are not yet developed. For example:

(1) A Justice of the Peace may by warrant authorise

(a) the Authority by its officers together with such other persons as are named in the warrant; or

(b) any police officer,

to enter upon any land, premises or thing, using such force as may be necessary, in the circumstances described in subsection (2).

(2) A warrant may be granted under subsection (1) where it is shown to the satisfaction of a Justice of the Peace that entry on or into any land, premises or thing is reasonably required by the Authority for the purpose of the exercise of a power conferred by this Act or any other Act administered by the Authority, but

(a) entry has been refused;

(b) entry is opposed or prevented; or

(c) in a case where such land, premises or thing is unoccupied, access cannot be obtained or a notice required by this Act cannot be served without undue delay or difficulty.

(3) A warrant granted under subsection (1) shall

(a) be in the form prescribed by regulations;

(b) specify the purpose for which the land, premises or thing may be entered; and

(c) continue to have effect until the purpose for which it was granted has been satisfied.

A long sentence is not always bad and a short sentence is not always good. If the material is suitable for presentation in paragraph form, a long sentence may

be acceptable. The drafter should avoid long sentences as a general approach but must choose the sentence structure or technique of presentation that will most clearly communicate the material.

11. Prefer the active voice to the passive

The advantage of the active voice is that the subject of the sentence names the performer of the action stated in the verb. The passive form either omits, or reduces the emphasis on, the person performing the action. In many legislative contexts, the subject of the sentence is given a power or a duty and that person must be identified clearly.

Expression in the passive voice may lead to a lack of directness. For example, a section enabling or requiring certain action to be taken may be grammatically adequate and apparently complete in meaning although the person so enabled or obliged is not specified. The form of the active voice is such that the drafter's attention is necessarily directed to the necessity to identify the person concerned. The following form, in the passive voice, is ambiguous because it is not stated whether the obligation to give notice falls on the transferor or the transferee.

> Notice of the sale or disposal of a licensed printing press must be given to the Registrar within 14 days.

The ambiguity could be removed by inserting the phrase 'by the transferor' after 'Registrar', but the following active form is an improvement.

> The transferor must give notice to the Registrar within 14 days of the sale or disposal of a licensed printing press.

However, if the person performing the action in a sentence is unknown or unimportant, an impersonal style using the passive form may be preferable.

12. Prefer the positive to the negative

Refer page 33.

13. Avoid double negatives and beyond[21]

Negatives cannot always be avoided, but a special effort should be made to avoid double or triple negatives. They are always difficult to understand and easily mislead the careless reader.

Consider the following form for example—

> In proceedings for defamation in which the defendant relies on a defence of honest opinion, the fact that the subject matter attributes a dishonourable, corrupt, or base motive to the plaintiff does not require the defendant to prove anything that the defendant would not be required to prove if the matter did not attribute any such motive.

A double negative does not always equate with a positive. The first of the following examples has a different meaning from the second:

21 See S. Greenbaum and J. Whitcut, *Longman Guide to English Usage* (1988) p221.

The registrar must not certify that the podiatrist has not been suspended.

The registrar must certify the the podiatrist has been suspended.

14. Follow conventional word order

In most sentences, legislative or otherwise, the conventional word order is subject-verb-complement. Any variation from that order may cause the reader to have to go back and read the passage again in order to identify the structure of the sentence.

15. Don't split verb forms unnecessarily

Multiple modification and the need to avoid the perils of ambiguous modification encourage drafters to split verb forms in a way that is seen much less frequently in other writing. In some contexts this may be the lesser of available evils, but it should be avoided if possible. Thus

The Tribunal must give reasons for its decision within 30 days of being asked to do so by an aggrieved person.

not

The Tribunal must, within 30 days of being asked to do so by an aggrieved person, give reasons for its decision.

16. Paragraph with restraint and care[22]

The most effective technique for presenting complicated sentences in a digestible state is that of paragraphing. Dick refers to the device as 'paragraph sculpture', a good description because it emphasises the visual aspect.[23]

Careful paragraphing is beneficial in four ways.

- The structure of the sentence is made more apparent to the reader.
- Paragraphing is an analytical tool for the drafter; (it demands the study and analysis of the structure of the sentence).
- Needless repetition is avoided.
- Syntactic ambiguity is removed.

Let us look at an example, first in an unparagraphed form and then paragraphed.

A person is entitled to have his or her name entered in the register if that person is immediately prior to the commencement of this Act registered as a pharmacist under the provisions of the Pharmacy and Poisons Act; or is the holder of a pharmaceutical diploma recognised by the Board as furnishing sufficient guarantee of the possession of the requisite academic knowledge of pharmacy and after obtaining such diploma, has worked in full time employment under the supervision of a registered pharmacist for not less than 12 months in such capacity and such circumstances as to satisfy the Board that he or she has acquired sufficient knowledge and skill for the efficient practice of pharmacy and passes an examination held by an examiner appointed by the Board for the purpose of testing his or her knowledge of such aspects of theoretical, practical and forensic pharmacy as the Board may decide to make the subject of the examination.

22 The recommended practice for identifying paragraphs by a sequence of letters is dealt with at p81.

23 Robert C. Dick, *Legal Drafting* (2nd edn) pp117 et seq.

More than one reading is necessary to discover how many clauses modify the subject 'A person'. This difficulty might be resolved by breaking the section into two but this course of action has two defects. First it involves the needless repetition of the principal words which begin the section ('A person shall be entitled to have his name entered in the register'). Secondly, it involves the separation into two spans of attention of what should logically be together, that is the fact that there are two classes of people entitled to have their names entered on the register and a statement of the details of such classes.

In the form below, the basic structure of the sentence is communicated even at a cursory glance. The subject and the predicate are immediately apparent and it is also clear that the subject is modified by the two paragraphs, (a) and (b), and that paragraph (b) is in turn modified by subparagraphs (i) and (ii).

A person is entitled to have his or her name entered in the register if that person

(a) is immediately prior to the commencement of this Act registered as a pharmacist under the provisions of the Pharmacy and Poisons Act; or

(b) is the holder of a pharmaceutical diploma recognised by the Board as furnishing sufficient guarantee of the possession of the requisite academic knowledge of pharmacy and

(i) after obtaining such diploma, has worked in full time employment under the supervision of a registered pharmacist for not less than 12 months in such capacity and such circumstances as to satisfy the Board that he or she has acquired sufficient knowledge and skill for the efficient practice of pharmacy; and

(ii) passes an examination held by an examiner appointed by the Board for the purpose of testing his or her knowledge of such aspects of theoretical, practical and forensic pharmacy as the Board may decide to make the subject of the examination.

Paragraphing is a flexible device.[24] Very often, as in the example set out above, clauses modifying either the subject or the predicate are presented in a paragraphed form. But the same method of presentation may be adopted in the case of multiple subjects or predicates or indeed any other element in a sentence. In every case, the indispensable requirement is that the elements to be set off in paragraphs must perform an equivalent function in the sentence.

Sound paragraphing depends on observing the following practical guidelines.

Guideline 1—Do not paragraph unnecessarily

Paragraphing is only useful if the sentence is of sufficient length and complexity to require the illumination of its structure. If the structure is manifest without paragraphing, there is nothing to be gained by paragraphing and it amounts only to pointless artificiality. The paragraphing is not beneficial in the following example:

premises includes

(a) a caravan; and

24 A comprehensive treatment of the various uses of paragraphing is to be found in E. A. Driedger, *The Composition of Legislation* (2nd edn) pp53 et seq.; Reed Dickerson, *The Fundamentals of Legal Drafting* (2nd edn) pp115 et seq.; Robert C. Dick, *Legal Drafting* (2nd edn) pp117 et seq.

(b) a mobile home; and
(c) a houseboat.

The following is preferable:

premises includes a caravan, a mobile home, and a houseboat.

GUIDELINE 2—AVOID TWO SERIES OF PARAGRAPHS IN ONE SENTENCE

See the example on page 59. This kind of sentence structure is invariably difficult to read and that is sufficient to warrant abandonment of the practice. The complexity is such that it may cause the drafter to stumble as well as the reader.

GUIDELINE 3—AVOID SANDWICH CLAUSES

A sandwich clause is one in which a series of paragraphs is preceded and succeeded by other text. For example

Where an application is made under section 10 for the incorporation of an association, the Commission must, unless it is satisfied that
(a) the association is not an association within the meaning of the Act;
(b) the association was formed or is carried on for an immoral or illegal purpose; or
(c) the incorporation of the association is otherwise against the public interest,
issue a certificate of incorporation.

The awkward separation of the subject from the verb and complement is an unnecessarily difficult structure to impose on readers. Restructuring sentences of this kind is almost always an easy matter. In the above example, the words 'issue a certificate of incorporation' should be inserted after 'must' in the second line. In addition to imposing hardship on readers, such clauses may lure the drafter into grammatical error.

However, if in breach of this guideline the sentence is to continue beyond the final paragraph in the series, that which follows the final paragraph must be appropriate to each paragraph. The reader should never be left in doubt as to whether concluding words are intended to relate to the whole series of paragraphs or just to the final paragraph. This is a matter that must be checked again by the drafter later in the process, because even if the concluding words are placed accurately at the drafting stage, the possibility of a misplacement at the typing or printing stage must be guarded against. It does happen and is easily overlooked.

GUIDELINE 4—EVERY PARAGRAPH MUST FLOW GRAMMATICALLY AND NATURALLY FROM THE INTRODUCTORY WORDS

The two errors illustrated in the following example are typical of those that embarrass drafters regularly.

A person who shows to the satisfaction of the registrar that the person
(a) is of good character; and
(b) holds a Commonwealth qualification in veterinary surgery; and
(c) that has the requisite practical skill and experience; and
(d) shall be entitled to have his or her name entered in the register.

Paragraph (c) should not begin with 'that' and paragraph (d) is not an appropriate part of the series. Similar elements of a sentence should be dealt with in the same way. The above example would be even worse if it began:

> A person who shows to the satisfaction of the registrar that the person is of good character and
>
> (a) as (b) above etc.

GUIDELINE 5—TAKE CARE WITH THE LINKING OF PARAGRAPHS IN A SERIES

It must be apparent to the reader whether the paragraphs are conjunctive or disjunctive. Great care must be taken in the use of 'and' and 'or'.[25]

The problem of linking a series of paragraphs is not only one of choosing between 'and' and 'or'. There are also occasions when no linking word should be used and the use of an 'and' or an 'or' may give rise to misleading inferences. For instance

> An order under this section
>
> (a) may impose duties and restrictions on any person having control of a slaughterhouse,
>
> (b) may restrict the cutting of carcasses before they are marked,
>
> (c) may require records to be kept relating to dealings with carcasses,
>
> (d) may authorise the Minister to give directions to the Commission as to the operation of the scheme.

The insertion of an 'and' between paras (a) and (b), (b) and (c), (c) and (d) opens the door to the argument that an order must be made in respect of the matters specified in all the paragraphs. Alternatively if 'or' had been used instead of 'and' it could be argued that an order could be made only in respect of one paragraph.

In paragraphing, 'and' and 'or' should be used only when it is desirable to show that the series is conjunctive or disjunctive. In the case of other series of paragraphs, such as those introduced by 'the following' or 'as follows' in a manner similar to the following, the safest course is to omit these potentially dangerous words.

> The Minister may give directions with respect to the following matters:

> The Minister may grant a permit in the following cases:

Where the series of paragraphs is either conjunctive or disjunctive it is usual to insert the 'and' or 'or' after the penultimate paragraph only. This, subject to context, raises the implication of a similar 'and' or 'or' to separate each of the previous paragraphs in the series.[26] Thus

> A local authority
>
> (a) must provide for the medical inspection of children after their admission to elementary school;
>
> (b) must make arrangements for attending to the health and physical condition of children attending any such school; and
>
> (c) so far as appears necessary, shall encourage and assist the establishment and continuance of voluntary agencies.

25 See pages 95–97.

26 See R. E. Megarry, 'Copulatives and Punctuation in Statutes', 75 LQR 29. See also 'Re The Licensing Ordinance' (1968) 13 FLR 143.

The placing of the 'and' or 'or' in just this one position rather than between each paragraph is a matter of custom only and it is probably more helpful to the reader to add the conjunction after each paragraph. If the reader is not acquainted with the custom, it may constitute a puzzle. In any event, if the conjunction is inserted after each paragraph, the reader may be saved the time it takes to avert to the penultimate paragraph in the series in order to discover the 'and' or 'or'.

In some cases, where it is specially desirable to show that the paragraphs are to be taken together or each separately, then the 'and' or 'or' should certainly be added after each paragraph. For example

No person shall sell an article of food that
(a) has in or on it any poisonous or harmful substance; or
(b) is unfit for human consumption; or
(c) is adulterated; or
(d) was manufactured under insanitary conditions.

17. Avoid subparagraphs and sub-subparagraphs

This rule is really just one feature of the major rule 'write simply'. Any sentence containing subparagraphs should be viewed with suspicion. If the material can be communicated in a less complex and artificial way, that should be done. Sub-subparagraphs are just too complex to be readily understood and should not be used.

18. Avoid nominalisations

A noun derived from a verb is called a nominalisation. Such nouns should not be used when a sentence using the verb form would be more direct and clearer.

The Commissioner must investigate every complaint lodged in writing.
not
The Commissioner must conduct an investigation of every complaint lodged in writing.

The Authority must consult representatives of parents before fixing the dates of school terms.
not
The Authority must engage in consultations with representatives of parents before fixing the dates of school terms.

19. Use cross-references with restraint

Some cross-references between provisions are essential to achieve certainty and to assist readers. For example, if a statute provides for two distinct permits, it may well be necessary in some contexts to refer to 'a permit granted under section xx' in the interests of precision. Similarly, some cross-references may be desirable as sign-posts to assist readers of a long and complex statute (but notes may perform the function better without muddying the text).

A cross-reference should only be included if it is either essential or useful. It must be admitted that drafters have in the past been inclined to use them far too readily. A law replete with countless cross-references may be technically correct but its 'legal' appearance will irritate ordinary readers. Precision is admirable but

over-precision is painful. The following example illustrates how unattractive a multitude of cross-references can be:

> (4) The notice referred to in subsection (1)(d), (1)(e) or (2)(b) is complied with if within one month after service of the notice in accordance with section 15(3) the default is remedied to the extent referred to in subsection (3)(b)(i), the amounts referred to in subsection (3)(b)(ii) have been paid and the enforcement expenses referred to in subsection (3)(b)(iii) have been paid.

It is not unusual for the relationship of subsections within a section to be spelled out with quite unnecessary cross-references. This can be particularly tiresome when subsections that complement an earlier subsection refer back to it needlessly. For example, suppose subsection (1) provides for the appointment of inspectors, there is no need for subsequent subsections to refer repeatedly to 'an inspector appointed under subsection (1)'. It would be necessarily implied that in the remainder of the section 'inspector' meant an inspector appointed under that subsection.

20. Punctuate conventionally and with restraint

Refer pages 34–35.

Rules concerning word choice—comment

21. Omit unnecessary words

All good writing uses words sparingly. 'Omit needless words' is one of the fundamental principles of composition stated by Strunk and White in their classic, *The Elements of Style*.[27] In legislation, a word used without purpose or needlessly is not merely a tedious imposition upon the time and attention of the reader; it creates a danger because every word in a statute is construed so as to bear a meaning if possible. A superfluous word is therefore a potential source of contention. If one word will communicate the intended sense exactly, two words or more should never be used.[28] 'Each word should pay for its passage... . nothing superfluous should be added and nothing essential should be omitted.'[29]

Economy in the use of language must be distinguished from brevity. Brevity has been said to be 'a fickle goddess to pursue too passionately' and certainly is better regarded as a welcome by-product of the economic use of language than as a virtue in its own right.[30] If the sense to be conveyed is capable of a treatment which is simple, precise, and brief then so much the better, for a reader is more easily able to grasp and comprehend brief provisions than lengthy ones. However, Horace identified the overwhelming danger in striving for brevity when he wrote 'I labour to be brief and become obscure'.[31] It is easy for a drafter who has become totally familiar with the subject to assume too much knowledge on the part of users.

27 William Strunk Jr. and E. B. White, *The Elements of Style* (Macmillan, 3rd edn) p17.
28 See Chapter 6, Sir Ernest Gowers, *The Complete Plain Words* (3rd edn).
29 Robert C. Dick, *Legal Drafting* (2nd edn) p20.
30 See G. V. V. Nicholls, 'Of Writing by Lawyers', 27 Canadian Bar Review.
31 For a criticism of brevity at the expense of clarity, see Lord Reid in *W & J B Eastwood Ltd v Herrod* [1970] 1 All ER 774 at 781.

It is far better to risk including something that might be unnecessary than to omit something that might be very helpful although strictly unnecessary.

Economy of language is not a virtue that comes easily to the lawyer.[32] Traditional practice, particularly with regard to the drafting of conveyances, contracts, wills and other legal documents, has always preferred a spread of shot to the single bullet. The practice results from an understandable desire to achieve certainty and to narrow the possibilities of dispute.

Advocacy of the merits of economy of language does not imply that the single general term must always be preferred to multiple particular terms. Exactness of meaning must be sought and very often this can only be achieved by particular language.

However, an unfortunate consequence of the traditional, cautious approach is a tendency to verbosity and redundancy. Phrases are included that add nothing to the meaning. This is illustrated by the following examples in which redundant words are italicised:

> The company may make reasonable charges for carrying passengers, animals, goods, *merchandise, commodities, minerals and parcels.*

> The corporation has *full* power to ...

> If the particulars requested by the respondent are not provided within 3 months after they are requested, the notice given and all proceedings thereupon shall be *utterly* void ...

> In this Act, *the following expressions have the following meanings respectively, that is to say* ...

> Every person who is registered as a pharmacist under *the provisions of* the Pharmacy Act ...

> This Act shall continue in operation until 31 June 1988 *and no longer.*

Tautology, the repetition of the same thing in different words, is incompatible with economy of language.

> Any person who acts otherwise than in accordance with these regulations or in contravention of these regulations shall commit an offence ...

'To act otherwise than in accordance with' is no more nor no less than 'to contravene'.

22. *Prefer the familiar word*

Words that are familiar are more easily communicated and understood.

Advice is sometimes given that short words should be preferred to long words and also that words of Anglo-Saxon origin should be preferred to those of Latin or French origin. This is very questionable advice, better forgotten. 'The quest

32 See *Mellinkoff*, pp339 et seq. Abraham Lincoln is quoted as saying of a fellow lawyer: 'He can compress the most words into the smallest idea of any man I ever met': Kupferberg, *An Insulting Look at Lawyers*, p62.

for Saxonisms is an unrealisable nationalistic dream.'[33] We should not however succumb to the temptation of displaying our erudition with a vocabulary of exotic Latinisms and a pretentious kind of writing. A definition recently encountered in a New Zealand statute begins

> 'territorial authority' has the meaning ascribed to it ...

Surely 'given' would be a simpler and more familiar word than 'ascribed'?

The familiar word may be short or long and it may be of any origin; if it is well known in current usage, its use will contribute to intelligibility. The rule that the familiar word should be preferred to the unfamiliar must be recognised as a subsidiary rule. It must always give way to the necessity to find and use the word which most exactly and precisely conveys the intended sense.

It is relevant to recall that one consequence of the vagueness of language is that, for practical purposes, no word when used in a context will have an exact synonym, although the same word in a pure or dictionary state may have a number of synonyms. The choice of a word to fit a particular context entails therefore a choice of meaning. The significations of two words in a context may correspond approximately but they are very unlikely to be identical. A concern to write with simplicity makes familiar words attractive. Nevertheless, if only an unfamiliar word is capable of communicating the intended sense exactly then that unfamiliar word must be used. It may cause a blockage in communication but this may be cleared by definition or otherwise and such a blockage is preferable to a complete failure of communication.

Perhaps it is consciousness of the importance or gravity of the proposed law or possibly a perceived need for dignity or formality that beguiles drafters to choose stiff rather pompous words in preference to simpler, more familiar but equally appropriate alternatives. The words in the first column should be preferred to those in the second.

after	subsequent to
before	prior to
begin	initiate, inaugurate, institute
end	terminate, conclude
find out	ascertain
give	furnish, accord
inform	acquaint, apprise
send	transmit
try	endeavour
use	utilisation, usage
happen	transpire, eventuate

The familiar need not be excluded from legislation because it is informal or colloquial so long as the usage is stable and well established. Some statutes are markedly less formal than in the past. For example, an English Act imposes an obligation on an authority to 'do all they can to secure that ...'.

23. Choose the exact word

When discussing the preference for familiar words, it was conceded that this preference must always give way to the requirement that the exact word to fit the

33 *Burchfield*, p11.

context must be used. It is possibly misleading to speak in this way of the 'exact' word for as we have seen language in ordinary use is with few exceptions far from exact because of its vagueness and ambiguity. What is really meant is that the drafter, being conscious that no two words in a context will convey an exactly identical meaning, must not be satisfied until the word which will communicate the intended meaning most accurately is found.

Many years ago, A. P. Herbert exhorted his readers to 'worry' about words. He wrote:

> I exhort you ... to worry about words, to have an affection and a respect and a curiosity about words.[34]

A drafter who establishes a standard in vague terms may be accused of—

- laziness in not thinking out all possible contingencies and providing for them;
- 'passing the buck' to the judiciary to draw a line that the legislature should have drawn, thus causing a variety of interpretations from a variety of courts;
- creating uncertainty in the law.

On the other hand the drafter may respond by urging that—

- in many areas legislation should aim at the general with a clear statement of purpose, rather than aim at the particular;[35]
- the drafter cannot foresee all possible contingencies and a word like 'nearby' when construed in the context with regard to the obvious aims of the legislation is not unduly vague;
- any particular precise line such as 'within 600 metres' would be arbitrary and could result in injustice by not permitting particular circumstances to be taken into account.

The deliberate use of vague words is in some circumstances both defensible and valuable.[36] It is a curious paradox that the careful use of vague words in laws may result in more humane laws and greater justice. In a very real sense the vague word may be the exact word required. When a deliberate choice of a vague word is justifiable is a matter for careful judgment but two factors should always be present.

First, the drafter should ensure that those instructing him require that, or acquiesce in the decision that, the vague word be used knowing that its interpretation is to be left to the courts. This involves an acceptance that the judiciary should in the particular circumstances share in the lawmaking function.[37]

Secondly, the general purpose and the intended scope of the provision must be clear from the context.

34 A. P. Herbert, *What a Word*, p2.

35 'The whole of our modern drafting technique seems to be based upon the obviously fallacious assumption that it is possible to cover every particular eventuality. Is it not time we gave up trying to do the impossible and concentrated instead in laying down broad general principles?' Gowers, 13 Mod LR 487.

36 'It may indeed be the chief merit of a statute that by its employment of general words it is possible to adapt it to changing social needs ... The experienced draftsman will not try to keep the judges on too tight a rein.' D. J. Payne, 'The Intention of the Legislature in the Interpretation of Statutes', 1956 Current Legal Problems, pp96, 107.

37 'But the draftsman should not forget that "Litigation is an activity that does not markedly contribute to the happiness of mankind" ', *Gallie v Lee* [1969] 2 Ch 17 at 41 per Russell LJ.

It is bad practice to lay down in vague undefined terms a standard for application by the courts or by any other authority unless the criteria to be applied are either declared specifically or are reasonably ascertainable from the context. Unless the purpose of the provision is beyond doubt, a vague standard can only lead to uncertainty in the law and inconsistent, and therefore bad, administration. For an example, let us look at an old section from Hong Kong's Marriage Ordinance:

> 15. If there is no parent or lawful guardian of such party residing in the Colony and capable of consenting or if such party satisfies the Registrar that after diligent inquiry such party is unable to trace any such parent or guardian, the Registrar may give his consent in writing to the marriage, *if on inquiry the marriage appears to him to be proper*, and such consent shall be effectual as if the parent or guardian had consented.

In this example it is by no means clear what criteria the Registrar should adopt in forming his opinion whether a proposed marriage appears to him proper. If the term is intended to mean no more than lawful, then 'lawful' should have been used. If it means more than that, then the section converts the Registrar into a moral arbiter. Quite clearly, such a person should not apply personal views of moral propriety, but what should the Registrar apply? Is the marriage of a rich old man with a poor young girl proper? Is the marriage of a poor young man with a rich old girl proper? Is the marriage of a divorced person proper? There are of course no absolute answers to moral questions like these and the section is indefensible.

Even though the purposes of the legislation are clear, vagueness is indefensible if the context is such that certainty in the law is necessary. There should, for example, be no doubt as to the maximum punishment the breach of a statutory provision may attract and the word 'reasonable' is insufficiently exact in the following illustration:

> Regulations may impose reasonable fines on persons who contravene any of the regulations.

The drafter must take care in the choice of words and must approach the task with an understanding of their qualities. Many problems arise from the use of abstract words and legislation cannot be drafted without their extensive use. Legislation regulating human conduct must frequently fix a standard of general application, a degree of conduct which the law requires or permits. Consider the following words:

acceptable	necessary
adequate	normal
appropriate	ordinary
due	proper
equitable	reasonable
expedient	requisite
fair	satisfactory
fit	sufficient
just	suitable

Every one of these words is found so often in legislation that it is used as a matter of course. Each word purports to fix a standard but does it really do so? Is the signification of any one word demonstrably different from that of the others? It is

suggested that what all these words do is to hand over to the courts the task of fixing a reasonable and appropriate standard in the light of the circumstances before them.[38]

There are many similarly vague and to some extent subjective terms in common use. For example, words denoting time such as brief, immediate, forthwith, permanent and temporary. There are also very many words denoting quantity or degree. The following is a small sample:

average	regular
disorderly	serious
excessive	several
few	trivial
gross	unconscionable
large	unjust
many	usual
objectionable	

These terms and others depending on a generalised concept are far from precise in the sense of certain or definite, although they may be used precisely in the sense of accurately expressing the legislative intention to provide flexibility and judicial discretion. The handing over of a lawmaking function to the courts by the use of a vague word should only be done by the deliberate act of the drafter where it is considered that the circumstances justify such a course.[39]

24. *Avoid archaic and legalese words*

Refer to pages 91–95.

25. *Avoid non-English expressions*

Numerous Latin and French words and phrases were once used by lawyers in the interests of precision. Many of these, for example appeal, alibi, indictment and verdict, have become part of the English language but others have not. Very few readers of statutes learn Latin these days and drafters should choose an English equivalent for a foreign term in order to facilitate easy communication. Some equivalents follow:[40]

a priori	by deduction
ab initio	from the beginning
ad valorem	according to value
bona fide	in good faith
ex aequo et bono	by reference to considerations of general justice and fairness
in pari delicto	equally at fault
inter alia	amongst other things
mutatis mutandis	subject to necessary modifications
prima facie	at first sight, on the face of it
pro tanto	to that extent
seriatim	one after another

38 See also p50.
39 See also p51.
40 See the list published in *Explain* Issue 1 published by the Centre for Plain Legal Language (NSW).

sine qua non	a necessary condition
sui generis	in a class of its own, one of a kind
viva voce	spoken
in esse	in being

26. Avoid emotive words

The drafter must attempt to draft laws in such a way that choice of language does not affect the intended meaning by adding emotional overtones. The content of the law will inevitably generate some emotion in those concerned to enact, apply or interpret it but its expression should be as nearly devoid of emotion as is possible. It is quite wrong, for example, to refer to 'the abominable crime of buggery' as does s49 of the Offences against the Person Ordinance [HK] (following 24 & 25 Vict c 100 s61).

It is quite wrong to set a standard in legislation based on emotional effect. For example, the use of the word 'loathsome' in the following passage taken from an old immigration law is indefensible:

> The landing may be prohibited of a person who is suffering from a contagious disease which is loathsome or dangerous.

27. Use informal and recently coined words with discretion[41]

Legislation must keep pace with social and technological needs arising from the passage of time and when appropriate must use the new words that social and technological change has spawned. Technological change particularly introduces many new words and such words as 'laptop', 'software' and 'modem' might now be safely used. Words must have attained some apparent stability as standard English (ie not just slang or used in a trendy vogue sense) before being used. There is at present a visible trend to use nouns as verbs and in some cases the usage may not be accepted as standard English.

An increasing preference for familiar everyday language has increased the acceptability of new popular terms as well as new words from technology. For example, the Dogs (Fouling of Land) Act 1995 [UK] uses the word 'pooper-scooper'. Some jurisdictions have enacted legislation for the protection of 'whistleblowers'.

28. Use one word and not more if one word will do

This guideline might be subtitled 'Avoid circumlocution'. In order to be simple and direct, writing must be straightforward, direct and devoid of circumlocution. Every draft needs to be scrutinised for the roundabout or circuitous expression. Directness is akin to economy for both require the rigorous pruning of unnecessary words and phrases. The use of circuitous expressions is usually the result of habit. A person's thinking is so intertwined with patterns of speech which are natural to that person that a conscious effort will commonly be necessary to detect troubles of this kind. Drafters have to be aware of the kind of mindset that induces people to write 'Passengers are urged to refrain from smoking' instead of 'No smoking'.

Paragraph 84 of 'Statute Law Deficiencies' quotes this tortuous gem from s139(2) of the Transport Act 1968:

41 See also pp 12–13.

direct access means access otherwise than by means of a highway which is not a special road, and **indirect access** means access by means of such a highway as aforesaid.

This guideline is particularly concerned with the couplets and phrases that are so often seen in legislation in contexts where one word would have been simpler and more direct. There are many couplets in widespread use in which one word is redundant in most contexts. The following should be used only where the second word serves a useful purpose:

all and every	due and payable
final and conclusive	from and after
complete and full	undertake and agree
have and hold	if and when
power and authority	release and discharge
save and except	sole and exclusive
permit or suffer	true and correct
null and void	give and devise
cease and desist	fit and proper
read and construed	good and sufficient
perform and discharge	let or hindrance
force and effect	goods and chattels
residue and remainder	just and reasonable
will and testament	aid and abet

Some phrases are commonly and unnecessarily used when one word would be simpler and more direct. Examples are almost beyond number but the following examples are illustrative of what is a very common drafting defect. The preferred word precedes the phrase to be generally avoided:

because	because of the fact that
because	by virtue of the fact that
because	for the reason that
because	on the grounds that
if	in the event that
if	if it should happen/eventuate/transpire that
if	under circumstances in which
by	by means of
think	of the opinion that
while	during such period as
except	except for the fact that
near	in close proximity
about	in connection with
about	concerning the matter of
about	as regards
about	in reference/relation to
although	notwithstanding/despite the fact that
usually	the majority of instances
when	at the time when
during	during such time as
may	is entitled to
until	until such time as

29. Use words consistently

In contexts where a choice must be made from a number of synonymous or near synonymous words, the choice should be adhered to once made. Different words should not be used to express the same meaning and, conversely, the same word should not be used to express different meanings. Consistency in the use of words is most desirable. For example, if one provision of a statute requires that a notice be 'given', other provisions of the statute should not require notices to be 'furnished', 'lodged', 'submitted', 'delivered' or 'filed'. If one provision of a statute refers to the 'issue' of a licence, another should not refer to the 'grant' of a licence.

Six rules instead of twenty-nine[42]

For readers who think that twenty-nine rules are immoderate and far too many to remember, here are six major sign-posts along the way to clarity:

- Write simply but precisely *(Rule 1)*
- Draft for users *(Rule 2)*
- Organise material logically *(Rule 4)*
- Avoid long sentences, particularly if unparagraphed *(Rule 10)*
- Omit unnecessary words *(Rule 21)*
- Choose the exact word *(Rule 23)*

STYLE AND GENDER

In a growing number of jurisdictions, lawmakers have accepted that sexist language offends the sensitivities of many women and now draft legislation in gender-neutral language. This has been a social response to the assertion that the enactment of legislation in 'masculine' language contributes to the perpetuation of a male-oriented society in which women are seen as having a lower status and value. It has been argued that the general use of masculine nouns and pronouns 'implies that personality is really a male attribute and that women are a human sub-species'.[43] The argument is a social rather than a legal one for interpretation legislation generally declares that masculine pronouns in legislation are taken to refer to both males and females. Such legislation does no more than follow common usage in the community, particularly with regard to spoken language. Nevertheless, changes in written language have been rapid and widespread. Many publishing companies now recommend authors to avoid language that may be regarded as sexist.

42 On the other hand, readers who consider 29 rules rather parsimonious may refer to the 135 principles in Laulk and Mehler, *The Elements of Legal Writing* (Macmillan, 1994). C. K. Cook in *Line by Line* lists five categories of stylistic faults that she considers most often impede reading and obscure meaning. They are 1 needless words, 2 words in the wrong order, 3 equivalent but unbalanced sentence elements, 4 imprecise relations between subjects and verbs and between pronouns and antecedents, and 5 inappropriate punctuation.

43 C. Miller and K. Swift, *The Handbook of Nonsexist Writing* (Harper and Row). See 'Avoidance of Sexist Legislation in Legislation', [1985] Commonwealth Law Bulletin 590.

It is accepted that what is seen as a sexist use of language is unacceptable to a large sector of society. It is therefore suggested that legislation should treat men and women equally and that gender-neutral legislation should become the general rule.

Unisex grammar

The challenge is to get rid of the male pronouns 'he', 'his', and 'him' in contexts where females are intended to be included. It arises because there is no gender free singular pronoun in English. In some sentences the challenge cannot be met without some loss of elegance but in general the benefit obtained outweighs any burden of awkwardness. There are a number of ways of dealing with the problem and the drafter must decide which technique best communicates the message with a reasonable degree of elegance in the particular context. One of the following techniques may be satisfactory or it may be necessary to recast the sentence, perhaps using a passive form, a nominalisation or some other phrase.

1 *Repeat the noun in place of a pronoun*

An employer at a mine must take reasonable care to ensure the employer's own health and safety at work.

On reaching the age of 80, a director must resign the director's office.

2 *Use 'his or her' in place of 'his'*

An employer at a mine must take reasonable care to ensure his or her own health and safety at work.

3 *Recast the sentence using the plural*

Employers at mines must take reasonable care to ensure their own health and safety at work.

4 *Omit the pronoun*

On reaching the age of 80, a director must resign office.

5 *Replace a nominalisation with a verb form*

If satisfied that an applicant has the specified qualifications, the Minister must consent to the application.
not
... give his consent ...

6 *Recast the sentence using a relative clause*

A person who has lodged a memorandum of appeal may ...
not
If a person has lodged a memorandum of appeal, he may ....

7 *Recast the sentence using a participle*

A person must give 7 days' notice before lodging an appeal.
not
A person must give 7 days' notice before he lodges an appeal.

Some authorities favour using 'they', 'them' and 'their' as singular unisex pronouns, a usage which goes back centuries but has never been fully accepted.[44]

Avoid demeaning or patronising language

Men and women should be dealt with in legislation as individuals in the same fashion and shown the same respect. Care should be taken to use parallel language when referring to men and women. For example:

husband and wife, ladies and gentlemen
not
man and wife, ladies and men

So far as possible, occupational references should be the same for men and women. By referring to a 'lady doctor' or a 'woman barrister' it is implied that the standard is male and that a female is non-standard. Conversely, 'male nurse' is unacceptable. In many instances the form perhaps ending in -ess that was formerly used for females is now obsolete or obsolescent. Examples of such forms are actress, stewardess, hostess and manageress. Care must be taken to avoid gender stereotypes.

The following are recommended:

ambulance worker	*not*	ambulanceman
drafter	*not*	draftsman
fisher	*not*	fisherman
firefighter	*not*	fireman
worker	*not*	workman
staffed, crewed,	*not*	manned
homemaker	*not*	housewife
administrator	*not*	administratrix
manager	*not*	manageress

If examples referring to hypothetical persons are included by way of notes or otherwise, the persons should not always be of one sex.

Avoid 'man' words

The battle between 'chairman', 'chair' and 'chairperson' continues. As yet there is no clear winner although 'chairman' appears to be losing ground. Acceptable alternatives to 'chairperson' are

president presiding member convenor coordinator.

44 See *Howard*, p397.

Avoid words containing 'man' that are used to refer to humanity generally.

the average person	*not*	the average man
humanity, people	*not*	mankind, man
workers, work force	*not*	manpower
staffing levels	*not*	manning levels
adulthood	*not*	manhood
manufactured	*not*	man made
maintenance worker	*not*	repairman

Chapter 4

Specific matters of style

SECTIONS

Legislation is for good reasons conventionally presented in a sequence of numbered sections. The arrangement of material in numbered sections makes that material more easily found and more accessible than it otherwise would be. To achieve those benefits, a section, of whatever length, must have a unity of purpose and a central theme. It may consist of one sentence or more; but if it consists of more than one sentence, the usual practice is for each to be placed in a separate, numbered subsection. Separate subsections must all have direct relevance to the central theme which characterises the section.

Some commentators have argued that more than one sentence should be permitted within a section not divided into subsections or in a subsection.[1] This is undesirable if the two sentences are of anything like equal strength or significance. It is permissible if the content of the second sentence is incidental to the substance of the first sentence. For example

> If the Commissioner has reason to believe that a plan provided under this section is inaccurate or incomplete, the Commissioner may direct the licensee to have a check survey conducted at the licensee's own cost. The licensee must comply with such a direction without delay.

However, communication is generally assisted if the reader can approach a numbered element with the knowledge that it will contain one sentence only with one subject-predicate relationship at its core.

The section heading (traditionally known as the marginal note) provides a reliable test to discern whether all subsections within a section comply with the requirement that a section should have a unity of purpose. If the central theme or topic of the section cannot be extracted and stated briefly in the form of a section heading, the design of the section needs review. Sections containing 10 or even more subsections are not uncommon in complex legislation, but a section of that length is very suspect. A real doubt must exist whether the unity of purpose is sufficiently strong to justify such a weight of material in one section. Just as the modern trend is for shorter sentences, so the trend is for material to be presented

1 See 'Statutory Reform: The Draftsman and the Judge', (1981) 30 ICLQ 141 at 158 where Sir William Dale recommends 'more than one sentence to a section (or subsection) without hesitation'.

in shorter sections. One advantage of shorter sections is that the structure of the Act and the logical sequence of material is more easily apparent from an increased number and therefore greater specificity of section headings.

A section should never contain subsections dealing with unrelated topics. For example the following section is misconceived. The two subsections are not sufficiently closely related to be presented together.

> (1) The purpose of this Act is to enable the exclusion, eradication, and effective management of pests and unwanted organisms.
>
> (2) This Act binds the Crown.

The content to be presented in a section often varies considerably in importance. If a section consists of one principal provision and a number of incidental or lesser provisions, the principal provision should be presented first in the most prominent position. By specifying the principal topic of the section first, the user understands more readily the relationship of the remainder of the section to the central topic and makes more sense more quickly of the detail that follows. As a general rule, what is important should precede what is not so important, but adherence to this rule should not be permitted to produce illogical order or breach of chronological sequence. Nor should it support an unbalanced section combining important principle with a mass of detail that would be better presented elsewhere.

In a section comprising a number of subsections, the relationship of each subsection to the others requires careful treatment. It is not unusual for the relationship to be spelled out with needless repetitions and cross-references.[2] Subsections usually need not be overtly linked together. So long as they have the requisite unity of purpose, there is room for reasonable flexibility. The subsections in a section are properly construed as elements of one entity and within the section a loose texture will in most contexts not lead to ambiguity but instead will help the sentence flow smoothly and contribute to ease of communication. A drafter is entitled to expect a section to be read and construed as a whole with each subsection read and construed in the context of the other subsections.

THE PROVISO

George Coode referred to the proviso as the 'bane of all correct composition'. 'It is most desirable', he wrote, 'that the use of provisos should be kept within some reasonable bounds. It is indeed a question whether there is ever a real necessity for a proviso.'[3]

Driedger is no more enthusiastic. After tracing through English legal history the use of the word 'provided' in its various forms as a term of enactment, and commenting on the incomprehensibility from the grammatical point of view of 'provided that' as the lawyers use it to introduce a proviso, Driedger reaches this conclusion:

> Notwithstanding its frequency or antiquity, the proviso is hardly more than a legal incantation. The best that can be said for it is that it is an all-purpose conjunction, invented by lawyers but not known to or understood by grammarians.[4]

2 See p65.

3 George Coode, 'On Legislative Expression' (reprinted in E. A. Driedger, *The Composition of Legislation* (2nd edn) p317, at p360)

4 E. A. Driedger, *The Composition of Legislation* (2nd edn) p96.

In the face of criticism of this stature it is pertinent to consider whether the words 'provided that' as traditionally used in the law are anything more than a magical formula capable of communicating to initiates in the rites of legal jargon a variety of senses different from those evoked in conventional non-legal usage.

The case against the lawyer's proviso is overwhelming. On both historical and grammatical grounds the proviso stands condemned. Historically, the phrase 'provided that' is a relic of the past when each enactment in a statute commenced with words of enactment. Now that the enacting words at the beginning of the statute cover the whole statute, further words of enactment are otiose. Grammatically, the accepted usage of the words 'provided that' requires that they be preserved for a true stipulation such as: 'He said he would go to the meeting provided that I went with him.'[5] As used in this way, the words 'provided that' could be satisfactorily replaced by the word 'if', but any attempt to make such a substitution in the case of the legal proviso serves only to illustrate the extent to which that usage is different.

Legal usage itself recognises differing grades of propriety for the proviso. In the first place, lawyers have accepted as correct and proper usage a proviso which follows an enactment of general application and makes special provision inconsistent with that enactment for a particular case. Here is an example:

> Every adult male must apply in writing for an emergency service registration certificate within 90 days of the commencement of this Act:
> Provided that an illiterate person may make oral application for such a certificate to the Registrar for the district in which he resides.

Frequently the purpose of a proviso is to exclude a special case from the operation of the general provision without making further provision for that special case. This is common in penal provisions. This usage is illustrated by the following example:

> Any act or omission taking place on board a British-controlled aircraft while in flight elsewhere than in or over the United Kingdom which, if taking place in, or in a part of, the United Kingdom, would constitute an offence under the law in force in, or in that part of, the United Kingdom shall constitute that offence:
> Provided that this subsection shall not apply to any act or omission which is expressly or impliedly authorised by or under that law when taking place outside the United Kingdom.
>
> *Tokyo Convention Act 1967* [UK] s1(1).

In the sense illustrated above 'provided that' performs the function of a conjunction meaning 'but' or 'except that' or 'nevertheless'.

A usage which is open to greater objection occurs when the proviso does not detract from the general application of the enactment preceding it but is coordinate with it. This usage is definitely not to be followed and has never been accepted as good legal practice. Two coordinate provisions should either be placed in separate subsections or, if appropriate, joined in one sentence by the word 'and' or some other apt conjunction. The proviso in the following example does not restrict the area of application of the provision but lays down a procedural step which is a prerequisite.

5 See Sir Ernest Gowers, *The Complete Plain Words* (3rd edn) p104.

> After the issue of a certificate by the Registrar, or the grant of a special licence by the Governor, the parties may, if they think fit, contract a marriage before the Registrar. Provided that, before they are permitted to do so, each of the parties shall sign a written declaration in the presence of the Registrar, which he shall witness, in the prescribed form.
>
> *Marriage Ordinance* [HK] s21(1).

The case against the proviso is established beyond reasonable doubt by the ambiguity and uncertainty of the phrase. The context may leave a doubt as to whether the proviso is intended to be a true proviso or a coordinate supplementary provision.[6] It is suggested that all use of the proviso form be abandoned. This is the trend and only a diminishing number of jurisdictions find it acceptable.

There can be no general rule as to what pattern of sentence structure should take the place of the proviso. The most appropriate form can be selected only after considering the function in the sentence which the contemplated proviso was intended to perform. In many contexts the substance of the proviso can adequately be introduced by 'but' or 'except that' and in others it would be better presented as a separate subsection.

NUMBERING, LETTERING AND INDENTATION PRACTICE

Sections are conventionally identified by consecutive numbers in Arabic script. They are not bracketed and the sequence is 1, 2, 3, etc.[7]

Subsections are identified by bracketed consecutive numbers, that is (1), (2), (3) and so on.

A series of paragraphs in a section or subsection is best identified by bracketed consecutive alphabetical letters, that is (a), (b), (c) and so on. If as occasionally happens the series extends beyond 26 paragraphs and the alphabet is exhausted, the series may be continued (aa), (bb), (cc), etc.[8] Some jurisdictions choose to use capital letters for paragraphs and others italicise the letters. A recent innovation in some jurisdictions is to introduce paragraphs of a series by 'bullets' or dots rather than letters. The disadvantage is that such paragraphs cannot easily be referred to if they are to be amended.

A series of subparagraphs in a paragraph is identified by bracketed small Roman numerals, that is (i), (ii), (iii), etc.

If yet a further subdivision is made into another series of subparagraphs (and such complexity should be avoided if possible), then each subparagraph should be identified with consecutive alphabetical letters in capitals, that is (A), (B), (C) and so on.

Sometimes there are two distinctly separate series of paragraphs in one section or subsection. For example:

> In this Part, 'food' means food and ingredients of food for human consumption, including

6 See for example *Stamp Duties Comr v Atwill* [1973] AC 558, [1973] 1 All ER 576, PC in which the Privy Council decided that a proviso in a Stamp Duties Act was not a true proviso and overruled a contrary view taken by majority decision of the Full Court of the High Court of Australia. For a decision in which a proviso was held to be a 'true' proviso and not an independent provision, see *Western Australia v Wilsmore* (1982) 149 CLR 79, 56 ALJR 335, CA.

7 As to the numbering and lettering of amending provisions, see p413.

8 A sentence of such inordinate length would only be tolerable in exceptional circumstances. One permissible instance might be in a section listing many paragraphs of regulation making powers.

(a) drink (other than water);
(b) chewing gum and like products;
but does not include
(i) milk and cream;
(ii) live animals or birds;
(iii) articles or substances, used only as drugs.

Food Act 1984 [UK] s67(1).

There is no uniform practice for the identification of the second series. The Canadian practice appears to be to letter the second series as if it were a continuation of the first series so that in the example above the paragraphs in the second series would be lettered (c), (d) and (e).[9] As Driedger points out this practice ensures that there will not be two paragraphs lettered (a) in the same section. This is so but the disadvantage is that consecutive lettering raises an inference that the paragraphs constitute one series when in fact they consist of two series which are quite separate. The English practice appears to be to distinguish the second series from the first by numbering it in small Roman numerals as in the example above. The disadvantage of this practice is that this type of numbering is usually used for subparagraphs not paragraphs and to avoid confusion is better confined to subparagraphs.

A better solution is to letter the second series (aa), (bb), (cc) and so on for this practice indicates that the second series is not a continuation of the first and comprises paragraphs not subparagraphs.

If it is practical to do so, the best solution is to avoid two series of paragraphs in one sentence and to present the material in two sentences. The device of paragraphing is to be used with restraint; no matter how accurately it may be paragraphed, a sentence of great length and complexity is likely to be more easily understood if broken up into smaller more easily digestible morsels.

The practice described above, or something not very different from it, is in general use throughout the Commonwealth. The system has been criticised as unnecessarily complicated in that it uses a multiplicity of symbols, Arabic and Roman numerals and capital and lower case alphabetical letters. Some American States have adopted a decimal system and some years ago the Statute Law Society advocated a system using only Arabic numbers and decimal points. Section 4(1)(a)(iii) would become section 4.1.1.3 and so on.[10] It is claimed that this simplification has the merits of ease of communication and greater comprehensibility but the claim is a dubious one. The present system does at least use different symbols for different things, it does not rely on decimals which interlaced with a series of numbers are not easy for tired eyes to read and, except in legislation that is amended frequently and extensively, it poses no serious problems when direct amendments introduce additional provisions.

Another alternative, which is particularly suitable for a long and complex statute such as an income tax Act, has recently been adopted in New Zealand for reorganised income tax legislation. It was designed to combat the inadequacies and inflexibility of the traditional numbering system in coping with the regular and extensive changes that occur with tax legislation. Such changes can produce horrendous and intimidating section numbers such as 159GZZZBG and 160ZZPAC.

The main features of the alternative system are—

9 E. A. Driedger, *The Composition of Legislation* (2nd edn) p57.
10 See Statute Law Deficiencies, the Statute Law Society, para 98.

- Parts and Subparts (in some jurisdictions called Divisions) are each lettered in a separate series beginning with the letter A and printed in capitals.
- Sections in each Subpart commence with the number 1.
- Each section has a unique reference, identifying the Part, Subpart and section. For example the third section in the second Subpart of the fourth Part would be referred to as section DB 3. The tenth section in the sixth Subpart of the eighth Part would be section HF 10. A section in an Act divided into Parts but not Subparts might be numbered H 10.
- The numbering and lettering of subsections and lesser elements is not changed from traditional practice.

The system claims a number of advantages:

1 As users of an Act so numbered become familiar with the system, the ready identification of the location and function of sections is facilitated.
2 It allows extensive replacement or review of segments of the Act without destroying a sensible numeric sequence.
3 It allows new Parts or Subparts to a Part to be added without breaking the existing alphanumeric sequence.
4 It helps to make the structure of the Act more easily apparent to users.

Indentation makes an important visual contribution to successful paragraphing.[11] Practice differs but it is desirable that whatever system of presentation is followed, paragraphs and subparagraphs should be indented uniformly in a manner that distinguishes them from each other and from other text.

MISCELLANEOUS STYLISTIC MATTERS

This section deals with the following stylistic matters:

References to dates.
References to numbers.
References to legislation.
Spelling.
Capitals.
Symbols and abbreviations.

Different jurisdictions have diverging practices in regard to these matters and there is no room for a dogmatic judgmental approach. However, three points are relevant.

1 **Consistency is important**. Each drafter must act consistently and the practice of all drafters in a jurisdiction should be consistent. The establishment and maintenance of a practice manual is highly desirable.[12]
2 **Stylistic practices should be kept under review.** They are in no way hallowed by long-standing custom. Drafters should not feel inhibited from considering the merits of the practices established or accepted by their

11 See the discussion on Format beginning on p176.
12 As to practice manuals for drafting offices, see p128.

precursors. Every such consideration should have regard to points 1 and 3.

3 **The principal criterion is the achievement of easy communication.** Stylistic practices should be designed as part of the pursuit of clarity. Simplicity and precision are the keys.

References to dates

Two approaches are common. First, the long form and variations of it—

the first day of December, One thousand nine hundred and ninety-six

the first day of December, nineteen hundred and ninety-six.

Sometimes for good measure, the appropriate figures are added in parentheses after the words denoting the year:

the first day of December, One thousand nine hundred and ninety-six (1996).

The second and recommended approach is simple and precise:

1 December 1996.

This form may be read more easily and more quickly. Figures are more quickly grasped than the words which they represent. The words 'day of' in the long form add nothing to the meaning and the comma introduces a break where none is required by the sense. The day of the month should always be referred to before the month. 'December 1st 1996' is an illogical sequence.

The objection raised by those who prefer the long form involving the use of words instead of figures is that the use of numerals increases the possibility of error. This argument is of equal application to the use of figures generally. The argument is to some small extent valid but the advantage of simplicity outweighs the slight risk of error. In any event, dreary though the task may be, drafts and proofs must be checked and checked again to remove typographical errors.

When a series of dates is to be stated, for example in tax tables, it is acceptable to use figures only. The recommended form is—

1.12.1996.

References to numbers

As a general rule, the use of figures instead of words is simpler, more economical and aids quick understanding. This is particularly so in the case of sentences containing numerous references to numbers. However, the recognised style books tell different stories. Some draw a broad distinction between descriptive and statistical usage of numbers and recommend the use of figures except for numbers under a hundred used in a descriptive sense.[13] Other authorities recommend the

13 See *Hart's Rules for Compositors and Readers* (39th edn) pp15–16; *Style Manual for authors, editors and printers of Australian Government Publications* (3rd edn) pp55–60.

use of figures for numbers over 1, over 10 and some specify over 50 or over 100.[14] Yet another authority recommends using figures for numbers that require more than two words to spell out.[15]

Of these rules, the one recommended is that figures be used rather than words for all numbers greater than 1 except in the cases mentioned below. Figures should generally be used for sums of money, times, percentages, ages, dates, and for all units of measurement. A number which begins a sentence should be expressed in words or alternatively the sentence should be restructured so as to change the position of the number.

The guidelines set out above are no more than guidelines; above all is the requirement that the drafter should present the material so as to assist easy communication. For example, 'six 5-year-old children' is clearer than 'six five ...' or '6 5... '.

In the case of numbers in the thousands, past practice was to mark off the thousands with a comma (4,000). It is suggested that a space is preferable. Thus

4 000
1 543 678

References to legislation

There is general agreement that references to legislation should use figures and not words. Reference should be made to 'section 27' or 'subsection (4)' not to 'section twenty-seven' or 'subsection four'.

Practice differs, however, in regard to more complicated references. Here too some favour a long form but in most Commonwealth jurisdictions a short form is used.

A reference using the long form might be—

subparagraph (iii) of paragraph (b) of subsection (3) of section 17.

Equivalent short forms are—

section 17(3)(b)(iii)
or
subparagraph 17(3)(b)(iii).

The first of these forms is that followed in English practice while the second is found in some Australian and Canadian jurisdictions.

Those who favour the long form or the second of the short forms base their stand on the fact that the reference in the example above is properly to a subparagraph, not to a section. This cannot be denied, but the approach is too punctilious.

A short form may be comprehended much more quickly than the long. In addition to the advantage of brevity, the order of reference in the first of the short forms is the order which the reader must follow to refer to the provision. The reader must first find the section, then the subsection and so on. Study in the reverse order takes a little longer.

14 *Howard*, p167.
15 *The Little Brown Handbook* (5th edn) p468.

What is said above is of application when the reference is to part of a section (in the same Act or another) other than the section in which the reference is contained.

Where reference is made in legislation to provisions in the same piece of legislation, it is generally not necessary to follow the particular reference by any such words as 'hereof' or 'of this Act'. Thus, it is not normally necessary to refer to 'section 6 *of this Act*' or 'subsection (2) *of this section*' or 'paragraph (a) *of this subsection*'. The italicised words are unnecessary. Similarly, the word 'hereof' is otiose in forms such as 'section 6 hereof'. In almost all contexts, the context is such that it is clear beyond doubt that a reference to section 6 is to be understood as a reference to section 6 of the Act containing the reference. No other meaning would be reasonable. To avoid argument some jurisdictions have dealt with the subject in interpretation legislation and a form is at page 118.

However, where references are made in the same sentence both to a provision in the same piece of legislation and also to a provision in another piece of legislation, the words 'of this Act' or 'of this section' (as appropriate) should be included to avoid ambiguity. In the following example, if the words 'of this Act' after 'section 4' were omitted the provision would be ambiguous:

> A person who is an approved person under section 4 of this Act or section 6 of the *Estate Agents Act 1992* is entitled upon payment of the prescribed fee to a certificate of registration.

If the reference is to a provision of other legislation, the reference should include reference to the short title of that legislation. For the convenience of users, it is desirable that a numerical reference to that Act should supplement the short title. It should be presented as a note to the section, an endnote or a marginal note.

Vague indeterminate references to legislative provisions should never be used. The following should be avoided:

> the preceding section
> the succeeding section
> the next following section
> the provision below (above)

A reference to or similar to the 'next following section' may lead to an embarrassing sin of omission if later amendment inserts a new section before that which was previously 'next following'. In any event, if a cross-reference is necessary (and this is always a matter that needs consideration), a precise reference communicates better.

Spelling

There are more exceptions than rules relating to English spelling and many words in common use may be spelt correctly in more than one form. Common examples are

> organize or organise (and many other 'ise' or 'ize' words)
> connection or connexion
> misdemeanor or misdemeanour (and other 'or' or 'our' words)
> inquire or enquire

by-law or bye-law
judgment or judgement

Good practice requires consistency of usage by all drafters in a jurisdiction. It is useful to include a list of such words with their agreed spelling in the practice manual maintained in drafting chambers. The version in more common usage should be accepted, if this can be agreed on. General guidance should be taken from the *Concise Oxford Dictionary* or another dictionary of standing and *Hart's Rules for Compositors and Readers*. A practical approach is to adopt the first spelling where two alternatives are offered by the dictionary adopted as standard for the office.[16]

Capitals

There are a number of obvious instances when accepted usage dictates that a capital letter should be used to begin a word. Nobody has a problem in using a capital for the first word of a sentence or for the name of a person or a place or for the title of a person of great eminence such as 'Her Majesty' or 'the President'. Conversely, without the need for thought we do not use capitals to begin the vast majority of words in ordinary usage.

Nevertheless, there is a sizeable limbo where we tend to find ourselves groping, unsure of what to do, and the frequent result is an inconsistency which Sir Alison Russell described as 'a dazzling mosaic of capitals and small letters'.[17] We grope because there is no substantial basis or reason for the confusion which constitutes current practice. The use of capitals is in many cases a matter of taste and taste like fashion defies logic. The modern trend is to reduce the instances where capitals are used and that trend seems likely to continue. *The Times* newspaper believes that capitals 'make pompous what need not be'.[18]

Three guidelines apply generally.

- **When in doubt a capital should not be used.** It is advantageous to begin a word with a capital only if well established usage demands it. The unnecessary or unconventional use of capitals merely tends to confuse the look of the print and present a muddled appearance.
- **The use of capitals should be consistent.** If a word is printed so that it begins both with and without a capital in the same statute, it is possible that an inference may be drawn that the word is used in two different senses, or perhaps that two distinct persons are referred to.
- **Words used in a general sense take the lower case although the same word used particularly begins with a capital.** For example

  This regulation applies to every road except Nathan Road.

  Every schedule other than Schedule 3 comes into force on 1 June 1996.

16 See also Harry Fieldhouse, *Everyman's Good English Guide* (Dent) pp239–243.
17 Sir Alison Russell, *Legislative Forms and Precedents* (4th edn) p90.
18 *Howard*, p67.

When to use capitals

It is usual to use a capital letter to begin

1 the major words of the short title of legislation, but the definite article preceding the title of legislation does not begin with a capital;
2 the major words of the title of a book or other work of art, a newspaper or film;
3 the trade name of particular merchandise, for example 'Pogg's Pills';
4 days of the week, months, public holidays, religious festivals or other days specially named, eg Independence Day;
5 the names of offices of considerable eminence (Her Majesty, Attorney General, Chief Justice, Minister for Finance, Governor-General, President). It is this classification which presents most of the problems surrounding the use of capitals. Appropriate words for lower case letters are police officer, chairman, deputy-chairman, barrister, magistrate, director, board of directors, clerk, plaintiff, appellant, petitioner, registrar, secretary, inspector;
6 the names of places or geographical features (Dar es Salaam, Mount Tauhara);
7 proper names;
8 the titles of particular firms, companies, societies, Government Departments, and other commercial and public institutions. But the same generic terms used in a general sense do not take a capital, ie High Court but court, Legislative Council but council;
9 certain terms used in relation to legislation; for example

Act	Bill
Part 2	this Part
Schedule 2	Order in Council

but compare

section 6	subsection (3)
order	proclamation
regulation	by-law
paragraph	clause
statutory instrument	resolution

10 words of general signification used in a specialised sense. The specialised sense is commonly established by definition; for example

> **Fund** means the reserve fund established by section 27;
>
> **Compensation Scheme** means the National Accident Compensation Scheme established by Part 3.

11 words designating races, nationalities, and languages;
12 words referring to religions and their followers.

When not to use capitals

Capitals are not recommended in the following cases:

1 In an interpretation section, the words defined should not begin with a capital unless they are intended to be used with a capital throughout the legislation. Thus—

> In this Act
> **document** (not 'Document') includes part of a document;
> **movable property** (not 'Movable Property') means property of any description other than immovable property;
>
> *but compare*
>
> **Fund** means the contingencies fund established by section 27.

2 Paragraphs in series should begin with a lower case letter not a capital. For example

> The Minister may make regulations
> (a) regulating (not Regulating) the position of advocates under this Act,
> (b) prescribing (not Prescribing) the fees and fixing the charges for any matter or thing under this Act;
> (c) generally (not Generally), for carrying into effect the provisions of this Act.

3 The use of capitals in long titles, headings and marginal notes should not be different from usage in substantive provisions in the body of legislation. The following long title should be shorn of all its capitals except those beginning 'An Act' and 'Minister for Industries':

> An Act to Empower the Minister for Industries to Acquire Compulsorily a Majority Shareholding in certain Industrial Companies and make Consequential Provisions.

4 The first word of a section heading should begin with a capital. Thus a section heading might read—

> Power to acquire shares compulsorily
> *not*
> Power to Acquire Shares Compulsorily

Symbols and abbreviations

There is no objection to the use in legislation of symbols or abbreviations unless their use would inhibit communication. Therefore where a symbol is used so widely that it is understood by all who will read the law, its use cannot be legitimately criticised. In this category are signs such as $, am, pm, %. Technical legislation may properly incorporate the signs accepted in the sphere of knowledge concerned, but if the terms are capable of explanation to lay persons, definitions should be inserted for the benefit of the legislators and judges who may be obliged to endeavour to understand.

Similarly, when considering the use of abbreviations the same test must be applied; the abbreviation must be judged according to whether it will or may inhibit communication. Many abbreviations in common use, in correspondence for

example, are better avoided in legislation unless defined. It is suggested that units of measurement, names of places, days of the week, and months are better not abbreviated in legislation. Thus

inches	*not*	in
feet	*not*	ft
centimetres	*not*	cms
kilometres	*not*	kms
New Zealand	*not*	NZ
New South Wales	*not*	NSW

Another form of abbreviation is that discussed by Fowler under the heading 'Curtailed words'.[19] He indicates two distinct types, both of which are in common usage.

First, the popular abbreviation of a word such as

pop	*for*	popular
pro	*for*	professional
vet	*for*	veterinary surgeon.

There is a host of such words in daily usé, but as a general rule the abbreviated forms should not be used in legislation. Words of this kind are usually in an unstable state. They may be perhaps destined to fade or die or alternatively they may take over from the word which gave them birth and render that word archaic or pedantic (eg cab for cabriolet). However, while they are in this state of flux they are better avoided, in case they become incomprehensible to a later generation.

The second class of curtailed words is that comprising acronyms, that is abbreviations that spell a pronounceable word formed by combining the initial letters of a group of words. For example

UNESCO
NATO
NASA

Such words may be used in legislation, but only with caution. and so long as they are defined. In many cases, their significance is known only to initiates in the specialised field of knowledge and must be treated with the suspicion appropriate to all jargon. Further, many acronyms are likely to be ephemeral and in time incomprehensible. Others become accepted as words in their own right. For example, laser was once an acronym for light amplification by stimulated emission of radiation and aids an acronym for acquired immune deficiency syndrome.

Acronyms may be manufactured for use in a Bill if that would avoid tedious repetition of a long and difficult word or series of words. Of course such an acronym must be defined. For example, it might be acceptable if the word was used sufficiently to justify it to use (after definition) the acronym 'CFC' for chlorofluorocarbons.

The use of full stops with abbreviations is a matter of style and not a matter of right or wrong. The trend is to leave them out and on the basis that no mark should be used unless it serves a purpose the trend is worth supporting.

19 Fowler's *Modern English Usage* (2nd edn) p116.

Chapter 5

Miscellaneous words and expressions

WORDS AND EXPRESSIONS TO AVOID

One of the most telling criticisms of the language of the law is that it habitually wraps its meaning in a mist of unnecessary jargon. This obscures the matter so far as the non-lawyers are concerned and is a cause of irritation. Of course some legal concepts are not capable of being communicated briefly and efficiently without the use of lawyers' jargon, but that is quite a different matter. The jargon to which the critic justifiably objects is the result of unnecessary deviation from words in general use to words and expressions commonly used only by the legal profession. Words like 'aforementioned', 'aforesaid', 'herein', 'hereby', 'hereinbefore', 'henceforward', 'whereas', are all in this class. They have a stiff, rather archaic flavour which some would say befits the law admirably.

Great stress must be laid on the principle that the drafter should not deviate from commonly used language except for good reason. The danger is that the 'heretofores' and 'hereafters' flow too readily from the lawyer's wordprocessor. Linguistic bad habits may be a problem. Just as language is personal, so too is the development of style and it is not unusual for a drafter, without knowing it, to develop an unfortunate habit of repeating a favourite word or expression. Words such as 'such', 'said', 'relevant', 'hereby' and 'deem' and phrases such as 'as the case may be' are often culprits.

It is good practice to acquire the habit of asking oneself whether the language of a draft might have been chosen equally well by a non-lawyer. Drafters have a special obligation to avoid archaic words.[1]

The following words and phrases should not be used in the contexts described. Some should not be used at all:

above—below

These words should not be used as terms of legislative reference, because they are imprecise and the vagaries of pagination may cause them to appear distinctly odd. What is referred to as 'above' may in fact be 'below' on a preceding page. The use of 'above' and 'below' in this manner is one of the less attractive practices

1 In Queensland, Parliamentary Counsel use a specially developed computer program to bring archaisms in legislation to their attention for review and replacement where possible.

found in English Acts. In the first of the following examples, *above* is undesirable because the reference to subsection (1) already provides a precise and unambiguous reference. In the second example, *above* is undesirable because the reference is imprecise and therefore unhelpful to the reader. A desire to draft flexibly and to avoid a rigid interlocking structure must not result in inattention to the reasonable needs of users.

> (2) Any payments under subsection (1) *above* may be made subject to conditions regulating the Commission's functions.

> Nothing *above* is to be construed as affecting the operation of this section.

See also **less than—more than.**

aforesaid—abovementioned—aforementioned—beforementioned

This group of words is objectionable on two counts.

- they represent an unnecessary resort to lawyers' jargon
- they are imprecise and inefficient as reference words.

The justification sometimes put forward for these words is that they avoid the ambiguity which would arise from the use of pronouns 'he', 'she' or 'it'. But this is not usually so. Let us consider an example:

> If the committee of a society consider it desirable that the bylaws of the society be amended to extend the objects, the secretary of such a society as *aforesaid* [or 'the *said* society'] must give notice in writing of the opinion of the committee to all members.

In this example, only one society is referred to and there is no necessity or justification for the words *'such a society as aforesaid'* or *'the said society'*. Those words should be replaced by *'the society'*.

If, on the other hand, the context was such that more than one society had been referred to, a reference to *'the aforesaid society'* or *'the said society'* does nothing to indicate which society is referred to. As a word of reference *'said'* and its associates can be dangerously ambiguous.

If reference is intended to another part of a statute, the reference should be specific. For example, if one provision of a statute is to be made subject to another, it is much more informative to say 'Subject to section 19(1)' than to say 'Subject as aforesaid'.

To summarise, before using one of this group of words the drafter should first consider whether a word of reference is necessary at all. If it is, the reference should be specific. It is better to be repetitive than ambiguous; and repetition may be removed in some circumstances by the use of a definition.

following—foregoing—preceding—succeeding

These are also imprecise words of legislative reference and a more specific reference should be preferred. When used to indicate the position of other legislative provisions, their inadequacy is not effectively cured by prefixing the

adjectives 'last' or 'next' because of the possibility that the legislature may insert a new provision and thus make the reference erroneous.

The word *following* is unobjectionable in contexts similar to

> A health and safety committee is to consist of the following persons:
> (a) ; and
> (b) ; and
> (c) .

However, in such contexts *following* may be redundant. The above example would be more neatly expressed

> A health and safety committee is to consist of
> (a) ; and
> (b) ; and
> (c) .

The word *foregoing* is a pretentious and pompous word better avoided altogether.

The words *preceding* and *succeeding* are words to use with care. Used without qualification they may be too imprecise, but when suitably modified by words such as *immediately* or *next* they can be useful. For example

> The chief executive must in each year prepare a report on the activities of the Board during the immediately preceding calendar year and submit it to the Minister by 31 March.

hereby—thereby

The use in legislation of the word *hereby* is traditional and widespread. For example

> Section 6 is hereby repealed.
>
> Section 6 is hereby amended by deleting ', parsnips'.
>
> The following persons are hereby appointed to be members of the Farm Advisory Council:
>
> There is hereby established a body corporate to be known as ...

In all these cases, the word 'hereby' is unnecessary. It adds nothing and it is fusty.

herein—hereinafter—hereinbefore—hereto—herewith—hitherto—heretofore

In a legislative sentence, 'herein' may refer to the sentence, the subsection, the section, the Part, or the whole statute. The vagueness may not always be wholly dispelled by the context and specific reference is preferable. Thus

> ... in this Part referred to as 'the court'

not

... herein referred to as 'the court'.

The other words listed may be similarly inefficient in some contexts and are stuffy in all contexts. The words **thereto, thereof, thereafter** and **therefrom** are equally unappealing.

It shall be the duty of

This phrase is commonly used in provisions which expressly oblige a specified person or authority to perform some act. For example

> It shall be the duty of the local education authority to make and enforce bylaws for their area respecting the attendance of children at school.

It is simpler, shorter and more direct to use instead the word 'must' (or, indeed, 'shall' if 'must' is not regarded as agreeable).[2] The example would be better expressed

> The local education authority must make and enforce bylaws for their area respecting the attendance of children at school.

It shall be lawful for—it shall not be lawful for

The first of these phrases is analogous to the phrase *it shall be the duty of* discussed earlier. '*It shall be the duty of*' denotes an obligation which can be denoted more directly and simply by 'must'. Similarly, *it shall be lawful for* denotes a discretion or a permission which can be better denoted by 'may'.

It shall not be lawful for is used in some jurisdictions to begin a provision imposing a prohibition to which a penal sanction is attached. The expression is unnecessarily indirect and a standardised simpler and more direct form of penal provisions is better adopted.[3]

It is hereby declared that

This phrase is sometimes used as an introduction to give special emphasis to a significant pronouncement, but it is pretentious and indirect. If the drafter is convinced that an unusual context justifies expressing a sentence as a formal declaration, *hereby* should be omitted.

the provisions of

These words are very often used in legislation when they are superfluous. It is not that they are objectionable, just that, as in the following examples, they are unnecessary:

> A licence issued under *the provisions of* subsection (6) is not transferable.

2 'Shall', 'must' and 'may' are discussed at p103.
3 See p353.

A person who contravenes *the provisions of* subsection (1) commits an offence and is liable to a fine of $10 000.

provided that—provided

The lawyers' proviso beginning 'provided that' should never be used. See page 81.

On the other hand, 'provided' is a legitimate conjunction meaning 'if' in sentences like the following:

Every person who applies must be granted a permit *provided* that person applies in accordance with regulation 4.

However, the word *provided* when properly used in a conjunctive sense is liable to be confused with a lawyer's proviso and so is better avoided.[4] 'If' is invariably an appropriate substitute but in some instances the sentence can be reconstructed more neatly. The example above reads better as follows:

Every person who applies in accordance with regulation 4 must be granted a permit.

The use of verbal forms of *provided* is unobjectionable. For example

The Minister may make regulations *providing* for
(a) ; and
(b) ; and
(c) ....

whatsoever—wheresoever—whosoever—whomsoever

These words are regarded as archaic, except in sectors of the legal profession. *Whatsoever* is frequently unnecessary and used by way of emphasis to remove a doubt which does not exist. For example

No animal *whatsoever* is permitted in the council chamber.

In this example *whatsoever* can be deleted without any loss of meaning. All three words are improved by deleting the affix 'so', becoming *whatever, whenever, whoever.*

Where is frequently to be preferred to *wherever. Any person who* or *a person who* is in most contexts preferable to *whoever.*

WORDS AND EXPRESSIONS TO USE CAREFULLY

and—or—nor—and/or[5]

The terms 'and' and 'or' are beguilingly simple; one is looked on as the antithesis of the other. 'And' is classified as conjunctive in character while 'or' is classified as

4 As to provisos, see pp79–81.

5 A useful treatment of the problems of 'and' and 'or' is found in E. L. Piesse and J. Gilchrist Smith, *The Elements of Drafting* (London, 3rd edn) pp68 et seq or E. L. Piesse, *The Elements of Drafting* (Australia, 8th edn) by J. K. Aitkin, pp88 et seq. See also Reed Dickerson, *The Fundamentals of Legal Drafting* (2nd edn) pp104 et seq; Stanley Robinson, *Drafting*, pp63 et seq.

disjunctive. 'The former connotes "togetherness" and the latter tells you to "take your pick". Drafters are strongly advised to stick to this basic distinction. If they had done so in the past, a lot of ambiguities would have been avoided.

Great care must be taken in the use of these two common words. It is perhaps because they are so common and so apparently simple that drafters use them so carelessly. In conversation, ambiguity caused by inattentive usage is quickly removed by question and answer; in legislation, it may take the House of Lords by a three to two majority. The point is driven home by two cases.

In *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 2 All ER 97, [1974] 1 WLR 505, the House of Lords by a three to two majority decided that 'or' meant 'and/or' in s1 of the Oil in Navigable Waters Act 1955 which provided

> If any oil to which this section applies is discharged from a British ship registered in the United Kingdom into a part of the sea which is a prohibited sea area, or if ..., the owner *or* master of the ship shall ... be guilty of an offence.

The convictions of both the master and the owner were upheld. Lord Wilberforce remarked 'The revelation of this difference of opinion may perhaps be salutary, if the draftsmen are encouraged to care in the use of "or" and "and" or even if I dare to say so "and/or" ' (p 523).

In *The Banco* [1971] P 137, the Court of Appeal held that 'or' meant 'either/or' in s3(4) of the Administration of Justice Act 1956 which provided that Admiralty jurisdiction

> may ... be invoked by an action in rem against
> (a) that ship, if at the time when the action is brought it is beneficially owned as respects all the shares therein by that person; *or*
> (b) any other ship which, at the time the action is brought, is beneficially owned as aforesaid.

There are numerous cases in the law reports in which, against the odds, courts have been urged to construe 'and' disjunctively and 'or' conjunctively.[6] Sometimes, guided or restrained by the context, the courts have corrected mistakes. It should be every drafter's ambition to keep the law reports free from his 'and's and 'or's.

The problems are not only those of carelessness. The classification of 'and' as conjunctive and 'or' as disjunctive is incomplete. It is important also to recognise the ambiguity of each term and the overlap of meaning which may occur in some contexts. This is illustrated by two examples:

(1) A and B may do X.
(2) A or B may do X.

Example (1) conveys three possible meanings

(i) A and B jointly may do X.
(ii) A may do X, B may do X or both A and B may do X.
(iii) The single concept of A and B may do X (for example, if A=civil servant and B=doctor then a doctor who is a civil servant may do X).

6 See for example *Re H (a minor)* [1994] 1 All ER 812.

Example (2) means

(i) Either A or B , but not both of them, may do X.
(ii) A may do X, B may do X or both A and B may do X.

It will be noted that meaning (1)(ii) is the same as (2)(ii). Where the collective nature of the group consisting of A and B is predominant in the mind, then 'and' is likely to be used. If A and B are thought of as individuals rather than as members of a class or group, then 'or' is usual. Neither form is more correct than the other; the matter is vaguely one of emphasis.

Very often the context admits of no possible ambiguity, but such a possibility must always be kept in mind. Once recognised, it is never difficult to remove it. The examples above might be rephrased as follows

(1) (i) A and B jointly may do X.
(1) (ii), (2) (ii) Both A and B may do X.
(2) (i) Either A or B, but not both, may do X.
(1) (iii) A person who is both an A and a B may do X.

Attention must be given to deciding whether 'or' or 'nor' should follow a negative.

Where the negative is 'neither', then 'nor' should follow. Conversely 'nor' should not follow 'either'.

When the negative is 'not' or 'no' the position is less clear. 'Nor' should be used when the sentence is so constructed that the negative in the first part of the sentence does not carry through and refer to the second part. If it does, then 'or' should be used to prevent the appearance of a double negative.

But modern usage tends to use 'nor' when 'or' would do, and so long as the meaning is clear, a punctilious approach is unnecessary.[7]

any—all—each—every

'Any' is well described by Driedger as a 'tiresome' word in legislation for it is very often used when a simple 'a' or 'an' would be better. 'Any' may properly be used if it is desired to emphasise that the provision is of universal application or without qualification.

> The Governor General may remove *any* appointed member from office at *any* time for disability, bankruptcy, neglect of duty, or misconduct.

In the above example 'any' is used twice. 'An appointed member' would convey exactly the same meaning as 'Any appointed member' and is to be preferred. 'At any time' is probably redundant but perhaps justifiable if the drafter wants to emphasise that although members may be appointed for a fixed term they may be removed at any time. The following form is preferable:

> The Governor General may remove an appointed member from office for disability, bankruptcy, neglect of duty, or misconduct.

7 See G. H. Vallins, *Good English* (Pan) pp64–5; Gowers, *The Complete Plain Words* (3rd edn by S. Greenbaum and J. Whitcut) p148.

'Any' may be ambiguous in some contexts. For example:

> The Minister must consult *any* organisation appearing to the Minister to be representative of substantial numbers of mushroom growers.

Does this mean that the Minister must consult every such organisation or is the statute complied with if he consults any one of them?[8]

'All' is frequently used unnecessarily to give a spurious kind of emphasis. Constructions based on 'all' may involve tiresome circumlocution. For example:

> All persons who are elected members of the Board hold office for 3 years.

It is quite adequate to say

> Elected members of the Board hold office for 3 years.

If the drafter desires to emphasise that a duty is imposed on each person elected and not just a collective duty imposed on the whole Board, this is better expressed

> Every member of the Board must ...

Avoid also archaic phrases including the word 'all', such as 'all and singular', 'all that parcel of land', 'all the rest and residue'.

Do not use the words 'each and every' coupled where one of them will do separately.

as to

'As to' is vague and often superfluous. It should be replaced by 'about' in the following sentence:

> An aggrieved applicant is entitled to be informed as to the reasons for the refusal.

In the following example, 'as to' should be omitted:

> A suspended inspector must inform the Commissioner as to whether he or she intends to appeal against the suspension.

comprise

'Comprise' is not a synonym of 'compose' or 'constitute'. To comprise is to include or contain. A whole comprises the parts of which it is constituted, but the parts do not comprise a whole. Thus—

> The Council is to comprise 4 appointed members and 4 elected members.
> *not*
> Four appointed members and 4 elected members comprise the council.

8 In *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms* [1972] 1 All ER 280, [1972] 1 WLR 190, the court construed 'any' to mean 'every' in a similar context.

deem

'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what is. For example

> A person who has received an offer of compensation is deemed to have accepted the offer unless the person sends an objection in writing to the Commissioner within 14 days of receiving the offer.

> For the purposes of this Part, a company having more than 25 shareholders is deemed not to be a company.

> A notice that is given to a district inspector is deemed to have been given to the principal inspector.

All other uses of the word should be avoided. Godfrey Howard's *Good English Guide*[9] acknowledges that use may be proper in legal documents but describes 'deem' in other applications as a 'pontifical, pompous, pretentious substitute for the word "think"'. Such strong language must give drafters cause to pause whenever the use of the word is contemplated. Phrases like 'if he deems fit' or 'as he deems necessary' or 'nothing in this Act shall be deemed to ...' are objectionable as unnecessary deviations from common language. 'Thinks' or 'considers' are preferable in the first two examples and 'construed' or 'interpreted' in the third.

The following example is quite unacceptable because the creation of an offence does not establish a fiction:

> A person who contravenes section 64 is deemed to be guilty of an offence against this Act.

Commonwealth legislation in Australia avoids use of the word altogether. Instead 'taken to' is preferred. For example

> This Act is taken to have commenced on 1 January 1994.

In some contexts, the stuffiness of the word can be avoided by the use instead of 'to be regarded as' or 'to be treated as'. The examples above can easily be redrafted to avoid 'deem' as follows:

> For the purposes of this Part, a company having more than 25 shareholders is to be treated as not being a company.

> A notice that is given to a district inspector is to be regarded as having been given to the principal inspector.

'Deem' is a starchy piece of legal jargon but is nevertheless useful on occasion to create a legal fiction. The word is dangerous. It can lead to ambiguity if the context raises a doubt whether the 'deemed' fact is to be accepted conclusively or is to be rebuttable by evidence. 'Deeming' creates an artificiality and artificiality should not be resorted to if it can be avoided.

9 Pan Macmillan (1994) p115.

less than—more than; not exceeding—exceeding

The 'less than—more than' formula may seduce the unwary into an embarrassing trap because provision for what is less than X and for what is more than X leaves X itself unprovided for. For example

> In the case of every motor vehicle
> (a) of a cylinder capacity of less than 1200 cc ... Shs. 300;
> (b) of a cylinder capacity of more than 1200 cc but less than 1800 cc ... Shs. 600;
> (c) of a cylinder capacity of more than 1800 cc but less than 2250 cc ... Shs. 1000;
> (d) of a cylinder capacity of more than 2250 cc ... Shs. 1500.

The provision should be

> In the case of every motor vehicle
> (a) of a cylinder capacity not exceeding 1200 cc ... Shs. 300
> (b) of a cylinder capacity exceeding 1200 cc but not exceeding 1800 cc ... Shs. 600;
> (c) of a cylinder capacity exceeding 1800 cc but not exceeding 2250 cc ... Shs. 1000;
> (d) of a cylinder capacity exceeding 2250 cc ... Shs. 1500.

The 'less than/more than' formula cannot be combined with the 'exceeding' formula. For example

> The owner of a ship exceeding 250 tons which would be forfeited if the ship were less than 250 tons is liable to a penalty ...

Assuming the forfeiture provision does have effect if the ship is less than 250 tons, the provision should be

> The owner of a ship of 250 tons or more which would be forfeited if the ship were less than 250 tons is liable to a penalty ...

above—below; over—under

These two pairs of words offer the same trap as the 'less than—more than' formula discussed above.

as the case may be

These words are very commonly used in legislation in contexts which are perfectly clear without them. They just become useless verbiage as is the case in the following:

> The Commissioner must refund any amount of overpaid tax or the aggregate of any amounts of overpaid tax, as the case may be, on being satisfied of the overpayment.

if any

These words are also very commonly used in legislation in contexts which are perfectly clear without them.

none

'None' may be either singular or plural.[10] It is just misguided pedantry to insist on a sentence like

> None of the funds is available for loans to worthy drafters.

notwithstanding—subject to

Where one provision is inconsistent with another provision in the same law or some other law, the drafter ought to make it clear which provision is to prevail.[11]

When drafting the provision intended to prevail, this intention can be put beyond doubt with an explicit reference such as

> Notwithstanding subsection (5), an inspector may ...
> Notwithstanding section 27, an inspector may ...
> Notwithstanding section 14 of the Fisheries Act 1990, an inspector may ...

'Despite' is an alternative word to 'notwithstanding' and in many contexts a more attractive and less starchy one. It is desirable to specify precisely the law over which the provision is to prevail, but if for any reason (failure to take the time to identify the inconsistent provision is not a legitimate reason!) the inconsistent provision cannot be specified, the following may, if used with extreme discretion, be acceptable (although it is rarely desirable):

> Notwithstanding any law to the contrary, ...

Nasty side effects may result from the 'notwithstanding any law to the contrary' formula (or other words to that effect).

- The application of the words may be uncertain and may be wider than intended.
- The legal effect is inadequately communicated to the reader and he or she may be misled.
- The words may be the subject of an implied repeal by a later statute and this will not be readily apparent to users after that occurs.

Of course the drafter really is in a spot of bother if he or she prefaces two inconsistent provisions with 'Notwithstanding any law to the contrary ...'.

When drafting a provision intended to be subservient to another, the relationship can best be indicated by an explicit reference such as

> Subject to subsection (5), an inspector may ...
> Subject to section 27, an inspector may ...
> Subject to section 14 of the Fisheries Act 1990, an inspector may ...

It is not permissible to use the following forms:

10 See C.K. Cook, *Line by Line* (Houghton Mifflin,1985) p81.
11 See *C & J Clark Ltd v IRC* [1973] 2 All ER 513 at 520. See also J.F. Burrows, *Statute Law in New Zealand*, pp204–206.

> Subject to the provisions of any law to the contrary ...
> Subject to any provision of any Act to the contrary ...

This phrase suggests that there is in fact some law or laws to the contrary and creates a sense of insecurity in the mind of any person intending to act on the section. The reader is given no guidance regarding the real application of the provision.[12] Similar monstrosities such as the following should also be spurned:

> Except as provided in this Part, this Part shall apply notwithstanding anything in any other Part, ...

Where in the same law there are two inconsistent provisions, the drafter has three possibilities—

1 begin the dominant clause 'notwithstanding [despite] ... (the subservient clause)'
2 begin the subservient clause 'subject to ... (the dominant clause)'
3 follow both 1 and 2.

All three have the same legal effect, but in complex legislation possibility 3 is probably more helpful to the reader as each provision draws attention to its relationship with the other. Technically, either alternative 1 or 2 is adequate and, except in a complex context, alternative 3 should not be followed.

The usage described above is valuable and accurate, but 'notwithstanding' and 'subject to' are frequently used in a most unsatisfactory manner.

A common mistake is to use one or the other or both expressions when there is no inconsistency. If the two provisions can be read together without one doing violence to the other, then such use could only befuddle users. 'Subject to' is frequently used incorrectly when what is meant is 'in accordance with'. Even if there is an apparent inconsistency, the context may be such that it is quite clear which provision is to prevail over the other and there may be no need to use 'subject to' or 'notwithstanding'. In other cases, it may be neater to remove the inconsistency by redrafting.

Careless use of 'subject to' may produce ambiguity. One very unfortunate phrase, 'subject to the Minister', is quite incapable of rational interpretation in sentences like the following:

> *Subject to the Minister*, the Board may borrow by way of bank overdraft funds necessary for the performance of its functions.

The extent of the Minister's functions should be expressed positively and directly.

Another common fault is the use of the phrase 'subject to this section'. This is intended to remind readers that the section must be read as a whole. However, such words are redundant because every section is entitled to be construed as a unit having regard to its purpose, its position in the context of the whole Act, and the purpose of the whole Act.

A multiplicity of 'notwithstanding's and 'subject to's indicates the probability of a structure that is rigid and interlocking and therefore difficult to comprehend quickly.

12 See *Harding v Coburn* [1976] 2 NZLR 577.

Ambiguity is also possible where the application of a statutory provision is expressed to be subject to an order of a court. There may be doubt whether the disapplication of the section survives the expiry of a court order.[13]

Other—otherwise

Fowler heartily condemns the adverbial use of 'other than' as ungrammatical and needless. He maintains that 'other than' is essentially adjectival in character while 'otherwise than' is adverbial.[14]

To be condemned is

> No person may appeal other than in the prescribed manner.

Accepted usage approves

> No person, other than an illiterate person, may appeal otherwise than in the prescribed manner.

Shall—may—must

'Shall' is a verbal auxiliary capable of performing two separate functions which should not be confused.[15]

'Shall' may be—

- temporal and denote future time, or
- modal denoting obligation (in traditional grammar referred to as the imperative mood).

The temporal use is not often necessary in legislation because of the convention (in some jurisdictions enshrined in interpretation legislation) that a statute is to be regarded as always speaking. Thus, although it may be known that acts or circumstances may occur long after the statute is passed, the present tense will in most cases nevertheless be correct.

These examples are incorrect—

> If any person shall give notice, that person may appeal ...

> If any balance shall have been found to be due ... .

> A person who shall allow any animal to stray ... shall be guilty of ...

Correct forms are—

> If any person gives notice, that person may appeal ...

> If any balance is found to be due ...

13 See *Vitzdamm Jones v Vitzdamm Jones* (1981) 55 ALJR 192, and 55 ALJ 247n and 764.
14 *Fowler's Modern English Usage* (Second edn) p425.
15 See p218.

A person who allows any animal to stray ... is guilty of ...

It is preferable to use 'must' instead of 'shall' to impose an obligation. This is more in line with ordinary speech and avoids the confusion that the use of 'shall' may introduce. The declaratory use of 'shall' in contexts that are neither temporal nor obligatory, although quite common, should be avoided.

The agreement is void.
not
The agreement shall be void.

In some contexts where an obligation is intended, 'is required to' or 'is to' may be preferable to 'shall', particularly when the obligation is of an administrative character.

The registrar is required to maintain the register in an up to date form.
or
The registrar must maintain the register in an up to date form.
not
The registrar shall maintain the register in an up to date form.

In the following example, 'must' is used correctly in its imperative sense:

If a balance is found to be due, the Commission must report that fact to the Minister.

'May' should be used where a permission, benefit, right or privilege is to be given. Thus—

A licensee may ...
not
A licensee shall be entitled to ...

The misuse of the word 'shall' can appear to convert a condition of a kind that may or may not be performed at the will of the party into a positive command. For example

Fourteen days' notice in writing shall be given by every person entitled to appeal ...

Not infrequently, courts have been obliged to construe 'may' as obligatory but these instances amount rather to judicial amelioration of drafting errors than to a licence to drafters to say one thing and mean another.[16]

A duty should not be disguised as a discretion or permission. 'May' should not be used where a duty is imposed which must be performed. The following example is indefensible—

Upon receiving an objection made under section 4, the Minister may consider it and ...

16 In some jurisdictions interpretation legislation prescribes 'shall' to be mandatory and 'may' to be permissive.

Oral—verbal

'Verbal' is commonly used when the intended meaning is 'oral'. 'Oral has to do with the mouth. Verbal has to do with words.'[17] When the spoken word is to be referred to, 'oral' should be used. Thus—

> A complaint may be made orally or in writing.
> *not*
> A complaint may be made verbally or in writing.

Practical—practicable

Practicable means capable of being accomplished. Practical means capable of being accomplished under given conditions or in particular circumstances. That which is practicable as a matter of fact may well not be practical in the given circumstances. On the other hand, that which is practical is necessarily practicable. Thus—

> An applicant for a widow's pension must, wherever practical, produce evidence of her birth, her marriage and the death of her husband.

> It must not be practicable under an approved Society's rules for a member to be refused admission on the grounds of sex or race.

Same

'Same' or 'the same' should never be used as a substitute for the pronouns 'it' or 'them'. Gowers describes this usage as artificial and pretentious.[18] The following example supports Gowers' view. The words 'of the same' can be deleted without loss of sense.

> The agreement is to be in writing and the parties must sign two copies of the same.

Save

'Save' when used to mean 'except' or 'but' is archaic and for that reason should be avoided. 'Save and except' is an example of the lawyer's traditional taste for coupled synonyms. Thus—

> Unless the contrary intention is specifically expressed, a reference in this Act to a mine is taken to include a reference to a part of a mine.
> *not*
> Save and except where the contrary intention is specifically expressed, a reference in this Act to a mine is taken to include a reference to a part of a mine.

17 *Gowers*, p249.
18 *Gowers*, p105.

Such

While condoning the lawyer's use of the defining 'such' as a useful device, Fowler says that for the 'ordinary writer' more often than not 'such' is a 'starchy substitute' for 'that' or for using a pronoun. While lamenting but understanding the inescapable implication that Fowler felt constrained to regard lawyers as something other than 'ordinary writers', the lesson is clear. The lawyer's use of 'such' is a deviation from common speech and therefore suitable only in a context where it is justifiable.

'Such' used adjectivally to refer back to a noun already used can undoubtedly be useful but care and restraint are needed. It is common to find 'such' used when 'the' or 'a' would be simpler and more elegant. For example

> Every Act is to be divided into sections numbered consecutively and *any such section* may be subdivided in such manner and to such extent as is convenient.

This sentence would be improved by substituting 'a section' for 'any such section'. 'Such' should only be used adjectivally where the noun to be qualified needs identification in relation to a previous use of the same noun. For example, in a context where various returns are provided for,—

> The returns required to be furnished by section 7 may be made by any officer of the society ... and where such returns are furnished by the secretary the secretary must ...

'Such' should be used in accordance with the following rules—

- Do not use 'such' if 'the', 'a' or 'that' will do.
- Where the noun referred to is qualified, check that the same qualification applies equally to the later use of the noun modified by 'such'.
- Ensure above all that the reference back is unambiguous.

The use of 'such' as a demonstrative followed by the conjunction 'as' can be a useful device, but ready understanding is hindered where, as in paragraph (b) of the example that follows, the reader must search afar for the 'as' once the 'such' has been encountered.

The word 'such' should be viewed with suspicion; it does tend to take charge. The following example is very obviously 'legal' and cries out for improvement:

> The Commission must consider all *such* objections, and may for that purpose
> (a) convene *such* meetings, either jointly or separately with all or any of the objectors and all or any of the local authorities concerned and *such* other persons or bodies, and hold discussions with *such* persons or bodies *as* the Commission thinks fit; and
> (b) at any *such* meeting or discussions, hear *such* representations submitted as the Commission considers relevant to the matters being inquired into; and
> (c) make *such* further inquiries as it considers necessary or desirable.

That—which

'That' is the restrictive or defining relative pronoun, 'which' the non-restrictive and non-defining pronoun. A non-restrictive clause is one which could be omitted or placed between parentheses without destroying the essence of the sentence.

Correct usage is

Premises that are registered under this Act must be painted green.

Section 24, which was amended in 1986, was repealed in 1987.

Does the distinction really matter? It is true that 'which' is often used when 'that' is required by the above rules. Strunk and White's answer is 'it would be a convenience to all if these two pronouns were used with precision. The careful writer, watchful for small conveniences, goes which-hunting, removes the defining whiches, and by so doing improves his work.'[19]

Whether

'Whether' is often encumbered with unnecessary appendages. 'As to' often precedes it unnecessarily.[20] For example, 'as to' should be omitted from the following:

Any question *as to* whether an applicant has been convicted of an offence must be dealt with by preliminary objection.

Similarly, 'whether' is often succeeded by 'or not' to no great effect and an 'of' intrudes unnecessarily in the phrase 'the question of whether...'.

Unless—except

If provision is made which is effective unless something happens or except in certain circumstances, the drafter must not overlook the need to consider whether provision should be included to apply if that something does happen or those circumstances do occur.

While

This word is better restricted to its temporal sense indicating concurrence. If used as no more than a substitute for 'although' or 'and' or 'but', a temporal connotation may be implied and cause ambiguity, or even a smile. Thus—

The plaintiff gave evidence in Cantonese while the defendant gave evidence in Japanese.

The form 'whilst' is the kind of word that gives lawyers a bad name.

EXPRESSIONS OF TIME

General

When drafting a provision as to time, the drafter is usually concerned to do one of three things. The provision is required to enable or provide for certain consequences to arise

19 William Strunk Jr. and E. B. White, *The Elements of Style*, p59.
20 See Harry Fieldhouse, *Everyman's Good English Guide*, p143.

(1) at a particular point in time; or
(2) during a period of time certain at each end; or
(3) during a period of time of which the beginning or the end but not both are certain.

It may be useful to illustrate each of these in turn.

(1) To fix or refer to a point in time

This is a common requirement in taxation legislation. For example

> For heavy oils delivered for home use after six o'clock in the evening of 31 August 1996, the rate at which rebate of the customs or excise duty is to be allowed ...

A more flexible approach, not suitable for the imposition of a tax, is seen in this example—

> Every bank specified in Part 2 of Schedule 2 must prepare a balance sheet in accordance with Form 4 as at the close of business on a date to be prescribed in respect of that bank.

With regard to the coming into operation of legislation, it is usual to provide for this to happen 'on' a particular day. Taken by itself such a provision would be far from clear, but interpretation legislation generally contains a provision based on s36(2) of the Interpretation Act 1889 [UK] whereby legislation expressed to come into operation on a particular day shall be construed as coming into operation immediately on the expiration of the previous day. Section 4 of the Interpretation Act 1978 [UK] provides for commencement in such circumstances 'at the beginning of that day'.

Legislation may be brought into operation at any given time. Thus—

> This Act comes into operation at 6 am on 1 January 1996.

A future point of time may be established in accordance with this formula:

> An order of suspension does not take effect until the expiration of 21 clear days after the notification by the Board to the registered surveyor of the making of the order.

'On' and 'upon' are not always sufficiently precise to fix an exact point in time. For example, 'on the death' might, according to context, refer to before, simultaneously with, or after, the death.[21]

(2) To refer to a period certain at each end

If the period to be fixed consists of one day, the appropriate preposition is 'on'. For example

> On the day when this Part comes into operation, each bank is required to establish with the Central Bank a Special Account for the purposes of this Part.

21 See *Larter (Inspector of Taxes) v Skone James* [1976] 2 All ER 615, [1976] 1 WLR 607. As to 'upon' see *R v Fairford Justices, ex p Brewster* [1976] QB 600, [1975] 2 All ER 757.

The following form is clear:

> Where a credit agreement is made at a place other than licensed trade premises, the purchaser may cancel that agreement at any time before the end of the period of seven days beginning with the day after the day of the making of the agreement.

The following forms are also acceptable:

> The Returning Officer must fix the day on which the poll is to be taken being a day not less than 35 nor more than 42 clear days after the day the Returning Officer receives the request for a poll.

> In this section, 'specified period' means the period commencing on the 20th day of any month and ending on the last day of that month.

> A person other than a body corporate must not at any time after the expiration of 6 months from the coming into operation of this Part, carry on any banking business in ...

A formula involving the word 'within' is common. It may be followed by 'of', 'after', or 'from' and in each case the stated day is excluded from the computation. For example

> A copy of the report of the Board must be laid before Parliament within 7 days after its receipt by the Minister if Parliament is then sitting and, if Parliament is not then sitting, within 7 days after the beginning of the next meeting of Parliament.

When the period to be fixed is short, it may be advantageous to stipulate a number of hours rather than days. 'Within two days after' may allow virtually three days because the stated day will be excluded from the computation. If the point from which time is to run can be stated exactly, use of the formula 'within 48 hours after' is more informative to the reader not blessed with a knowledge of the vagaries of statutory construction; it also permits greater precision.

(3) To fix a period certain at one end

'On or after' or 'on or before' are useful to ensure that the stated day is included. For example

> This Act applies to proceedings commenced on or after the date of the coming into operation of this Act and to proceedings commenced but not completed before that date.

'Not later than' and 'not earlier than' are also acceptable.

> Every bank to which this section applies must lodge in the Special Account not later than the 28th day in each month such sum as ...

Existing

If the word 'existing' is used, care should be taken to relate the application of the word to some particular point in time.

If 'existing' is used in legislation without being so related, its construction cannot be forecast with certainty. Regard may be had to the maxim that a statute is considered to be always speaking and the word may be construed as relating to any relevant moment in time after the coming into operation of the statute.

On the other hand, the context may be such that the word may be held to refer to the point of time when the Act comes into operation. If this is the intended construction, it is not safe to rely only on the word 'existing'. The reference should be precise, as in the following example:

> The provisions of Schedule 3 apply to all incorporated societies existing immediately before the coming into operation of this Act.

One way of removing the ambiguity is to insert a definition of 'existing'. For example

> **existing** means existing on 1 January 1995.

> **existing** means existing at the time when Part II comes into operation.

Before—after—from

The use of these words presents a danger analogous to that described above with respect to the 'less than/more than' formula. Provisions related to the time before a certain day and after that day may leave the day itself unprovided for.

'Before' and 'after' are construed so as to exclude the day specified. 'After' is to be preferred to 'from' because the latter is equivocal.[22]

'After 1 January' clearly excludes 1 January; 'from 1 January' is open to argument, although 1 January is probably excluded. 'On and after' should be used when it is desired to include the day specified.

Forthwith—as soon as possible—immediately—without delay—without unreasonable delay—as soon as may be—without undue delay

'As soon as may be' should not be used because it is archaic.

The other phrases are in common use but each of them is imprecise and uncertain. Each has been construed in a variety of ways according to context and to judicial taste. 'Immediately' has been construed to mean 'with all reasonable speed considering the circumstances of the case' and a notice sent by an inspector of taxes after 13 days was held to have been sent 'immediately'. In a different context, an hour might be too great a delay.[23] The use of any of these phrases amounts to an invitation to the judiciary to fix the period considered reasonable in the circumstances. However, this is construction after the event and of little help to the person who wants to know in advance how much time the law allows to do some act.

22 See *Forster v Jododex Australia Pty Ltd* (1972) 46 ALJR 701 at p707; *Pritam Kaur v S Russell & Sons Ltd* [1973] QB 336; *Dodds v Walker* [1981] 2 All ER 609 at p610.

23 See *R v Inspector of Taxes, ex p Clarke* [1974] QB 220, [1972] 1 All ER 545, and compare *NAS Airport Services Ltd v Hotel and Catering Industry Training Board (No 2)* [1970] 3 All ER 928, [1970] 1 WLR 1576.

If the circumstances permit, a definite period of time should be specified. Some flexibility can be given where desirable by enabling the specified period to be extended. For example

> Within a period of 6 months after the end of the financial year, or such longer period as the National Assembly may by resolution appoint, the Minister must lay a copy of the statement of accounts and auditor's report before the National Assembly.

> Any bank that before the coming into force of this Act entered into a transaction incompatible with section 21 must liquidate the transaction within 2 years after the coming into force of this Act or such longer period as the Commission may specify in a particular case.

> An appeal may be brought out of time if the Tribunal is satisfied that
> (a) there was a reasonable excuse for not bringing the appeal within the time allowed; and
> (b) application for leave to appeal is made without delay.

Where power to extend time is given, it may be desirable to provide that the time may be extended although the application for an extension is not made until the time has already expired. This may conveniently be included in interpretation legislation. See clause 61 of the Model Interpretation Bill published by the Commonwealth Secretariat.

Between—and

Expressions such as 'between the 1st April and the 14th May' are ambiguous. Both stated dates are probably excluded.

By, until, till

Where action is to be taken 'by' a stated date, or 'until' or 'till' such a date, action on that date is permissible.[24] 'Not later than' is clearer and therefore preferable.

At least

'At least seven days' has the same meaning as 'not less than seven days'.

Clear

As a precautionary measure, drafters on occasion refer to clear days. This is effective to remove every shadow of a doubt but if in the same legislation reference is made elsewhere to 'days', not 'clear days', an inference may be drawn that 'days' is not intended in that context to mean 'clear days'.

24 See *Eastaugh v Macpherson* [1954] 3 All ER 214.

Chapter 6

Interpretation Acts

INTRODUCTION[1]

The principal objects of interpretation statutes are three in number:

(1) to shorten and simplify written laws by enabling needless repetition to be avoided;
(2) to promote consistency of form and language in written laws by including standard definitions of terms commonly used;
(3) to clarify the effect of laws by enacting rules of construction.

The desire to shorten Acts by removing the necessity of repetition may be traced back to the forerunner of modern interpretation Acts, the United Kingdom Act of 1850, widely known as Brougham's Act. A similar desire may, in fact, be traced back much further to the trenchant criticism of Bentham and the strenuous activities of those who were inspired by his work.[2] Many of the best known and most beneficial interpretation provisions may trace their ancestry this far, for example the provision that references to the singular include the plural, and vice versa.[3] Also of value in the task of keeping the statute book in good order are interpretation provisions which make unnecessary the repetition in particular enactments of certain complete provisions. Probably the best example of provisions of this kind is seen in s16 of the Interpretation Act 1978 [UK] which sets out savings and other provisions of general application in case of a repeal.[4]

1 See 'A New Interpretation Act' NZLC R17 which is a report published in 1990 by the New Zealand Law Commission. It contains a draft Interpretation Act recommended by that Commission. For a comprehensive and useful commentary on a particular Interpretation Act, see W. A. Leitch and A. G. Donaldson, 'A Commentary on the Interpretation Act (Northern Ireland) 1954', 11 Northern Ireland Legal Quarterly 43. See also W. A. Leitch, 'The Interpretation Act—Ten Years Later', 16 Northern Ireland Legal Quarterly 215; W. A. Leitch, 'Interpretation and the Interpretation Act 1978' [1980] Stat LR 5. See also the Renton Report, paras 19.4 to 19.11. In 1983, the Commonwealth Secretariat published a model interpretation bill drawn from the legislation of many Commonwealth jurisdictions. The Interpretation Act 1984 of Western Australia is similar to that model. New South Wales and Victoria also have recent interpretation statutes and the Queensland Act has been extensively renovated.
2 Sir Cecil Carr, 'The Mechanics of Law-Making', Current Legal Problems 1951, p122.
3 See *No 20 Cannon Street v Singer & Friedlander Ltd* [1974] Ch 229; *Prior v Sovereign Chicken Ltd* [1984] 2 All ER 289, [1984] 1 WLR 921.
4 See Chapter 17.

The benefits of shortening particular statutes by general interpretation provisions are very clear. The obesity of written law increases year by year and interpretation legislation makes a useful contribution to keeping this in check.

Nevertheless, the process of shortening laws by interpretation statutes cannot be taken too far without risk of defeating its own ends. Written law should not be misleading or incomprehensible without reference to interpretation legislation. Indeed, it may be said that in many respects the Interpretation Act forces the drafter to walk a tight-rope; a balanced approach is called for.

On one side must be considered the real benefits of shortening the statute book. Further, it is reasonable to expect the informed reader of a statute book either to know the contents of or to refer to an Interpretation Act. Each particular enactment must in any event be seen in the context of the field of law to which it relates. Except in the case of codified laws, a particular enactment rarely stands alone. Leitch has written: 'Since it will in any case be necessary to refer to the Interpretation Act for the purposes of construing any other Act, nothing will be lost by making the Interpretation Act as comprehensive as possible.'[5]

Leitch's view goes too far. Particularly in the case of legislation of day to day concern to many ordinary people (for example tenancy or family legislation), it is desirable that the legislation should be as self-sufficient as is practical. It is unrealistic, and possibly naive, to believe that most readers of statutes will, where necessary, actually refer to interpretation legislation. Readers who are not lawyers may not even know such legislation exists. Interpretation Acts are referential legislation and as such are predisposed to cause communication failure and difficulty.[6]

In fields of law where it is important that communication be achieved with a particular section of the public, a cautious approach to reliance on interpretation legislation is necessary. Consider the common example of a statute incorporating the governing council of the members of a particular trade or profession. The persons most closely connected with such a statute are not likely to refer to interpretation Acts. There is, on this ground, a good case for excluding from interpretation statutes provisions of general application to statutory bodies such as those in s20 of the Interpretation Act [Can] and s19 of the Interpretation Act 1954 [NI].[7]

A provision already in interpretation legislation may be repeated in particular legislation if the need to communicate that provision effectively justifies it. Of course, there is no technical need to do this and the critic may cry redundancy. However, the drafter has a continuing need to communicate and this need can be more important than the sin of a little repetition.

An alternative approach is to include a note beneath any section in which a term defined in interpretation legislation is used.[8] Footnotes or endnotes to the legislation are other possibilities.

While the ignorance of a non-lawyer concerning interpretation legislation may be forgiven, such forgiveness is impossible for the drafter. Yet a notable feature of much legislation is the failure of the drafter to use interpretation legislation as fully as it is intended to be used. Failure to rely on interpretation legislation is not

5 *Leitch*, pp236–237.

6 As to referential legislation, see pp168–171.

7 The Northern Ireland section has in its favour that it must be specifically applied thus at least bringing its application to the notice of a reader.

8 In 'The Format of Legislation', NZLC R27, the New Zealand Law Commission recommends the adoption of a general practice of including notes to sections indicating the use of terms defined both in the Act itself and in interpretation legislation. See paras 30–35.

the only available danger. Drafters need to be fully aware of the provisions of interpretation legislation because those provisions will apply unless a contrary intention is expressed. There may be a need to disapply one or more of them. For example, the provisions that apply on a repeal may be inappropriate in the particular context. A comprehensive knowledge and a complete understanding of the interpretation Act are most important.

It is an excellent practice to acquire the habit of reading through the relevant interpretation Act every three months or so. It is remarkable how every reading brings to light at least one point which had been either overlooked or forgotten.

APPLICATION OF INTERPRETATION LEGISLATION

Interpretation legislation must state clearly the scope of its application. The draft Interpretation Act produced by the New Zealand Law Commission contains the following provision:

> The provisions of this Act apply to every enactment which is part of the law of New Zealand except to the extent that the enactment otherwise provides or the context otherwise requires.[9]

The broad application to 'every enactment' is subject to two limits.

Any enactment may provide 'otherwise', for example by including a definition which is inconsistent with that in the Interpretation Act or enacting provisions about the effect of a repeal which differ from those in the Interpretation Act. Alternatively, an enactment might state explicitly that a particular provision of the Interpretation Act does not apply.

The context which might exclude the operation of an interpretation Act provision might be that of the particular law in question or the wider law relevant to the issue.[10]

The extent to which an interpretation statute applies to subordinate legislation is of particular importance. In some jurisdictions, interpretation legislation may apply to subordinate legislation such as regulations but not to bye-laws and other instruments.[11] In other jurisdictions, it may not apply to subordinate legislation except where it is specifically applied.

The proposed enactment of a new interpretation Act raises the question of its application to existing as well as future legislation. It may be appropriate for some new provisions to be made applicable only in respect of future legislation. For example, suppose a new interpretation Act is to include a provision enabling time to be extended; it may be inappropriate for this to apply to existing Acts.

DEFINITIONS OF WORDS AND EXPRESSIONS

Definitions of words and expressions are suitable to be included in an interpretation Act if—

9 Clause 3 of the draft Interpretation Bill in NZLC R17. The provision must be read with the definition of 'enactment' in cl 19.

10 See paras 256–261 of NZLC R17.

11 See paras 249–250 of NZLC R17.

(1) the words and expressions are demonstrably of general application to a reasonably broad range of legislation, and
(2) the definitions conform to the criteria applicable to all statutory definitions.

These are discussed at page 147 et seq.

It is especially desirable that a definition in interpretation legislation should not stipulate a sense which is substantially different from conventional usage.

The definitions in the Interpretation Act 1978 [UK] and similar legislation in other Commonwealth countries are generally expressed to apply 'unless the contrary intention appears' or some similar formula such as 'unless the context otherwise requires'.[12] These two expressions approximate in meaning and are, in fact, declaratory of the common law for in *Meux v Jacobs* Lord Selbourne held that an interpretation clause applied only in the absence of something repugnant in the context or in the sense. In some English statutes, definitions are introduced by the phrase 'In this Act' and that is the simplest and best introduction.[13]

Statutory definitions need to cover other parts of speech as well as other grammatical forms of the term defined. Common sense suggests that in the absence of some contrary indication in the context these would not constitute a problem, but some jurisdictions have reduced the possibility of argument by a provision similar to the following:

> Where a word or expression is defined in an enactment, other parts of speech and grammatical forms of the word or expression have corresponding meanings.

The following definitions are thought to be worth considering but the selection is not intended to be comprehensive.

> **act** when used with reference to an offence or civil wrong, includes a series of acts and an omission and a series of omissions;
>
> **amend** includes repeal, revoke, rescind, cancel, replace, add to or vary, and the doing of any 2 or more of such things simultaneously or in the same written law or instrument;
>
> **bye-law** means a bye-law made under the Act in which the term is used;
>
> **commencement**, in respect of an enactment, means the time when the enactment comes into force;
>
> **consular officer** means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular relations;[14]
>
> **contravene**, in relation to a requirement or condition prescribed in a written law or in a grant, permit, lease, licence, or authority granted under a written law, includes a failure to comply with that requirement or condition;
>
> **document** means any record of information and includes
> (a) anything on which there is writing; and

12 For an instance of a contrary intention, see *Rolloswin Investments Ltd v Chromolit* [1970] 2 All ER 673, [1970] 1 WLR 912.

13 (1875) LR 7 HL 481 at 493. See also *In the matter of Fourth South Melbourne Building Society* (1883) 9 VLR (Eq) 54.

14 The text of this definition is taken from the Vienna Convention on Consular Relations.

(b) anything on which there are marks, figures, symbols, characters, or perforations, having a meaning for persons qualified to interpret them; and
(c) anything from which sounds, images, or writing can be reproduced, with or without the aid of anything else; and
(d) a book, map, plan, graph, photograph, or videotape;

function includes powers, duties, responsibilities, authorities, and jurisdictions;

individual means a natural person;

land includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude, or right, in or over any land;

oath and **affidavit**, in the case of persons allowed by law to affirm or declare instead of swearing, include affirmation and declaration;

occupy includes use, inhabit, be in possession of, or enjoy the land or premises to which the word relates, otherwise than as an employee only or for the purposes only of the care, custody or charge of the land or premises;

or, **other** and **otherwise** are to be construed disjunctively and not as implying similarity, unless the word 'similar' or some other word of like meaning is added; [Hong Kong, cf Northern Nigeria][15]

penalty means a fine, imprisonment, or other form of punishment, including the suspension or cancellation of a licence, registration, or permit and disqualification from obtaining a licence, registration, or permit;

perform in relation to a function, includes the exercise of a power, responsibility, authority or jurisdiction;

person or any word or expression descriptive of a person, includes
(a) a public body, a company, and an association or body of persons, corporate or unincorporate; and
(b) the heirs, executors, administrators, or other legal representatives of a person;

power includes a privilege, authority, or discretion;

prescribed means
(a) prescribed by or under the written law in which the word occurs; and
(b) in a case where reference is made to anything prescribed by a written law other than the law in which the word occurs, includes anything prescribed by subsidiary legislation made under that other written law;

repeal includes rescind, revoke, cancel or delete;

15 This provision having effect to abolish the eiusdem generis rule would have found favour in the eyes of Sir John Salmond who tried unsuccessfully to introduce a provision of similar effect into New Zealand's Interpretation Act in 1906. See XXI, Journal of Comparative Legislation 308. Nevertheless, some consider the rule helpful. See A. Samuels, 'The Eiusdem Generis Rule in Statutory Interpretation' [1984] Stat LR 180.

sign includes, in the case of a person unable to write, the affixing or making of a seal, mark, thumbprint or chop; [Hong Kong]

under in relation to an enactment, includes 'by', 'in accordance with', 'pursuant to', and 'by virtue of';

words includes figures and symbols;

writing and **printing** include writing, printing, lithography, photography, typewriting, and any other mode of representing words in a visible form; [Hong Kong]

It is useful to establish in interpretation legislation certain terms for different categories of legislation These categories are likely to vary according to the constitutional law and customary practices pertaining to each jurisdiction but the following few examples illustrate one set of possible definitions.

Act means any Act or Ordinance passed by the Parliament of—, or by any Parliament, Council or body previously having authority or power to pass laws in—, such Act or Ordinance having been assented to by or on behalf of Her Majesty;

enactment means a written law or any portion of a written law;

subordinate legislation means any proclamation, regulation, rule, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument, made under the authority of any written law and having legislative effect;

written law means all Acts and subordinate legislation for the time being in force.

PROVISIONS REGARDING CONSTRUCTION OF LEGISLATION

Some, but not all, of the following provisions are declaratory of the common law. Their presence in an interpretation Act is useful for avoiding doubt.

An enactment applies to circumstances as they arise so far as its text, purpose, and context permit.[16]

Among the matters that may be considered in ascertaining the meaning of an enactment are all the indications provided in the enactment as printed or published under the authority of the Government.[17]

A word or expression used in an enactment that is subsidiary legislation has the same meaning as it has in the written law under the authority of which the enactment is made.

Punctuation forms part of an enactment, and regard shall be had to it accordingly in construing the enactment. [Federation of Nigeria]

16 See NZLC R17, paras 75–87. The draft replaces earlier references to legislation 'always speaking'. See *Re Barretto* [1994] 1 All ER 447 at 455.

17 See NZLC R17, paras 88–99. The draft extends earlier more specific provisions dealing with preambles, divisions, marginal notes, schedules and appendices.

(1) Except where there is an express provision to the contrary,
   (a) a reference in an Act to a particular Part, Division, or section is to be construed as a reference to a Part, Division or section of the Act in which the reference is made; and
   (b) a reference in an Act to some other particular element is to be construed as a reference to that element in its immediate context.

For example, a reference to 'paragraph (c)' is to be construed as a reference to paragraph (c) of the section, subsection, definition, or other element in which that reference is made.

(2) The provisions of subsection (1) apply, with necessary modifications, to the construction of subsidiary legislation.

Words in an enactment descriptive of another enactment shall not be used as an aid to the construction of the other enactment and are intended for convenience of reference only. [Federation of Nigeria][18]

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(1) A reference in a written law to a written law is to be taken to include a reference to such written law as it may from time to time be amended.

(2) A reference in a written law to a provision of a written law is to be construed as a reference to such provision as it may from time to time be amended.[19]

A reference in a written law to a written law is to be taken to include a reference to any subsidiary legislation made under that written law.

The reconstitution and renaming of ministerial portfolios are an established feature of the art of politics. Such action demonstrates, so politicians assume the electors will believe, a positive approach and a praiseworthy determination to remedy the inadequacies of the past. One result of this practice is that specific references in legislation to the current title of a particular Minister may soon become inaccurate and possibly ambiguous. The practice of referring in all statutes to 'the Minister' and relying on the definition of that term in interpretation legislation is one means of avoiding the problem. If a practice is followed of allocating responsibility to Ministers for specified statutes, the following form is suitable for adaptation:

A reference in an enactment to the Minister is to be construed as a reference to the Minister who is for the time being responsible for the administration of that enactment.

The following form is of fundamental importance; it directs a liberal interpretation of statutes and is, in theory at least, incompatible with the old strict 'plain meaning' approach.

18 This provision is of particular value in jurisdictions where amending clauses commonly describe parenthetically the content of the section to be amended. As to this practice, see p411.

19 The NZLC approaches the matter differently. The same purpose is achieved by the following: 'An amending enactment is to be read as part of the enactment which it amends.' See NZLC R17 at para 331.

> Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit. [New Zealand]

The ultimate source of this provision, at least so far as the Commonwealth is concerned, appears to be Canada. It was introduced to New Zealand in 1888 but its practical effect in that country is difficult to estimate.

The Law Commission Report on the Interpretation of Statutes suggests that one reason for the comparatively little attention paid by the courts to the New Zealand provision may be that although it 'attempts to embody the mischief approach of *Heydon*'s case in more modern language, it makes no contribution to the problem of how the mischief and the remedy envisaged by the legislature are to be ascertained'.[20]

Section 19 of Ghana's Interpretation Act attempts to meet this deficiency in the following terms:

> (1) For the purpose of ascertaining the mischief and defect which any enactment was made to cure and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of inquiry into the state of the law, or any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the assembly.
>
> (2) The aids to construction referred to in this section are in addition to any other accepted aid.

An Australian version was enacted by the Commonwealth and several State governments in variations of the following form:

> In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

Clause 9(1) of the Interpretation Bill recently produced by the New Zealand Law Commission has the following short form. Its efficacy rests on a broad interpretation by the courts of the word 'context'.

> The meaning of an enactment is to be ascertained from its text in the light of its purpose and its context.[21]

Provision for the admissibility of legislative materials as aids to construction is of interest and concern.[22] A discriminating use of legislative materials is accepted in the United States of America as a valuable aid to ascertaining legislative intent

20 Law Commission Report on the Interpretation of Statutes (Law Comm No 21) at p20.
21 See NZLC R17, paras 33–74.
22 See the note at 57 ALJ 129.

and in that country, at least since 1940, the 'plain meaning' rule has been overthrown.[23] Since the House of Lords decision in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, the position has changed markedly in the United Kingdom where recourse to *Hansard* is permitted where the court is of the opinion that an enactment is ambiguous or obscure or its literal meaning leads to obscurity.

In Australia, the Commonwealth and some States recently enacted amendments to interpretation legislation permitting recourse by the courts to legislative and other materials. See, for example, s15AB of the Acts Interpretation Act 1901 (Aust) (inserted in 1984). Argument concerning the desirability of legislation of this kind is beyond the scope of this book, but the experience of many drafters concerning the accuracy and quality of explanatory materials and parliamentary speeches is not such as to give grounds for confidence that the courts and the public will be much assisted by studying them.

There is much more to be said for the practice of including in legislation itself a clear statement of the purposes of the legislation. See page 154.

POWERS AND DUTIES

It is desirable that the exercise of statutory powers conferred by an enactment not yet in force should be enabled for the purpose of making the enactment effective on its coming into force. The provision for this purpose in the 1889 Act of the United Kingdom has been expanded in various jurisdictions over the years. An adaptation of a recent form follows:

> (1) Where a provision of an Act does not commence on the passing of the Act and that provision would, if it had commenced, confer power to
> (a) make an instrument of a legislative or administrative character;
> (b) give or serve a notice or other document;
> (c) appoint a person to a specified office;
> (d) establish a specified body of persons, whether incorporated or not; or
> (e) do any other thing for the purposes of the Act,
> then the power may, notwithstanding that that provision has not commenced, but subject to subsections (3) and (4), be exercised at any time after the passing of the Act to the extent that it is necessary or expedient for the purpose of bringing the Act, or provisions of the Act, into operation, or giving full effect to the Act, or provisions of the Act, when or after that provision commences.
>
> (2) Where
> (a) a provision of an Act does not commence on the passing of the Act and the provision would, if it had commenced, amend another Act; and
> (b) a provision of that other Act would, if the first-mentioned provision had commenced, confer power to

23 See H. M. Hart Jr and A. M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, pp1242–1284. This work, although of great significance and interest, is not published, but the Cambridge Tentative Edition, 1958, is available in a number of libraries. See also the Law Commission Report referred to in n 20 and the materials listed in Appendix E of that report, particularly Justice Felix Frankfurter, 'Some Reflections on the Reading of Statutes', 47 Columbia Law Review 527, and 'A Re-Evaluation of the Use of Legislative History in the Federal Courts', 52 Columbia Law Review 125. See also Reed Dickerson, 'Statutory Interpretation in America: Dipping into Legislative History' [1984] Stat LR 76 and 141.

(i) make an instrument of a legislative or administrative character;
(ii) give or serve a notice or other document;
(iii) appoint a person to a specified office;
(iv) establish a specified body of persons whether incorporated or not; or
(v) do any other thing for the purposes of that other Act,

then the power may, notwithstanding that the first-mentioned provision has not commenced, but subject to subsections (3) and (4), be exercised at any time after the passing of the Act in which the first-mentioned provision is contained to the extent that it is necessary or expedient for the purpose of giving full effect to that other Act, or provisions of that other Act, when or after the first-mentioned provision commences.

(3) Where a power to make an instrument of a legislative or administrative character, or to give or serve a notice or other document, is exercised as provided in subsection (1) or in subsection (2), that instrument, notice, or document shall take effect
(a) on the day on which the provision referred to in subsection (1) or, as the case may be, the provision first-mentioned in subsection (2) commences; or
(b) on the day on which it would have taken effect, if at the time when the instrument was made or the notice or document was given or served, the provision so mentioned or first-mentioned had commenced, whichever is the later.

(4) Where a power to appoint a person to a specified office, or to establish a specified body of persons, is exercised as provided in subsection (1) or subsection (2), the person so appointed may act in that office, or, as the case may be, the body so established may meet and perform and exercise its functions, duties, and powers, but only for a purpose referred to in subsection (1) or subsection (2) (whichever of those subsections is applicable); and for the purposes of any provision as to the duration of the term of office of the person or a member of the body, that term does not begin until the relevant provision referred to in subsection (1) or subsection (2), as the case may be, commences.

A much less complicated but more limited form is contained in the New Zealand Law Commission's Bill. Clause 5 states

A power conferred by an enactment may be exercised before the enactment comes into force, with effect from any time on or after it comes into force to the extent necessary or expedient to bring the enactment into operation.

Here are two handy face-savers:

Power given to do any act or thing, or to make any appointment, is capable of being exercised as often as is necessary to correct any error or omission in any previous exercise of the power, notwithstanding that the power is not in general capable of being exercised from time to time.

The Attorney General may, by order published in the Gazette, rectify any clerical or printing error appearing in any Ordinance printed or published in accordance with law. [cf Hong Kong]

A common drafting instruction is to provide for power to delegate an executive function. Repetition may be avoided if a provision of general application is included in interpretation legislation. For example

(1) Where a written law confers power upon a person to delegate the exercise of any power or the performance of any duty conferred or imposed upon that person under a written law
  (a) the delegation does not preclude a person so delegating from exercising or performing at any time a power or duty so delegated; and
  (b) the delegation may be made subject to such conditions, qualifications, limitations or exceptions as the person so delegating may specify; and
  (c) if the delegation may be made only with the approval of some person, such delegation, and any amendment of the delegation, may be made subject to such conditions, qualifications, limitations or exceptions as the person whose approval is required may specify; and
  (d) the delegation may be made to a specified person or to persons of a specified class, or may be made to the holder or holders for the time being of a specified office or class of office; and
  (e) the delegation may be amended or revoked by instrument in writing signed by the person so delegating; and
  (f) in the case of a power conferred upon a person by reference to the term designating an office, such a delegation does not cease to have effect by reason only of a change in the person lawfully acting in or performing the functions of that office.

(2) The delegation of a power is to be taken to include the delegation of any duty incidental to or connected with that power and the delegation of a duty is to be taken to include the delegation of any power incidental to or connected with that duty.

(3) Where under a written law an act or thing may or is required to be done to, by reference to or in relation to, a person and that person has under a written law delegated a relevant function conferred or imposed on that person with respect to or in consequence of the doing of that act or thing, the act or thing is to be regarded as effectually done if done to, by reference to or in relation to the person to whom that function has been delegated.

TIME

The careless drafting of provisions relating to time and the computation of periods of time may cause needless confusion. It is not difficult to achieve certainty and clarity and this is facilitated by a provision such as the following:

(1) In computing time for the purposes of a written law
  (a) a period of time that is expressed to begin at, on, or with a specified day, includes that day in the period;
  (b) a period of time that is expressed to be reckoned after or from a specified day, does not include that day in the period;
  (c) where anything is to be done within a time before a specified day, the time does not include that day;

(d) a period of time that is expressed to end at, on, or with a specified day or to continue to or until a specified day, includes that day in the period;

(e) where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day;

(f) where there is a reference to a number of clear days or 'at least' or 'not less than' a number of days between 2 events, in calculating that number of days both the days on which the events happen are excluded;

(g) where there is a reference to a number of days not expressed to be clear days or 'at least' or 'not less than' a number of days between two events, in calculating the number of days the day on which the first event happens is excluded and the day on which the second event happens is included;

(h) where an act or proceeding is directed or allowed to be done or taken on a certain day, or on or before a certain day, then, if that day is an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day that is not an excluded day.

(2) In this section, 'excluded day' means Saturday, Sunday, public service holiday, and a public holiday throughout the State or in that part of the State which is relevant to the event, act, thing or proceeding concerned.

Computation of periods expressed in months or years can also cause difficulty. It may be useful for interpretation legislation to include a definition of a year as being a period of 12 months.[24] The following useful provision is an adaptation of a Ghanaian provision:

(1) In a written law, 'month' means a month reckoned according to the calendar.

(2) If a period of one month indicated in a written law begins on any date other than the first day of any of the 12 months of the calendar, it is to be reckoned from the date on which it is to begin to the date in the next month numerically corresponding, less one, or, if there is no corresponding date, to the last day of that month.
For example: a month beginning on 15 January ends on 14 February and a month beginning on 30 or 31 January ends on 28 February (or 29 February in a leap year).

(3) If a period indicated in a written law is of 2, 3 or more months, it is to be reckoned from the date on which it is to begin to the date numerically corresponding, less one, in the second, third, or other successive month thereafter or, if there is no such corresponding date, to the last day of the latter month.
For example: a period of 6 months beginning on 15 August ends on 14 February and a period of 6 months beginning on 30 or 31 August ends on 28 February (or 29 February in a leap year).

The examples are not essential to the form but are useful illustrations and help to communicate the meaning. The technique is therefore justifiable.

24 Note, for example, the varying judicial opinions as to the calculation of months in *Dodds v Walker* [1981] 2 All ER 609.

Chapter 7

The drafting process: Part 1

INTRODUCTION

The process of drafting legislation may be said to begin with the receipt of drafting instructions and end with completion of an agreed draft. But the drafting process needs to be seen in a wider context if it is to be understood fully. It is just one part of the process of legislation, whereby an idea or concept concerning the social framework of society becomes government policy, is transformed to legislative shape by means of the drafting process, and eventually passes through the legislative machinery to reach the statute book as law.[1]

It does not by any means follow that the end-product of the legislative process bears much resemblance to the concept from which it developed. At each stage of the process, the concept is developed, refined and tested. The development of the concept may involve extensive change. A common experience is that the drafting process itself tests the policy, helps refine it, and generates a better sense of the practical operation of the proposed scheme. The drafter's role in the process is a significant part of society's procedure for regulating the conduct of its members.

The drafter is not usually a party to the beginning of the process. The desire for legislation may in any instance come from one or more of a great many sources, perhaps a commission of inquiry, a political party's manifesto, a parliamentary committee, perhaps a branch of the public service or a public body, a law reform body, a trade or professional group, some other pressure group representing a sector of the public, or less frequently a demand from the public as a whole. A judicial decision may have revealed an error or loophole in an existing law. No matter where the ideas originate, it is not until they are accepted by the government as part of its policy that they become the prime concern of the drafter.

The procedure or machinery for adopting ideas as government legislative policy will, necessarily, vary according to the nature of the institutions of the government concerned. This procedure will usually involve the acceptance of the policy first by the responsible Minister and then probably by Cabinet or a committee of Cabinet and possibly by a party caucus.

Whatever may be the nature of the procedure for adopting proposals as legislative policy, the establishment of and adherence to such a procedure are important to the drafter in three respects:

1 For an interesting study of the legislative process, see S. A. Walkland, *The Legislative Process in Great Britain*. See also the *Australian Legislation Handbook*.

- it enables a legislative programme to be projected and drafting priorities to be decided;
- it provides some assurance that the drafter will not be obliged to waste time working on proposals that are later shown to be unacceptable to the government as a whole;
- it offers some protection against being instructed prematurely. Drafters are entitled to enjoy a reasonable expectation that the sponsors of legislative proposals will, in order to gain government approval of the policy, have been obliged to think through and develop their proposals to a comprehensible and reasonably complete form. To this end, some jurisdictions require drafting instructions to have been prepared and to be attached to the submission for policy approval.

THE ROLE OF A LEGISLATIVE DRAFTER

The proper role of a legislative drafter lies somewhere between two extreme views.

One extreme view regards drafters as doing little more than selecting words as if from a shelf and putting them in the right order. This view holds that policy is for policy makers alone and the drafter should draft as instructed without regard to fundamental principles, practicality or anything else.

The other extreme view considers it to be the responsibility of drafters to develop a broad idea into a practical scheme. In other words, to take over from the policy makers by developing incomplete policy to a refined and complete state.

Neither view is sustainable. Drafters are not and should not be primarily responsible for the development of policy although they do have important responsibilities in that area. In essence, the proper role of a legislative drafter is to convert a developed legislative policy to legislative shape. Note the word 'developed'. It is not a proper responsibility for a drafter to develop what is no more than a broad idea into a practical and detailed scheme. The drafter should neither be expected nor disposed to take over the role of policy maker by developing incomplete policy and working out the details of how the policy is to be implemented.

On the other hand, the proper role is more creative than that of mere wordsmith. The drafter has skills and knowledge not generally possessed by policy makers. The drafter is 'an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all. The difference between a legal mechanic and a legal craftsman turns largely on awareness of this point.'[2] Although not primarily responsible for policy, drafters do have important advisory responsibilities of a policy kind. Some of these are described later in this chapter.

Drafters do themselves and those who instruct them an injustice if they do not recognise the value to the policy makers of their expertise and their knowledge and experience, particularly their analytical skills and their knowledge of the broad legal framework into which the proposed legislation must be shaped to fit comfortably. Their analysis of the proposals and the implications and consequences of the proposals should be made available. This is usually welcomed (and if it isn't, it should be!).

2 Hart Jr and A. M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge Tentative edn, 1958) p200. The passage from which this extract is quoted refers to lawyers generally but is especially apposite to drafters.

The role is creative and positive. Skilful questioning, constructive comments and suggestions, including the putting forward of possible alternative methods of achieving the policy objectives, contribute to the achievement of those policy objectives, but the policy remains that of the government. The drafter's role is to provide a professional service.

WHEN SHOULD DRAFTERS BECOME INVOLVED IN LEGISLATIVE PROPOSALS?

Although the drafting process proper begins with the receipt of drafting instructions by the drafter, there are arguments in favour of earlier involvement of drafters, particularly in the case of major and complex proposals.

Involvement and input by an experienced drafter before the policy has been fully developed and accepted are likely to avoid delays during the drafting process. The need for supplementary drafting instructions will be reduced. Also, it is less likely that the drafting instructions will need to be varied extensively in the course of the drafting process.

The experience and expertise of drafters are likely to avoid wasted time and effort on the part of the policy makers as a result of their being steered away from blind alleys and dangerous precipices.

The drafter also benefits. The knowledge gained at this early stage about the underlying principles and the technicalities of the proposals is likely to have two results.

- The legislative proposals are likely to be more clearly and intelligibly expressed both in the submission for policy approval and also in the drafting instructions.
- The drafter is likely to be able to produce a draft more quickly and more in harmony with the thinking of the policy makers.

The contrary arguments are largely practical, but cogent nevertheless. Early consultations before proposals are fully developed and become accepted policy are enormously time consuming. One inevitable result is that drafters spend valuable time on matters which are of little concern to them. It is likely to be a waste of drafters' time to sit through long meetings at which different policy makers thrash out their differences. Drafting offices are usually short of staff and time. It may be impractical as well as wasteful for a drafter to be made available to engage in preparatory consultations and provide advice regarding a project that may fall in an irredeemable heap at the first hurdle. However, for complex proposals the establishment at least of an informal liaison between the sponsor of proposed legislation and the drafter will be of mutual benefit. It is clearly helpful to sponsors to know at an early stage whether perceived directions, solutions, and procedures are likely to be opposed by drafters when the drafting stage is reached.

THE ROLE OF INSTRUCTING OFFICERS

It is of immense benefit to the drafter and, perhaps more importantly, to the smooth progression and prompt completion of a high quality draft, if the sponsors of proposed legislation nominate one suitable person as instructing officer for the project. That person needs to be of sufficient seniority and to have sufficient

knowledge and experience to be completely familiar with the background of the issues concerned and with the attitudes and inclinations of the relevant Minister and chief executive officer. The instructing officer also needs to have sufficient authority, and also the breadth of knowledge and experience, to be able to take decisions and give instructions on day-to-day points arising in the course of the drafting process.

Usually, the instructing officer will be a person who has played a major role in preparing the drafting instructions. Once drafting begins, the instructing officer becomes a key player in the drafting team as the channel of communication between the drafter and the instructing body. The role involves three principal functions.

- to provide such explanations, responses to queries and information as the drafter requires in order to achieve an adequate understanding of what the legislation is intended to do and how it is intended to do it;
- to consider, comment on and criticise drafts developed during the drafting process;
- to coordinate the respective interests and contributions of the various divisions of the instructing ministry or body and those of other interested ministries or bodies that are consulted or otherwise involved.

Of course, an instructing officer will not in the case of complex legislation with a technical content necessarily have either the knowledge or the authority to deal personally with all matters raised by the drafter. But it will remain his or her duty to obtain further decisions and instructions for the drafter from the appropriate persons.

A duty shared by drafters and instructing officers is to develop a harmonious and cooperative working relationship. The benefits for each are substantial.

BASIC EQUIPMENT

Access to a fine library is, of course, highly desirable but in many jurisdictions that is just something to dream about. It is a great advantage to have available the statutes of as many Commonwealth countries as possible, and an effort to keep them up to date is well worth making. In addition it is suggested that the following short list of books should be regarded as essential equipment:

The New Shorter Oxford Dictionary (1993 edn)
A good dictionary of synonyms
Fowler's Modern English Usage
Longman Guide to English Usage, Greenbaum and Whitcut
Everyman's Good English Guide, Fieldhouse
The Good English Guide, Godfrey Howard
The Complete Plain Words, Gowers, revised edn Greenbaum and Whitcut
The Well-Tempered Sentence, Karen Elizabeth Gordon
Rediscover Grammar with David Crystal
Hart's Rules for Compositors and Readers (Oxford University Press)
Words and Phrases Judicially Defined
Stroud's Judicial Dictionary
Statutory Interpretation, Bennion (2nd edn)
The Composition of Legislation, Driedger (2nd edn)

Legislative Forms and Precedents, Driedger (2nd edn)
The Fundamentals of Legal Drafting, Reed Dickerson (2nd edn)

Every drafting office needs a practice or style manual and a mechanism to keep it under review. This is worth the labour regardless of the size of the office. Production of such a manual requires a careful and critical review of existing practices and this exercise is itself likely to result in improvements. Stylistic practices and format have improved markedly in some jurisdictions recently and the opportunity of gaining from the experience of other offices should be pursued. The existence of a practice or style manual promotes stylistic consistency within a jurisdiction and consistency is helpful to those who use statutes.

In addition to a style manual, every drafting office needs a system for noting useful precedents and other helpful material. An established procedure for sharing experience and knowledge can contribute hugely both to the effectiveness and to the contentedness of the office.

THE FIVE STAGES OF THE DRAFTING PROCESS

Five stages may be recognised in the drafting process. These are

1. Understanding
2. Analysis
3. Design
4. Composition and development
5. Scrutiny and testing

The drafter endeavours to move in logical progression from stage 1 through to stage 5. He or she begins by trying to understand fully the instructions and their background, continues by analysing the implications of the instructions, then designs the legislative scheme, proceeds to draft, revise and develop the draft and finally tests the draft and has it scrutinised by at least one other drafter.

These five stages do not consist of five watertight compartments; they are better regarded as recognisable areas of the process as a whole. Progress from stage 1 to stage 5 is usually neither smooth nor regular, and frequently it is necessary to return to an earlier stage and try again.

The process of drafting a law has much in common with the children's game of snakes and ladders. The aim is the same of proceeding uninterruptedly from start to finish, preferably with bursts of acceleration. In both cases, that aim is rarely realised. The player lands on a snake and slithers down to a position she hoped she had passed for good. The drafter encounters problems—perhaps gains a clearer understanding of instructions or realises the draft just will not work—and must slither back to an earlier stage, perhaps to begin again. Too often the instructing officer pulls the ladder away by varying the instructions and deposits the unfortunate climber at its foot in an irritated heap. One must not press the analogy too far. Snakes and ladders is a game of chance. Drafting legislation is a game of skill.

Stage 1—Understanding

The first task for the drafter is to understand what he or she is about. Patently it is vital to gain a thorough and complete understanding of the purposes of the

required legislation. The drafter must be certain as to the 'mischief and defect' intended to be remedied. To gain this necessary understanding may require time, patience, great care, and not a little tact. The drafter may have to work very hard to achieve an accurate and complete understanding of the goals of the sponsors of the proposed legislation.

It has been emphasised earlier that the drafting of a law is an essay in communication, an essay which is wholly successful only if the law is communicated in clear English in a form that is readily comprehensible. The preparation of drafting instructions is also an essay in communication and it is not difficult to see that unless that communication is successful the draft is unlikely to achieve its purposes. The drafter to whom the drafting instructions must be communicated has a paramount interest in doing everything possible to promote a complete and successful communication. The drafter can do two things.

First, the question of drafting instructions—guidance must be available to those who prepare drafting instructions. Very often they come to the task for the first (and perhaps only) time and have little idea of what the drafter needs and the form in which it will be most helpful. It is desirable that every drafting office should have information available for distribution to prospective instructing bodies. It is in the drafter's interest that the manual or other guidance should highlight the point that the better the instructions the better the Bill is likely to be. A particular case may warrant particular advice in special circumstances in addition to that generally made available. Good instructions are a pearl beyond price and not only improve the quality of the Bill but also reduce drafting time. Bad instructions are the bane of the drafter's life. However, it is easy for drafters to misjudge or overlook the difficulties of preparing adequate drafting instructions and some advice from the drafter on their suggested form and contents is invariably useful and often welcome.

Secondly, the question of consultation—a drafter needs to consult with the instructing officer at an early stage after receipt and preliminary digestion of the drafting instructions.

Let us look at each of these two questions in turn.

1 DRAFTING INSTRUCTIONS

How to write drafting instructions

Instructions should be written in narrative form in clear, straightforward language that is as free from jargon and technical language as the substance allows. They should be complete and they should be comprehensive. Detail may be presented in tabular form if that seems to aid communication. For example, instructions for the detail of amending legislation may be suitably presented in that way.

Language must be used carefully and consistently. If the same thing is meant in more than one place, the same words should be used. If different words are used, the drafter will assume the intention is different. Topics should be dealt with in logical and, if appropriate, chronological sequence. The relative importance of different issues should be made clear. If technical language is necessary, the instructions must take into account that the drafter almost certainly lacks specialised knowledge of the subject. A glossary or other explanatory material should be provided where necessary.

Most drafters do not favour drafting instructions in the form of draft legislation and there are good reasons why straightforward, clear prose is preferable. A draft law is an artificial creation that is likely to be less successful as communication

than straightforward prose. A draft Bill prepared by a non-drafter confuses the role of instructor and drafter and is almost certain to raise difficulties of construction and to mislead. It does not tell the drafter what the problem is and how it is to be remedied, but tells the drafter how the author thinks an unstated problem can be remedied. Instructions in this form will slow things down rather than speed them up because the drafter will have to penetrate behind the words of the draft to gain the necessary knowledge of the relevant facts and to divine the intent. Time should not be wasted on discussion and argument on what a non-drafter's draft means.

There are added difficulties for the drafter if a draft submitted as instructions is a scissors and paste compilation comprising extracts from the laws of several jurisdictions or even several laws of the same jurisdiction. For a start the structure of the draft is likely to be confused and the language is likely to be inconsistent. Sad experience persuades that large chunks of assorted extracts lifted from assorted sources combine to make a large muddle. An instructing officer needs the discipline and the stimulus occasioned by the task of writing out clearly and comprehensively what the legislation is to achieve, why and how.

Drafting instructions should not be written hastily. Subsequent variations after drafting has begun will waste the time of everybody concerned and delay the drafting process. Additional instructions which should have been included in the original instructions will also delay the process and may render work already done futile.

What to put in drafting instructions

Good instructions will illuminate

- the nature of the problem by providing **background information**
- the **purposes** of the proposed legislation
- the **means** by which those purposes are to be achieved
- the **impact** of the proposals **on existing circumstances and law.**

Background information

To understand and attempt to perfect the solution to a problem, the drafter must understand the problem. That statement may be obvious but it is none the less hugely important. Drafting instructions need to contain sufficient background information to enable the drafter to see in perspective and in context the circumstances and problems which the legislative proposals are intended to meet.

It often happens that legislative proposals have a history that has contributed to their shape and the drafter needs to be acquainted with that. Information should be provided as to consultations that have taken place within and without government and the results of those consultations. Reference should be made to any papers, documents or other desirable reading for the drafter and copies should be provided. If the proposals have stemmed from or been considered by a commission or other advisory body, the proceedings and report of that body should be annexed to the instructions. If the proposal is a consequence of a judicial decision, a copy of the judgment or a reference to it should be given.

If the subject is a technical one, the instructions or accompanying material must educate the drafter to a level sufficient to provide an adequate understanding of the technicalities and technical terms involved. This may not be easy but the need is real and the matter may need to be discussed with the drafter at an early stage.

The drafter should be informed of the extent to which consultation has taken place within the various branches of government. If not so informed, the drafter

should seek confirmation that necessary consultation has in fact taken place. For example, it would not be appropriate for anything in the nature of a tax or rate or levy to be imposed without Treasury approval. Nor would it be proper, without Treasury approval, to confer financial powers on a body in a manner that might result in an obligation to expend public funds (eg to satisfy a guarantee).

Courtesy requires that the Minister responsible for a piece of legislation should be consulted if that legislation must be amended in consequence of a legislative proposal carried forward by another Minister.

It is certainly not the function of the drafter to perform this task of consultation, but it is in everybody's interests to see that it is done as early as possible. The drafter has a responsibility to ensure that the Attorney General is consulted regarding areas of his or her responsibility, eg maintenance of the rule of law, conferring on or removing jurisdiction from a court, evidentiary provisions, penal sanctions.

Instructions should distinguish background information from legislative proposals.

Purposes

A fundamental appreciation of what the legislation is intended to achieve is a necessity. The drafter must be introduced to the very heart of the proposals so that there is no doubt as to their 'spirit and intent'. The drafter must absorb the objects of the exercise exactly and comprehensively. Unless the drafter's appreciation of the governing purposes of the legislation is both accurate and complete, the structure of the Bill will be at risk and the balance and emphasis given to different provisions may mislead users as to the primary purposes of the legislation.

Means

The instructions should provide the drafter with a total picture of how the purposes are to be achieved. The drafter must know how the scheme will actually work in practice. The important issues of principle must be declared and the proposed administrative machinery must be described in detail. It may be helpful if the instructions provide hypothetical examples of how the scheme will work. The drafter may or may not decide to use examples in the legislation itself.[3]

Matters of administrative detail, including structures and administrative powers and duties, and also matters intended to be dealt with in regulations should be outlined. A drafter can only draft an adequate clause empowering the making of subordinate legislation if aware of the scope of the regulations that will be required. If power to delegate any function is required that should be stated. The drafter should be informed if power to impose fees or charges is needed.

Conduct that is to be prohibited or regulated in some way should be described carefully and the nature of any proposed sanctions stated. The consequences of breaches of proposed obligations should be dealt with.

The instructions must make it clear who is to have the function of making any administrative decisions or exercising discretions provided for. In the case of decisions or discretions of importance, the question of review or appeal provisions must be dealt with. Provisions for an appeal or review must specify the nature of the appeal or review, which body or person is to hear or otherwise determine it, and the procedure to be followed.

It does not matter if the instructions include matter that will be handled administratively without the necessity of a statutory provision. The important thing

3 See p163.

at this stage is for the drafter to gain a thorough understanding of the practicalities of the proposals.

Impact on circumstances and law

No new law can stand alone. It must be crafted to fit into the whole fabric of law, both statute law and the common law. For example, every new law is likely to be reliant on the existing criminal law and the laws of criminal procedure and evidence. Common law principles such as natural justice must also be taken into account. Those preparing drafting instructions tend to be preoccupied with their objectives and their proposals and may need to be reminded to consider how the proposed law will fit into existing circumstances. All anticipated difficulties and problems, whether legal, social or administrative, should be discussed.

The impact of the proposals on existing law must be stated and the extent to which existing laws need to be repealed or altered, either to achieve the objects of the proposals or as a consequence of those objects, must be set out. In the case of amending law, every provision which appears to require amendment should be identified.

Proposals for the commencement of the new legislation should be included. The instructions should draw the drafter's attention to the kind of administrative or other actions that will be necessary before the law can come into effect. The drafter needs to know if it will be necessary to bring the new Act into force progressively.

Any proposals intended to have retrospective operation should be specifically indicated and explained.

The impact on people and circumstances when the proposed law first comes into force must be given careful and fair treatment. If the proposed law is to replace an existing one, savings and transitional provisions must be instructed in respect of powers, rights and duties existing under the old law. If an activity is to be regulated for the first time, the rights of people lawfully carrying on that activity before the law comes into force must be taken into account and dealt with fairly.

The instructions must refer to any constitutional obligations or standards that might be affected by the proposals. For example, in a jurisdiction having a Bill of Rights reference must be made to any apparent breach or near breach. Similarly, the instructions must refer to any relevant international obligations under a convention or otherwise.

Financial considerations should also be dealt with where they exist and the drafter should be made aware of action within government to obtain the necessary approvals. The drafter must know how the costs of administering the proposed legislation are to be met.

2 Consultation

In all but very simple cases, a thorough and wide-ranging discussion with the instructing officer is a necessary part of the understanding stage of the process. Such a discussion not only gives the drafter an opportunity to clarify points that are unclear but also provides a check on how successfully the legislative proposals in the instructions have been communicated to the drafter. Time spent in preliminary consultations before drafting begins may result in the saving of much time later on.

The importance of consultation at this stage is not generally recognised. In fact, it is at this stage that the skill and experience of a really competent drafter are

apparent as he or she builds on the foundations laid by the written instructions by questioning the instructing officer. 'He that nothing questioneth, nothing learneth' said the poet.[4] The drafter should prepare carefully and thoughtfully before engaging in consultation. He that asketh the wrong questions, learneth the wrong answers and wasteth his time.

During this early stage, the drafter should concentrate on gaining a comprehensive understanding of what the client has in mind and wants. The drafter will better be able to consider and assess the proposals and their implications if they can be seen as a whole.

In the course of these preliminary discussions, the drafter may think of and be tempted to raise objections to some minor details of the instructions, but it is wise to refrain from exploring the by-ways at this stage. Except so far as is necessary for acquiring a full understanding, it is better to wait until the drafter has been able to give thought to the scheme in its entirety.

Stage 2—Analysis

Legislative proposals should be subjected to careful analysis in relation to

1. existing law
2. special responsibility areas
3. practicality.

1 LEGISLATIVE PROPOSALS AND EXISTING LAW

If the written law and common law in force at a particular time in a society are regarded as a coherent whole, every additional new law is properly regarded as amending in nature.[5] This is so notwithstanding that a law may not, on the face of it, appear to amend or even refer to any existing law, and even although the law may appear to break new legal ground, perhaps by regulating some sphere of activity for the first time. In such a case, the law is an amending law in a very real and practical sense; what was legal becomes illegal and former freedom of action is restricted.

Once every new law is regarded as an amending law, the need to be aware of all relevant existing law becomes very clear. The drafter must take pains to know what is being amended. Relevant written law, common law and case law must be studied.

Laws *in pari materia* must also be studied. Because the courts will construe all such laws together, it is desirable to achieve as much consistency of language as is possible. Moreover, care is needed to avoid the possibility of perpetrating an unintended repeal by implication.

It may be useful to study comparable laws of other Commonwealth jurisdictions at this stage. Some thought on the reasons for differences may be instructive.

4 Thomas Fuller.

5 See P. S. Atiyah, 'Common Law and Statute Law', 48 Mod LR 1. 'the relationship between common law and statute law must be seen as the relationship between two developing and moving bodies of law'.

2 LEGISLATIVE PROPOSALS AND SPECIAL RESPONSIBILITY AREAS

In general terms, it may be said that the rights and wrongs of the policy contained in legislative proposals are not the drafter's concern. The drafter's function is to put that policy into legislative shape, not to pontificate on its demerits. The drafter has a professional duty to approach each task with objectivity.

However, although not primarily concerned with policy, the drafter is not in a position to wash his or her hands of it. To do so would often be the easy way out, for the proper discharge of the drafter's duty may require comment upon the implications of the policy behind the instructions in a way that may be unwelcome. Nevertheless, the drafter's position is one of responsibility. Independence from the instructing officer or department and familiarity with law as a whole enables the drafter to see a legislative proposal in a wider and more balanced context than is possible for others. It is the ability to see the legislative proposals against the background of the whole structure and panoply of the law that gives the drafter both an advantage and a special responsibility.

This responsibility is particularly great in certain areas of potential danger. The dangers will be apparent to the drafter who has a duty to be sure that instructors are also aware of these dangers. The drafter has a clear duty to society to see that the freedom of the individual is interfered with no more than is absolutely demanded to achieve the desired purpose. Both the drafter and those who instruct must be concerned to consider whether every element of the proposed legislation complies with basic principles of the legal and constitutional system.

Of course, legislation within these areas of potential danger may be necessary and justifiable but care is required. Proposals of the following kinds fall within this class.

Proposals affecting personal rights

In particular

- proposals enabling detention or restriction without trial, or deportation;
- proposals that affect personal status or might render a person stateless;
- proposals that affect detrimentally existing pension or other similar social benefits;
- proposals that do not safeguard equitably the position of persons engaged in a trade, profession or activity when it is first regulated by statute;
- proposals depriving a person of recourse to the courts of the country;[6]
- proposals infringing the rules of natural justice;
- proposals reversing the onus of proof in criminal cases;
- proposals that do not provide adequate protection against self-incrimination;
- proposals affecting detrimentally freedom of speech, or discussion, or the right of assembly or holding public meetings;
- proposals curtailing rights in relation to industrial matters;
- proposals of a discriminatory nature on grounds of race, religion, sex, age, physical or intellectual handicap or, indeed, any other grounds;
- proposals interfering with electoral rights;

6 A provision ousting the ordinary jurisdiction of the court will be construed strictly. See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 All ER 208. For a case illustrating the subjugation of an ouster clause to the rules of natural justice, see *A-G v Ryan* [1980] AC 718, [1980] 2 WLR 143.

- proposals that would intrude on personal privacy, for example by requiring unnecessary personal information.

Proposals affecting private property rights

In particular, proposals which would grant

- a right of entry upon private property;
- a power to search private property without a judicial warrant;
- a power to seize, detain or forfeit private property without a judicial warrant;
- a power of user of private property, for example by laying a pipe line or erecting pylons;
- a power to acquire compulsorily or requisition private property;[7]
- a right to restrict the use of private property.

Also in this class are proposals which would interfere with the provisions of existing contracts or detract from rights or privileges enjoyed under existing written law.

It is certainly not suggested that legislation on the above subjects is wrong in principle; it is necessary, however, to proceed with caution and to have regard to the rights of the persons affected and include where necessary transitional provisions and other safeguards, rights of appeal and compensation provisions.

Proposals to delegate to the executive a power to impose taxation

It is a basic principle that only Parliament should have power to impose taxation. Any derogation from this principle must be carefully scrutinised and justified. However, a power to impose a tax must be distinguished from a power to impose fees or other charges for a service.[8]

Proposals for retrospective legislation

'... it is desirable that wherever possible a statute should indicate in express and unmistakable terms whether (and, if so, how far) or not it is intended to be retrospective. The expenditure of much time and money would be thereby avoided' (Lord Simon in *Williams v Williams* [1971] 2 All ER 764 at 772.)

Retrospective laws offend against the general principle that legislation intended to regulate human conduct ought to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law.

'Much of the law works because the people subject to it know in advance what it requires of them and organise their actions in accordance with it.'[9]

'... the presumption against retrospection is not a technicality. It is a general rule of justice not dependent on forms of words. It is founded on a judicial preference, where choice is possible, for the reading which does not invalidate existing rights and obligations. An Act which says that all existing obligations shall be deemed not to have been entered into is plainly retrospective, and should, therefore, not be read in that sense if another reasonable meaning is possible. It would be wrong to regard as **not** retrospective, and therefore **not** to be otherwise

7 See *Limb & Co v British Transport Docks Board* [1971] 1 All ER 828, [1971] 1 WLR 311.
8 See p347.
9 A New Interpretation Act NZLC R 17 at para 274.

construed where possible, an Act which simply spoke of the future and said, for example, that there shall not in future be any payment of interest or capital in respect of some government loan.'[10]

As regards criminal offences, retrospective operation is never given to a statute, unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language. It manifestly shocks one's sense of justice that an act legal at the time of doing it should be made criminal by a new enactment. Apart from the inequity of an offence enacted with retrospective operation, it is necessary for the criminal law to be certain if adherence to it is to be expected.

Likewise, it is manifestly unjust if a new enactment converts an act wrongfully done at the time into a legal act in such a way that a person injured by that act is deprived of a remedy.[11] Similarly, it is unjust if the effect of a statute is to deprive a person of a defence available to him before the commencement of the statute.[12]

Professor Goodhart has pointed out that a clear distinction must be drawn between criminal and civil law in regard to retrospective legislation.[13]

A criminal law enacted ex post facto cannot fulfil the primary purpose of all penal legislation. It cannot deter what is already done. A civil law of retrospective operation may on the other hand serve to accomplish its primary purpose. Retrospective operation may indeed be necessary for that purpose as, for example, in the case of validation of marriages which would otherwise be void owing to some defect in the ceremony, or in the case of the imposition of an obligation to pay taxes in respect of profits from completed transactions. If the proposals are intended to operate retrospectively to confer a benefit on private persons without imposing a corresponding obligation, then no substantial objection is likely to arise.

Professor Goodhart suggests that retrospective civil legislation falls to be judged in relation to two principles. First, the law should, as far as is reasonably possible, be certain and stable, and secondly, law ought to be general in character and not subject to alteration in regard to particular individuals.

For the legislator, it is a matter of judging what is reasonable in the circumstances, for both the individual and the state. The law should take into account the reasonable expectations of persons that arrangements they make under existing law will not be affected by changes in the law. But this principle may be outweighed by the desirability of implementing considered policy changes. For example, family law might be amended to alter the available ground of divorce to the breakdown of marriage in place of grounds based on fault. Such a change would have retrospective operation in relation to existing marriages. Procedural changes applicable to existing events are not uncommon and may be unexceptionable.

If legislative proposals are patently unreasonable or shock the drafter's sense of justice, the drafter must advise the sponsors of the proposals of his or her opinion and draw attention to the inequity or breach of fundamental principle involved.

Proposals inconsistent with international obligations and standards

In New Zealand, the Legislation Advisory Committee published in 1991 a list of primary legislation which appears to raise treaty issues. Perhaps surprisingly, the list includes no less than about a quarter of all public Acts.[14] It seems probable that in every jurisdiction the impact on domestic law of international conventions

10 Lord Pearce in *Customs and Excise Comrs v Gallaher Ltd* [1971] AC 43 at 66.
11 *Young v Adams* [1898] AC 469 at 476.
12 See *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, [1982] 3 All ER 833.
13 66 Law Quarterly Review, pp314 et seq. See also 88 Law Quarterly Review, pp400–401.
14 Legislative Change, Report No 6 by the Legislation Advisory Committee, para 44.

is increasing all the time. In areas where there is no direct obligation by convention, there may be an international standard which is relevant, especially in the human rights area. Drafters may need to remind instructing bodies of their need to deal with this aspect, initially by appropriate consultations.

Proposals of doubtful territorial or constitutional competence

It is essential that the drafter bears in mind at all times the competence of the legislature to which the draft will be submitted. Commonwealth constitutions are too diverse for treatment here, but in every case some restrictions and limitations apply and the drafter must be thoroughly familiar with those affecting his or her work.

Drafting under a federal or quasi-federal constitution raises special problems. So also does drafting for a colonial or other dependent legislature.

Territorial application of legislation is discussed at page 210.

Proposals which are unnecessarily bureaucratic

The drafter who ventures to suggest that proposals are unnecessarily bureaucratic risks being told to mind his or her own business. That should not deter the making of the suggestion if it is justifiable.

Although the time has come when most members of society acknowledge the need, indeed the duty, of the state to intrude into their personal lives much more than in days gone by, it remains valid that legislation should impose no more rights or obligations affecting members of the public than are strictly and demonstrably necessary to achieve the purposes of the legislation.

Procedures should be simple and comprehensible and forms should be kept to a minimum. Those which are necessary should be kept simple and direct. Nobody should be asked to respond to any question unless the answer to that question is necessary for the purposes of legislation. Questions concerning the sex, religion, political affiliations, age, or race of a person ought to be scrutinised with care.

Proposals affecting prerogative powers

'The rule that the prerogative is not displaced except by a clear and unambiguous provision is extremely strong.'[15]

3 LEGISLATIVE PROPOSALS AND PRACTICALITY

It should not be necessary to recommend that an analysis of drafting instructions should include an assessment of the practicality of the scheme set out in those instructions. Nevertheless, experience confirms the widespread existence of an illusion that to legislate in respect of a problem is of itself in some way to meet that problem, as if legislation amounted in some mystical way to action instead of amounting only to a legal framework for action. The magic of words is indeed wondrous. It is not unknown for sponsors of legislation to be more interested in pushing for rapid legislation than in considering the capacity of the proposed legislation to be administered effectively and equitably.

15 Barwick CJ in *Barton v Commonwealth of Australia* (1974) 48 ALJR 161 at 164. See also B. S. Markesinis, 'The Royal Prerogative Re-visited' [1973] CLJ 287.

A drafter needs at this early stage to study most rigorously the practical aspects of the legislation proposed and be satisfied that the scheme will work, that the machinery proposed is practical and that the legislation will be capable of enforcement. This last question is one the drafter will have to come back to when drafting the penal provisions. At that stage, if it should arise that an offence is to be created which is patently incapable of proof, this must be strenuously resisted.

Stage 3—Design

After gaining an understanding of the proposals and assessing their implications in relation to existing law, the drafter reaches the design or planning stage.

The first step is to consider whether further legislation is in fact necessary or whether the desired ends might not be capable of achievement wholly or in part either by administrative means or under existing legislation. If legislation is enacted that is not needed, that is a clear waste of time and therefore money and swells the volume of the statute book unnecessarily. In particular, proposals to confer statutory powers on Ministers or officials require scrutiny because it may be that those powers, or some of them, may already exist under the common law or possibly under other statutes.[16] Needless legislation must be discouraged. Lord Radcliffe once pointed out—

> The respect for law, without which it will certainly never be readily obeyed, cannot survive the spectacle of its continual making and remaking before our eyes. Human nature is not so constituted.[17]

If a new statute is necessary, it is essential that its structure should be designed before textual drafting begins. The principal purpose is to design a structure that facilitates communication of the content at the same time as it achieves the objects of the instructions. The design stage should be regarded as an opportunity to look at the material as a whole, to weigh up the relative importance of topics, to bring together in the mind those elements that are related, and to consider how the material can best be presented. It should be remembered that a court may attach some weight to the structure in construing an Act.[18]

An outline or framework should first be prepared so that the drafter can visualise the shape and broad contents of the finished product. There is no settled practice as to the degree of particularity with which form and substance should be sketched at this stage, but experience will guide each drafter as to the procedure he or she finds most helpful. Consideration of what is to go into the Bill may bring to light a number of matters that the drafter believes should not go into it. It is useful to make a note of these to ensure they are kept in mind and where necessary discussed with the instructing officer. To go into too much detail may tend to obscure the fundamental structure of the Bill and make the projection of a logical sequence more difficult. Time spent on designing a structure is time well spent. A sound structure lays the foundation for a draft that is understandable.

Once the drafter is satisfied with the basic outline, it is desirable in most cases to invite the instructing officer to consider it. This may avoid the need for change at an unnecessarily late stage when change is inconvenient. Of course, the outline

16 See Departmental Statutes, a report of the Legislation Advisory Committee (New Zealand) (1989).
17 Lord Radcliffe, 'Some Reflections on Law and Lawyers', 10 CLJ 361 at p366.
18 See *R v Huntingdon District Council, ex p Cowan* [1984] 1 WLR 501 at 508.

must be regarded only as provisional when first produced because the design of a legislative scheme is a continuous process. As the draft is developed and new elements are added and others discarded and as the drafter gains better insight into the material and the relative importance of various aspects of the text, so the initial structure of the Bill must be kept under review and be changed from time to time if that will assist communication.

The preliminary design of a statute must take into account four important factors.

First and foremost, the design must aim at the greatest level of simplicity that is compatible with the achievement of the objects of the proposed legislation. Unnecessary concepts should not be created. If complex structures are essential, they should be designed and presented as simply as possible with the interests of users in mind.

Secondly, conventional practice as to the position in the statute to be occupied by various formal technical provisions must be adhered to. The short title, commencement, application, definitions, interpretation, repeal and savings provisions should be arranged consistently in accordance with the practice of the jurisdiction.[19]

Thirdly, the drafter must recall Lord Thring's famous aphorism that 'bills are made to pass, as razors are made to sell'.[20] In other words, if the policy is controversial, the drafter must recognise political realities and be prepared to compromise over the arrangement of the material. In such a case, an early opportunity should be sought to consult with the Minister who is to be responsible for the Bill in the legislature. He or she will certainly seek to present the controversial policy to the legislature in the way that is anticipated to be the most acceptable politically and the Minister may have strong views as to the necessity for the Bill to accord with the proposed manner and order of presentation. There may have to be a compromise between the order most conducive to successful debate and that most conducive to easy communication and administrative convenience. In the design of controversial legislation, a loose construction should be favoured and, so far as is practical, the scheme should anticipate possible amendments or excisions. Cross-references that are not essential should be avoided.

Fourthly, a new separate statute should not be contemplated if the proposed legislation coheres with an existing statute. In this case a new Part of that statute should be considered. The statute law on a subject should form a coherent whole not an untidy, dissipated mess.

In relation to the conflicting needs of legislators and ultimate users of legislation, the Renton Report recommends that 'in principle the interests of the ultimate users should always have priority over those of the legislators: a Bill, which serves a merely temporary purpose, should always be regarded primarily as a future Act, and should be drafted and arranged with this object in view'.[21]

THE DESIGN OF LEGISLATION NOT DIRECTLY AMENDING IN CHARACTER

Where the proposed legislation does not directly amend other legislation, except consequentially, a start is best made by preparing in precis or heading form a

19 See p190.

20 See Sir George Engle, '"Bills are made to pass as razors are made to sell": practical constraints in the preparation of legislation' [1983] Stat LR 7.

21 Renton Report, para 10.3.

statement of the basic objectives and principles to be contained in the legislation and then a statement of the principal means devised for the attainment of those objectives and principles.

At this early stage it is necessary to consider whether the structure of the legislation is likely to benefit from a formal division into Parts.[22]

The next stage is to develop this statement of headings by taking each topic and planning the number and content of clauses considered necessary to deal with that topic adequately. This development process will certainly prove incomplete and subject to modification but it is none the less valuable. No drafting should yet be attempted but a note, in the style of a section heading or marginal note, should be used to describe each proposed clause.

Once each topic is developed in this way, the drafter is able to envisage more accurately the range of the statute and can then turn to reflect on the design of the structure of the Bill.

Order is in part governed by convention, but so far as the substantive provisions are concerned, the traditional rule is that the main principles to be established by the law should be laid down first. It is convenient that the legislature should first debate the main principles before turning its attention to the administration of those principles and the practices and procedures to be followed for that purpose.[23] The same rule is of equal application to each Part in cases where a Bill is divided into numbered Parts.

Sequence should be logical. A series of procedural steps should be expressed in the order of occurrence. The general should precede the particular, the permanent should appear before the temporary and the more important before the less important.

However, although this rule appears logical and practical, circumstances may arise where the importance of the authority which is to administer the main principles is such that it is desirable for the establishment or designation of that authority to precede the statement of principle. The two are often inextricably entangled politically and indeed the acceptability of the principle to the legislature may depend on the acceptability of the authority and the machinery proposed for administration. It has become common practice therefore for provisions establishing a council or other statutory body to precede the statement of the functions of the body even though those functions may constitute the underlying principle of the Bill.[24]

Although special circumstances in some cases may justify the positioning of administrative provisions before the basic statement of principle, this derogates in no way from the general desirability of presenting provisions of principle as early in the Bill as is practical and in as prominent a position as possible. That which is basic should not be planted deep in a jungle of comparatively minor powers and duties or procedures. Division into Parts or the use of headings may be used to achieve this prominence.

The use of schedules can make a substantial contribution to effective communication by clearing away procedural and other distinct groups of provisions to schedules in order to present the main provisions of the statute more prominently and in a less cluttered package.[25] Care must be taken with the selection of material that may suitably be placed in a schedule, but no great difficulty will

22 As to division into Parts, see p177.
23 See Sir Courtenay Ilbert, *Legislative Methods and Forms*, p245.
24 But the position may be assisted by removing machinery and procedural provisions relating to the body to a schedule. See p253.
25 As to the drafting of schedules, see p400.

be encountered if the purpose of scheduling is kept in mind. The general approach should be that matters of a subsidiary or consequential nature are suitable. Examples are: procedural provisions for an appeal and transitional and savings provisions.

Also to be considered at this stage is what matters of detail or procedure, if any, should be kept on one side as more suitable for subordinate legislation.

A further point relevant to the design of a statute is the rule that distinct and different matters should not be combined in one Act.[26] Although a proposed law may cover a broad canvas and perhaps may require consequential amendments to a considerable number of other Acts, the nature of its subject-matter should give it a fundamental coherence. For example, although ships and motor-cars are both means of transport, the connection is too tenuous to support the combination of provisions as to each in one Transport Act. In such a case it is much more convenient to have separate Acts. It is not always easy to draw the line, but on the other side of it, and thus marginally acceptable, is an annual Finance Act amending a variety of unconnected revenue laws.

It is of still greater importance not to include in one Act, as was frequently done in old Acts, matters that have no connection at all with one another. One exception to this rule, which would appear on balance to justify its eccentricity, is a Bill which sweeps up together a number of miscellaneous minor amendments of a technical and non-controversial nature in an effort to tidy up the autumnal and blighted leaves of the statute book. Miscellaneous repeals of obsolete laws may be treated in the same way.

THE DESIGN OF AMENDING LEGISLATION[27]

The design of amending legislation depends on which technique of amendment is followed. Three courses of action are generally open.

- The amending law may amend the principal law directly by deletions, substitutions and insertions. For all practical purposes an amending law of this type loses its separate identity on enactment.
- The new law may repeal and replace the old—consolidating new provisions, amended versions of old provisions and re-enacted unamended old provisions.
- The new law may stand separately on enactment, but may be expressed to be construed and perhaps cited as one with the law it amends.

Political considerations as well as technical considerations are relevant to the choice of which technique is to be adopted in a particular case. Where the content of the legislation is sensitive politically, the drafter must be prepared to be flexible and should consult before beginning to draft. In the absence of special considerations, the first two methods are preferable to the third, but for a consideration of different techniques of amendment see Chapter 18.

The implementation of a legislative proposal may require the amendment of more than one Act. In such a case each Act could be amended by a separate amending Act, but if the proposal has one single purpose it is convenient and results

26 Reference to English practice is made in C. Hand, 'Drafting with the user in mind—a look at legislation in 1982–83' [1983] Stat LR 166.

27 As to amending legislation, see p403.

All that can be said is that there is a need for each draft produced to be subjected to searching scrutiny and that this scrutiny and the resulting redrafting and polishing lead to a number of revisions being produced until the drafter feels unable to improve the product. If time permits the draft to be put away for a time before returning to it, so much the better, for the advantages that derive from an opportunity to see it afresh are very great.

In the production of the first draft and in the earlier stages of developing the draft, the emphasis is on essential matters of substance rather than form and the drafter has foremost in the mind the need to give effect accurately to the drafting instructions. Work at this stage is, of necessity, roughly hewn and is likely to be awkward. The drafter is preoccupied with the choice of words best suited to his or her purposes and so sentence structures are likely to be capable of improvement. The draft does not read well at this stage even if sentences are syntactically acceptable. There are very probably inconsistencies between various provisions of the draft and unsteadiness of language.

Such faults are to be expected. It is important to concentrate first on achieving a design and an approach both at the level of the Bill and the clause that will answer all the needs of the drafting instructions with precision and clarity.

As work proceeds, the structure becomes more taut and less flabby as increasing attention is paid to the relationship of each provision to its fellows and the role of each as part of a coherent whole. As the draft develops, there is a shift of emphasis from the prime object of accurately achieving the legislative intention to the subsidiary but very important object of achieving that intention with the greatest degree of clarity possible. It is a matter of converting what is comprehensible and clear to the drafter to the shape and form most easily and unequivocally comprehensible to the reader. The process is usually described as polishing the draft but it is much more than that.

The draft and successive developments of the draft will be submitted to the instructing officer for study and comments. Each draft is likely to be accompanied by a list of queries and comments that will call for a response from the instructing officer. The drafting process often makes a positive contribution to the development of policy as the experience and skill of the drafter disclose weaknesses or problems in the proposals or matters that have not been but should be dealt with. The development of a close and positive liaison between the drafter and the instructing officer is an important necessity if the inadequacies and ambiguities of both the drafting instructions and the draft are to be detected and remedied. Changes to the drafting instructions are an irritation that all drafters must become accustomed to and accept with good humour as part of the drafter's lot.

The indirect and consequential effects of alterations to instructions and alterations to the draft on the drafter's own initiative are easily overlooked. The use of language or the cross-references and numbering in areas of the Bill not directly affected by the changes may require attention. For example, a change in a definition for the purposes of one Part of a Bill may mean that the definition is no longer suitable for another Part. Major changes or extensions to the drafting instructions may also have a detrimental impact on the structure developed at the design stage. If necessary the structural design must be revisited to make sure that an appropriate balance and emphasis is maintained.

THE USE OF DEFINITIONS

The kind of definition commonly found in legislation explicitly assigns a meaning to a word, phrase or other symbol and stipulates that throughout the law, or some

specified part of the law, that symbol is to be construed as bearing the meaning assigned to it. Definition of this kind may be classified as stipulative definition and contrasts with lexical definition which is concerned with actual usage at some time in the past by some group of people.[1] Stipulative definition is not bound by past usage or the limits which conventional usage has placed on the term defined. It stipulates for the future, free from the restrictions of the past.

Freedom to stipulate definitions at will is, however, largely theoretical because definition in legislation is only useful so long as it serves the essential purposes of determining and communicating the legislation. To serve the purpose of easy communication, a definition must follow customary usage as closely as possible. A definition which places a completely forced and artificial meaning on a term is a bad definition.

The functions of definition

In legislation, definition performs two functions:

1. the avoidance of ambiguities,
2. the avoidance, by means of abbreviation, of tedious repetition.

The first and principal function is to shear away some of the vagueness and ambiguity which would otherwise surround the term defined. The process is one of delineation, the drawing of boundaries around the stipulated meaning of the term. Definitions having as their purpose the avoidance of ambiguity are of three broad classes:

- delimiting
- extending
- narrowing.

Delimiting definitions

A delimiting definition determines completely the limits of the significance to be attached to the term defined. The purpose is not to alter conventional significances but to provide a desirable degree of definiteness. This form of definition may be of value not only in the case of vague words with a core of essential meaning and blurred edges of fringe meaning but also in the case of ambiguous words having a number of different meanings.

Difficulties of classification may often be reduced in scope by the use of delimiting definitions. For example

> **employment agent** means a person who, whether for payment or not, assists persons to find employment or other work or assists employers to find employees or workers;
>
> **vessel** means any kind of vessel used or capable of being used in navigation by water, however propelled or moved, and includes a barge, lighter or floating restaurant.

Delimiting definitions may, without deviating from the customary meaning of a term, be used to relate a word of general significance to the smaller world of the subject-matter of the legislation. For example

1 See Richard Robinson, *Definition*, p80.

operator, in relation to an aircraft at a particular time, means the person who at that time has the management of the aircraft;

private practice, in relation to a nurse or midwife, means practice as a nurse or midwife otherwise than as an employee of the Government;

company means a company incorporated in Hong Kong.

EXTENDING DEFINITIONS

An extending definition stipulates for the defined term a meaning that in some respect goes beyond the meaning or meanings conveyed in common usage by the term. Such a definition usually adds to the conventional meaning an element of assigned meaning. For example

person includes a corporation sole and also a body of persons whether corporate or unincorporate;

constable includes a police officer of any rank;

wall includes a door, window or other structure dividing a lot from another lot;

animal includes a bird.

NARROWING DEFINITIONS

A definition of this type stipulates a meaning narrower in some respect than the meaning commonly conveyed by the term. For example

aircraft means any aircraft that is not a military aircraft;

animals means cattle and horses;

bank means a body corporate specified in Schedule 1;

money means currency notes;

motor vehicle does not include a taxi;

milk does not include condensed milk.

The second function of definition in legislation is to abbreviate a group of words by stipulating that one word or phrase is to signify the longer group of words. Such definitions are sometimes referred to as **labelling definitions**.[2] The purpose of the device is to avoid cumbrous and unnecessary repetition and thus promote easier understanding by reducing the quantity of verbal symbols required to convey the intended meaning. Many definitions of this type are simple, and to some extent self-evident, but can nevertheless be useful. On the other hand, care is necessary to avoid including definitions where the meaning of the term defined is obvious and unambiguous.[3] The following definitions are likely to be helpful:

2 See Robert C Dick, *Legal Drafting* (2nd edn) p78.

3 But see p90. Definitions of this kind may be unnecessary if the meaning of the term is clear and unambiguous in the context.

Board means the Mines Occupational Health and Safety Advisory Board established under section 5;

United Kingdom means the United Kingdom of Great Britain and Northern Ireland;

repealed Acts means the Rice Pudding Act 1983 and the Cheesecake Act 1986 both of which are repealed by section 7;

CALA means the Civil Aviation Licensing Authority.

A useful device is the manufacture of a phrase to denote a concept which requires some length to express it adequately. Such a phrase should be as pertinent and descriptive as possible so that although the words used as a label do not amount to an analysis of the substance of the concept defined, they do indicate its content in a general way. For example

authorised officer, in relation to a council, means an officer of the council authorised by resolution of the council to act in a matter or matters of a kind specified in the resolution;

supervisory authority means a person appointed under section 6 by the Minister upon the recommendation of the Council to be a supervisory authority over any registered nurse, registered midwife, enrolled nurse or enrolled midwife, wherever practising.

However, artificiality is always to be embraced circumspectly. Complex phrases such as 'branch equivalent tax account person' are unattractive even if defined.

Drafting definitions

A definition may be of great value but, on the other hand, if it has no clear function it may only add to the difficulties of construction.[4] Before drafting a definition, therefore, the drafter must be quite sure of the intended purpose of the definition. Is it intended to remove ambiguity or to abbreviate? If the definition is to remove ambiguity, the next question must be—will the definition achieve this

- by delimiting the commonly accepted meaning, or one of them in case of a word of multiple meaning; or
- by extending common meaning; or
- by narrowing common meaning?

It is as well if the drafter settles these questions before beginning to draft. It is always an advantage to know what one is trying to do before beginning to do it.

The word or expression to be defined should begin the definition and should be identified clearly. Many jurisdictions do this by means of inverted commas but printing the term in bold face without the use of inverted commas is an effective alternative that is followed in this text and recommended. Inverted commas do no more than clutter the page and are unnecessary so long as the word or expression is printed in a manner that distinguishes it sufficiently. One possibility is to print the defined term in bold letters and italics. The word or expression should not be encumbered by any prefixed word such as 'the' or 'to' or 'the term' or 'the

4 *Robinson*, p80.

expression'. Unless it ordinarily begins with a capital letter it should not be given one. Immediately after the subject of the definition should follow the verb of stipulation, generally 'means' or 'includes', and then should follow the stipulated meaning.

'Means' is appropriate where the stipulated meaning is expressed in a complete form and no part of the intended meaning is omitted. The significance to be attached by the reader to the word defined is limited to the stipulated meaning. 'Means' may be appropriate in delimiting, extending or narrowing definitions. The vital element is that the definition must give a complete meaning.

'Includes' is appropriate only where the expression of the stipulated meaning is incomplete and part only of the intended meaning is expressed. 'Includes' may be appropriate for an extending definition. When used negatively, 'includes' may be appropriate for a narrowing definition.

The distinction between 'means' and 'includes' definitions is illustrated by the two definitions following:

> **horticultural produce** means vegetables, fruits, flowers or plants;
>
> **horticultural produce** includes vegetables and fruits.

The expression 'includes only' used to stipulate a complete meaning is an objectionable circumlocution for 'means' and should not be used. Equally objectionable is the expression 'shall mean'. It is not uncommon to find a definition introduced by 'includes' which nevertheless appears to be complete and comprehensive and this is usually a case of the drafter seeking to keep the door slightly ajar lest something has been omitted through an oversight. Generally the door would be better shut. The following is an example of this kind of cautionary definition:

> **minerals** includes all minerals, metals, coal, oil, clay, stone, gravel, sand, precious stones, and water; and also includes geothermal energy within the meaning of the Geothermal Energy Act 1953 and petroleum within the meaning of the Petroleum Act 1937.

Stipulation of an extended meaning and part only of the conventional meaning in a definition introduced by 'includes' may at worst induce an unintended interpretation of the stipulated meaning as being complete. At the very least it is likely to cause readers to waste time pondering whether the meaning is or is not complete.

Occasionally a definition is expressed negatively and this practice is acceptable. For example

> **mineral** does not include natural gas or mineral oil in a free state.
>
> **plant** does not include a plant that is declared to be a noxious weed under the Noxious Weeds Act 1990.

Complexities in the intended stipulation may require a compound definition involving more than one verb of stipulation. Such a definition may, but of course need not, include a negative provision. For example

> **aircraft** means a machine or craft that can derive support in the atmosphere from the reactions of the air or from buoyancy but does not include an aircushion vehicle.
>
> *Liquid Fuel Emergency Act 1984* [Aust] s3(1).

fishing vessel means a vessel used for catching fish, and other living resources of the sea or the seabed for commercial purposes but excludes a vessel engaged solely in harvesting or transporting aquatic plants.

The expression 'means and includes' should not be used because complete and incomplete meaning cannot be stipulated at one and the same time. However, in certain circumstances, the first clause of a compound definition may be introduced by 'means' and a further clause may begin with 'includes'. This is only proper when the second clause is intended to remove a doubt arising from the meaning stipulated in the first clause. The 'includes' clause should not introduce matter beyond the reasonable scope of the 'means' clause or contradict the substance of the 'means' clause. Here are examples of correct usage:

nurse means a nurse for the sick and includes a medical nurse, surgical nurse, public health nurse and a psychiatric nurse.

Antarctica means the area south of the sixtieth parallel of south latitude, excluding any part of the high seas but including all ice shelves south of that parallel.

Antarctic Treaty Act 1967 [UK] s10(5).

aerodrome means any area of land or water designed, equipped, set apart or commonly used for affording facilities for the landing and departure of aircraft and includes any area or space, whether on the ground, on the roof of a building or elsewhere, which is designed, equipped or set apart for affording facilities for the landing and departure of aircraft capable of descending or climbing vertically.

Civil Aviation Act 1982 [UK] s105(1).

The following examples illustrate incorrect usage. In both cases the added-on meaning following 'includes' extends beyond what might reasonably be expected to be the complete meaning stipulated after 'means'.

railway means a railway or any portion of a railway for the public carriage of passengers, animals or goods and includes all ferries, ships, boats and craft used for the traffic of the railway.

carcase, in relation to an animal, means the dead body of the animal and includes every animal product derived from it.

The definition of a word may be limited in its application to a particular usage of the word. For example

owner, in relation to a vehicle that is the subject of a hiring agreement or hire purchase agreement, means the person in possession of the vehicle under that agreement.

address means

(a) in relation to a person other than a corporation, the last known residential or business address of the person;
(b) in relation to a corporation, the address of the registered office or principal place of business of the corporation or, where there is no such office or place, the address of the principal office or place of business of the corporation in the place in which it is incorporated;
(c) in relation to any real property, the postal address of the property.

relevant date, in relation to 1996 means 1 December, and in relation to every subsequent year means 1 November.

Ten practical rules for drafting definitions

Rule 1—A word or expression should be defined only if the definition will assist readers.

Inexperienced drafters are apt to define every term in sight but in some circumstances the definition does not achieve anything. For example, if an Act establishes one body only and that body has a chairperson, then there is little advantage in defining 'chairperson'. It will be obvious in the context that 'chairperson' means the chairperson of the body established. Definitions should not state what is obvious. The following definition is purposeless:

calendar year means a period from 1 January to 31 December.

Rule 2—A definition should not include substantive matter.

A reader expects a definition to stipulate a meaning and is entitled to assume it will do no more. The position is made worse where the definition is ambiguous and may or may not be construed so as to confer a power or impose a duty. For example

unlawful weapon includes any weapon or class of weapon that the President may declare by order published in the *Gazette* to be an unlawful weapon for the purposes of this Act.

managing director means the person appointed to be the managing director of the corporation by the Minister.

In the second example the provision is not adequate to empower the Minister to make the appointment. That power should be conferred explicitly in a substantive provision and a definition similar to the following might also be included:

managing director means the managing director of the corporation appointed by the Minister under section 7.

Rule 3—A definition should not stipulate an outrageous or extravagant meaning.

For example, readers may be misled or confused, or both, if 'table' were to be defined to include a 'chair' or 'fish' were to be defined to include a 'bird'. Artificiality is to be avoided.

An example of this kind of impropriety may be seen in the definition of 'railway' set out on page 149.

Rule 4—A definition should, if possible, be complete in itself.

An intricate too-clever interlocking web in which the content of definitions can only be understood by reference to other definitions is to be avoided. The reader should not have to dodge from definition to definition in order to comprehend a definition.

Rule 5—A definition should not indulge in avoidable and unjustifiable referential legislation.

This rule is one important aspect of the previous rule stipulating that a definition should if possible be complete in itself. It imposes a burden on readers to expect them to dart from one definition to another. The burden is patently greater if they must dart to other quite separate legislation to discover the meaning of a term defined. If a term is to be defined in the same way as it is already defined in another law, it is better as a general rule to repeat the text of the definition rather than to refer to it.

In some circumstances however, for example in the case of a technical definition in a related law, a reference to other legislation may be necessary and desirable. For example

> **gross tonnage** means gross tonnage of a vessel ascertained in accordance with Part 1 of Schedule 2 to the Shipping Act 1988.
>
> **veterinary surgeon** means a person for the time being licensed to practise as a veterinary surgeon under the Veterinary Surgeons Act 1949.
>
> **public service vehicle** has the same meaning as given in section 3 of the Public Passenger Vehicles Act 1991.

Rule 6—A term manufactured for the purposes of a definition should be as descriptive and helpful to readers as possible.

For example, if an Act is to provide for an authority to review applications that have been refused it would be preferable to use and define the term 'review authority' rather than 'authority' or 'prescribed authority'.

Rule 7—A definition of a term that is already defined in the interpretation legislation should not be included.

Contravention of this rule negates the purpose of interpretation legislation. The position is of course different if the term is required to carry a different meaning.

Rule 8—A definition need not state that it is to apply to grammatical variations and cognate expressions of the term defined.

In the absence of some indication to the contrary, it is surely sensible and indeed indisputable that the definition would apply.

For example, a definition of 'sale' need not declare that 'sells' has a corresponding meaning. Similarly a definition of 'public notice' would normally be applied to 'publicly notified'. In some jurisdictions, this rule has been expressed in interpretation legislation.[5]

Rule 9—A definition should define one word or expression only.

Multiple definitions make it more difficult for readers to find definitions. Definitions like the following should not be used:

5 For example, s5, Interpretation and General Clauses Ordinance [HK].

coastal ship and **ship** have the meanings given in the Merchant Shipping Act 1955.

Rule 10—A word or expression that is not used in an enactment should not be defined.

This rule is of course unashamedly obvious. However, it is not uncommon for alterations made in the course of the drafting process to remove a defined word from the text of the draft, thus depriving the definition of its reason for existence. This is a matter to be checked when the draft is complete.

Arrangement of definitions

As a general rule all definitions contained in an Act should be assembled where they may easily be found by the reader.[6]

A series of definitions should be introduced as follows:

> In this Act, unless the context otherwise requires
> *or*
> In this Act, unless the contrary intention appears
> *or*
> In this Act

The first two of the above forms are commonly used but 'In this Act' is sufficient for there is authority that a definition applies only if a contrary intention does not appear.[7]

A more recent development is the presentation of assembled definitions in a 'dictionary'. The dictionary may be presented as a schedule in which case, a section is included in the Act along the following lines:

> Schedule 1 contains a dictionary of words and expressions used in this Act.
> *or*
> Words and expressions that are used in this Act and defined in the dictionary in Schedule 3 have the meanings given them in the dictionary.

An alternative is for the dictionary to be presented at the end of the Act following the schedules. The claimed advantage for this practice is that users can always access the dictionary easily by turning to the end of the Act. A section in the Act is necessary similar to that which follows:

> In this Act the words and expressions defined in the Dictionary at the end of the Act have the meanings given to them in that Dictionary.

Each definition of a series should be placed in a separate paragraph and the paragraphs marshalled in alphabetical order. A definition should not be hidden away as it is in the definition of 'local authority' in the following example:

> Section 47 applies for the interpretation of this section; and in this section 'local authority' means a local authority within the meaning of the Local Government Act 1972.
> *Food Act 1984* [UK] s45(4).

6 Where to put the assembled definitions in an Act is discussed at pp191–192.
7 *Meux v Jacobs* (1875) LR 7 HL 481 at 493.

If a defined word is used only in one section, the definition may be presented in that section. The principal purpose of the section should be attended to first in the most prominent position in the section and so the definition is best presented as the final subsection of the section. A definition presented in the section to which it relates should also be referred to in the general assembly of definitions, whether definitions are presented in a section or in a dictionary in a schedule. The assembly of definitions is of most use to readers if every term defined anywhere in an Act is either defined or referred to in that position. A satisfactory reference is—

> **confidential information** is defined in section 27(3).
> *or*
> **confidential information** has the meaning given in section 27(3).

If a defined word is used in two sections, the definition should be placed in the general series of definitions. It should not be placed in one of the two sections in the following way:

> In this section and in section 24, **hazard** means ... .

If a defined word is used only in one Part, the question arises whether the definition should be presented in the general assembly of definitions or in that Part with other definitions that relate only to that Part. To some extent, the balance of advantage should depend on the context but generally preference should be given to keeping all definitions together.

Where a definition is limited in its application to a section or Part, it is important to determine whether the word is used elsewhere in the Act, and if so whether in the same sense. If a word is used in different senses in different parts of an Act, a compound definition may be necessary. For example

> **Minister** means
> (a) except in section 27, the Minister of Agriculture; and
> (b) in section 27, the Minister of Finance.

In considering the arrangement of definitions, the drafter must be primarily concerned with ease of communication. To achieve this, the pepper pot approach must be avoided; it produces a muddled appearance and the scope of the definitions is difficult to see quickly.

The pepper pot approach may be seen in very many United Kingdom Acts. An interesting example is the Housing Act 1985 which contains a number of sections, each of which lists in index form references to the definitions and explanations found in the Part in which that section is found. This technique is valuable in the circumstances but is no substitute for better and more consistent arrangement of definitions.

The ordinary reader of statutes (if such there be) may easily overlook definitions in the course of struggling through a legislative forest and there is a strong case for introducing definition signals which would distinguish a word subject to definition. The Renton Report (para 11.18) suggests that a marginal reference might be better than a distinctive type. The Victorian Law Reform Commission was attracted to the printing of the symbol whenever a defined term was used. The Law Commission in New Zealand recommends the use of a footnote beneath each section using a defined term.[8] How best to draw a reader's attention to a

8 See p162

relevant definition may be the subject of disagreement. The desirability of doing so can hardly be disputed.

Definition dangers

The supreme rule of stipulation, according to an authority on definition, is to stipulate as little as possible.[9] This rule applies particularly, but not exclusively, to stipulations which extend or narrow conventional usage. An unnecessary definition wastes the reader's time.

It may do more than this. It may confuse or introduce an ambiguity. Lord Reid's approach to definitions is cautionary:

> No doubt a statute may contain a definition—which incidentally often creates more problems than it solves.[10]

It should not be assumed that every technical, scientific or similar term of art needs to be defined. The meaning may be unambiguous and well understood without a definition. Definition is always a risky business.

In the first place, having stipulated a meaning for a word it is extraordinarily, almost uncannily, difficult to use it only in that sense. At the time the definition is stipulated for a particular purpose, instances when the word might be used in another sense are not contemplated. However, inconsistency in the use of language is one of the most serious pitfalls in the drafting of legislation and great emphasis must be placed on the necessity to check and check again that words are used only as they are defined.

A second difficulty with definitions is that they tend to deceive or mislead the reader, particularly in lengthy legislation. Unless a procedure for sign-posting is adopted, a definition is easily overlooked or forgotten and if it stipulates an artificial meaning the reader will very probably gain quite the wrong impression on a first reading. Communication is likely to fail.

Another risk must also be mentioned. Definition in legislation uses words to define words. Despite the admirable purpose of shearing away ambiguities, it is not impossible that a careless definition will have precisely the opposite effect and may serve only to add further problems of vagueness and ambiguity arising from the words used in the definition. A definition which equates one term with another of like imprecision doubles the difficulties. There may be two problems of classification instead of one.

THE USE OF PURPOSE PROVISIONS

The functions of purpose provisions

Now that a purposive approach to statutory construction is routinely taken by the courts in many jurisdictions, there is an increased obligation on drafters to make the aim and object of legislation clear on the face of it. The readiness of courts in some jurisdictions to look at *Hansard* and other legislative materials increases the need for drafters to make the purposes of legislation clear in the legislation itself.[11] A clear statement of the overall purpose of an Act facilitates the communication

9 Richard Robinson, *Definition*, p80.
10 See *Brutus v Cozens* [1972] 3 WLR 521 at 525.
11 See *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

of the detailed provisions that follow. A reader who is aware of the objects that a law is intended to achieve is better able to comprehend the means by which those objects are pursued. An understanding of the totality of what a law is seeking to do helps a reader to discern the significance of the parts of the law both in relation to the law as a whole and in relation to one another.

A purpose provision establishes a context clarifying the scope and intended effect of the law. It illuminates the principles on which the law is based, whether those principles are explicitly stated in the law or not, and it provides a guide for the interpretation of provisions where there is doubt or ambiguity.

Sir William Dale has described the purpose of purpose provisions in this way:

> An enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the mind of the legislator, provides guidance to the Executive, explains the legislation to the public, and assists the courts when in doubt about the application of some specific provision.[12]

A purpose provision usually declares the purpose of the whole Act, but in some contexts it may achieve greater usefulness if it is more limited in scope and refers only to the purpose of a Part, a section, or some other specified element of the law. A purpose clause that relates to an identified element of an Act has the advantage of a capacity for greater particularity and its content can be more clearly defined and informative than one relating to the whole Act. Professor Reed Dickerson has written 'the most useful [purpose] clauses are those introducing particular sentences, which offer the advantage of focused specificity'.[13] Greater specificity can reduce the level of vagueness that depreciates the value of many purpose provisions.

The experience of many drafters has been such that they are not great enthusiasts for purpose provisions. One reason is that it is extremely difficult to draft a really useful purpose provision. There is always a tension between generalities and particularities. Certainly, it is very easy to produce a string of rather grand phrases of the kind that would fit well into a party policy document or amount to sanctimonious inanity. It is also easy to err by drafting a purpose provision that goes too far and extends beyond the substance of the provisions of the law. In such circumstances the law does not deliver what the purpose provision promises. It is not easy to compress into few words a summation of the problems sought to be addressed by legislation and the remedy prescribed. Another argument that has been put forward in criticism of purpose provisions is that the purposes of a well-drafted Act need to be and are apparent from the substantive provisions themselves without the need for a specific purpose clause and the inclusion of such a clause will do no more than introduce unnecessary and possibly inconsistent and confusing words. Yet another criticism is that in some cases the aims of a law are so extensive or diffuse that no useful summary of purpose is possible.

These arguments have some validity and cannot be ignored. They are valuable in drawing attention to the fact that purpose provisions can do harm and need to be skilfully and carefully drafted. They should be included only in circumstances where the drafter has an understanding of the purpose and likely effect of the purpose provision. Unless the provision is in such terms that it will be of assistance both in communicating the message of the law and in relation to the interpretation

12 [1988] Stat LR 15.

13 Reed Dickerson, 'Statutory Interpretation in America: Dipping into Legislative History—II' [1984] Stat LR 141 at 153.

of any provisions of the Act that may turn out to be ambiguous, it will be at best redundant and at worst misleading.

On balance, it is recommended that a purpose provision should be included in every Act unless the drafter considers such a provision will not be of assistance. Not every Act requires such a provision. For example, a purpose provision would serve no useful purpose in the very common case of an Act that textually amends another Act in a variety of unrelated respects.

Like all other provisions, purpose provisions can be amended or repealed. The adequacy of any existing purpose provision must be considered as part of every exercise involving the textual amendment of an Act.

Five rules for drafting purpose provisions

Rule 1—A purpose provision should be drafted early in the drafting process.

Compliance with this rule assists both drafters and policy makers to refine and clarify their objectives. As far as the drafter is concerned, it is desirable that the provisions implementing the purpose of the Bill should be drafted in the light of the purpose clause rather than the other way around. Early drafting of the purpose clause helps the drafter to keep the objectives of the exercise in mind as the draft is composed and developed. A kind of benchmark is established against which the draft can be measured and tested.

Analysis of drafting instructions may reveal some degree of inconsistency so that the draft purpose clause requires a review. Alternatively, there may be a need to review the drafting instructions in the light of the acknowledged purpose of the legislation.

Rule 2—A purpose provision must state accurately and unambiguously the purpose and objectives of the provisions to which it relates.

Purpose provisions should be that and nothing else. The means of attaining the objectives are distinguishable from the objectives themselves and, in most circumstances, a purpose clause should not deal with the means of attaining those objectives. There may be circumstances where the means are so closely entwined with the aims from the policy point of view that it is justifiable to include them in a purpose clause but this is unusual. The following provision is justifiable, for example:

> The purpose of this Act is to protect the health of young persons by restricting their access to tobacco in light of the risks associated with the use of tobacco.
>
> *Tobacco Sales to Young Persons Act* (1993) [Can].

Similarly, the principles on which a law is to be based are generally distinguishable from the purposes and should not be included in the purpose clause. It may be desirable to state those principles in the legislation separately. An example of this practice is seen in the following two sections:

> **Purpose of Act**
>
> The purpose of this Act is to ensure that the scenery, natural features, and eco-systems of the Protected Area that should be protected and conserved by reason of their distinctive quality, beauty, typicality, or uniqueness are conserved.

Principles

The Protected Area shall be administered and maintained so as to ensure that, so far as is practicable,

(a) the area, and its scenery, natural features, and eco-systems are protected and conserved in their natural state:

(b) the value the area has in providing natural habitats is maintained:

(c) members of the public have access to the area for recreational purposes and for the purpose of studying, observing, and recording any marine life in its natural habitat:

(d) the provisions of any relevant management plan for the time being in force under the Fisheries Act 1983 or the Conservation Act 1987 are complied with.

Sugar Loaf Islands Marine Protected Area Act 1991 [NZ] ss3,4.

Rule 3—The language of a purpose provision must be consistent with the language of the substantive provisions of the Act.

The heady scent of lofty politically-charged sentiments must not waft the drafter's feet above the ground so that words are used in the purpose clause that are not followed in the later text. The product must not be oversold.

Rule 4—The specificity of a purpose provision must be clearly stated and appropriate.

It may be more helpful to both legislators and later users to draft one or more purpose clauses with greater specificity than just one clause purporting, perhaps inaccurately, to refer to the whole Act. The advantages of greater particularity affecting a narrower context are particularly apparent in complex and lengthy legislation.

Rule 5—A purpose provision and the later text of a law should not say the same thing in different words.

This rule is easily adhered to if the drafter keeps in mind the essential distinction between purpose provisions and those that follow. It may be simply stated as the distinction between 'why' and 'what'. The purpose provision states 'why' the law is to be enacted while the remainder of the text which implements the purpose states 'what' the law is.

Examples of purpose provisions

Here are several examples of purpose provisions relating to all of an Act:

The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 [Aust] s4.

The purposes of this Act are

(a) to state principles and rules for the interpretation of legislation; and

(b) to shorten legislation by avoiding the need for repetition; and

(c) to promote consistency in the language and form of legislation.

The purposes of this Act are to

(a) facilitate the interpretation of statutory instruments; and
(b) facilitate improvement in the presentation of statutory instruments; and
(c) rationalise notification, publication, tabling and disallowance requirements for subordinate legislation; and
(d) generally ensure that Queensland subordinate legislation is of the highest standard.

Statutory Instruments Act 1992 [Q] s2.

The objects of this Act are

(a) to eliminate, so far as is possible, discrimination against persons on the ground of sex, marital status or pregnancy, race or religious or political conviction in the areas of work, accommodation, education, the provision of goods, facilities and services and the activities of clubs; and
(b) to eliminate, so far as is possible, sexual harassment in the workplace and in educational institutions and sexual harassment related to accommodation; and
(c) to promote recognition and acceptance within the community of the equality of men and women; and
(d) to promote recognition and acceptance within the community of the equality of persons of all races and of all persons regardless of their religious or political convictions.

Some of the most useful purpose provisions refer to Parts or other specified elements of an Act. For example:

The provisions of Schedule 2 shall have effect for the purpose of reducing statelessness.

British Nationality Act 1981 [UK] s36.

The purpose of this Part of this Act is to prevent, so far as is reasonably practicable, the detrimental effects of smoking on the health of any person who does not smoke, or who does not wish to smoke, inside any workplace or in certain public enclosed areas.

Smoke-free Environments Act 1990 [NZ] s4.

The purposes of this Part are

(a) to confer sufficient powers on the Commissioner to enable the Commissioner to obtain information that is necessary for the proper administration and enforcement of the Income Tax Act 1991 and the performance of the functions conferred on the Commissioner by other enactments; and
(b) to impose duties on taxpayers and other persons to make returns and other information available to the Commissioner and to maintain records that are necessary for such administration, enforcement and performance.

THE USE OF SUPPLEMENTARY AIDS[14]

Clear English and a logical and observable structure can contribute mightily to comprehensibility but they certainly cannot achieve the miracle of trouble-free communication and ease of use. It is not only complexity of subject-matter but

14 Supplementary aids have been the subject of considerable experimentation and development in Australia in the last decade. Refer particularly to Commonwealth, New South Wales and Queensland legislation.

also length that makes many laws difficult to use. Complicated processes and procedures are difficult to grasp quickly for most readers and the task becomes even more formidable when the practicalities of those processes or procedures depend on, and perhaps only make sense after reference to, various other parts of the statute.

Supplementary aids can provide potent assistance to make it easier for readers to find their way around and to use a statute. A word of caution is necessary. The pursuit of clarity and the desire to communicate successfully must not be permitted to cloud the fact that the actual text of the statute is and should always be recognised as being in a special and powerful position. Sir William Blackstone observed more than 200 years ago that 'An Act of Parliament is the exercise of the highest authority that this kingdom exercises on earth. It hath power to bind every subject in the land ...': nothing should be permitted to obscure this and, if supplementary aids are permitted to intrude, there is a danger that non-lawyers will confuse the significance of the aids with that of the text. For this reason, some experienced drafters believe that there is no place for supplementary aids within a statute. They point out that different users require different aids and argue that the text should not be encumbered by material that is of little value to many users.

Supplementary aids may or may not form part of the legislation and it is critical that drafters leave no possible doubt in this area. Some aids might be part of the legislation or not according to the manner and position in which they are presented. This obviously casts the primary responsibility on drafters to take care. If the aid is to form part of the law there is the added risk of creating an inconsistency with other textual provisions and influencing the interpretation in unforeseen and unwelcome ways.

The position of some aids may be dealt with in interpretation legislation. For example, section 14D of the Acts Interpretation Act 1954 [Q] states

> If an Act includes an example of the operation of a provision
> (a) the example is not exhaustive; and
> (b) the example does not limit, but may extend, the meaning of the provision; and
> (c) the example and the provision are to be read in the context of each other and the other provisions of the Act, but, if the example and the provision so read are inconsistent, the provision prevails.

Note the words that begin the above provision. It would, of course, be possible to present an example not as part of the Act but in the form of a non-statutory note. If interpretation legislation does not cover the technique proposed to be used, a particular provision may need to be included in the legislation itself. For example

> The notes that are subscribed to sections in this Act are explanatory notes and do not form part of the Act.
> *or*
> The examples that are contained in notes subscribed to provisions of this Act are explanatory notes and do not form part of the Act.

As part of every drafting exercise, a drafter should consider whether the complexity of the subject-matter of the draft or the sheer quantity of it is such that the communication of the text would benefit from supplementary assistance. It is difficult for a drafter who may have worked on a project for many weeks or even months to put himself or herself in the position of a first-time user or a non-legally trained user of the eventual law and it may be desirable to consult with

other persons to gauge objectively the desirability of providing supplementary aids of some kind. They may take one or more of the following forms:

- explanatory and signposting provisions
- other explanatory notes
- examples
- flow charts
- graphics including formulas, diagrams, pictures, maps, charts and graphs
- indexes.

Explanatory and sign-posting provisions

An axiom of legislative drafting is that draft legislation should have legal effect. Declaratory statements of intention or commitment to do something or adhere to some principles are better dealt with by other methods. But there is an important distinction between an Act that is legally unnecessary on the one hand and legally unnecessary provisions within an Act that is necessary on the other. In the latter case, provisions that, although not legally necessary themselves, illuminate provisions that do have legal effect are justifiable in many contexts and may be extremely valuable.

Explanatory or sign-posting provisions (the latter are sometimes referred to as road maps) may relate to the whole statute, a part of it or some lesser element. Their value is to provide an overview of the location of provisions and in some case their relationships. They may be presented

- as introductions to Parts (or other large elements, however designated)
- in the form of a section of the statute
- in table form either as a note or as part of the statute
- in note form.

An interesting example may be studied in the Local Government Act 1993 (NSW) which is both long and complex. The Act provides an explanatory introduction before each chapter which is intended to provide a bird's-eye view of the contents and the contexts of the chapter.[15] The same Act also contains several summaries of provisions to assist users to find their bearings.

An explanatory or sign-posting provision differs from a purpose provision and care is needed to apply the correct descriptive label as a section heading. Some drafters err in describing material that is explanatory in character as purpose provisions. The provision may nevertheless be useful even if sailing under false colours.

If the drafter decides that explanatory material would be helpful, the question arises whether an explanatory provision should be included within and as part of the statute or the material should be provided by way of a note that is not part of the law. In either case the note may incorporate any of the supplementary aids discussed below.

Here are a few examples of explanatory and sign-posting provisions or notes.

15 Because the Act is one of the longest in the NSW statute book, the Act has been structured in Chapters divided into Parts and Parts divided into Divisions. The extra layer is exceptional and only necessary in such a lengthy Act.

This Part
(a) provides for the assessment of taxable income after deducting from net income any loss carried forward from a prior income year; and
(b) enables losses from a prior period to be carried forward to subsequent income years; and
(c) restricts the extent to which certain losses may be offset.

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(1) This Part provides for listing the native species, ecological communities and threatening processes with which this Act is concerned.

(2) Division (1) provides for Schedules 1 to 3 to set out lists of native species, ecological communities and key threatening processes.

(3) Division (2) describes the procedure by which the Minister may amend the lists.

(4) Division 3 describes how the lists are to be made public.

Endangered Species Protection Act 1992 [Aust], s14.

NOTE: Section 13 should be read with the other provisions of Part 2 and in particular with
section 16 (which concerns the powers of inspectors to give directions); and
section 28 (provision of facilities for inspectors); and
section 30 (compliance with inspector's directions).

Outline of this Chapter

This Chapter is about ways in which evidence is adduced.
Part 2.1 is about adducing evidence from witnesses.
Part 2.2 is about adducing documentary evidence.
Part 2.3 is about adducing other forms of evidence.

Evidence Act 1994 [Aust] (Part 2).

Other explanatory notes

The provision of explanatory material in the form of notes presented beneath sections, at the end of an Act, as introductory notes beginning a Part, or as footnotes may make life significantly easier for users of the statute. It is suggested that notes about a section are best placed immediately after that section. If positioned as footnotes or endnotes, they are not immediately associated with the text to which they relate. On the other hand, a profusion of notes must not be permitted to distract readers from the text.[16] It is desirable that notes not forming part of an Act should be printed differently from the text of the Act. It is usual to use a slightly smaller font. A different typeface would highlight the distinction further. [17] A note should provide users with help by way of examples, explanations, information including material from external sources, or cross-references; it should not state the law. 'While the text of the Act should certainly not be lost in a rash of textual aids, if a note is helpful there is no reason why it should not appear in an Act ....'[18]

16 Notes were placed experimentally in a lined box in some New South Wales statutes but the practice has been discontinued because of the belief that the boxes gave notes too much prominence.
17 As recommended in the NSW working paper at 2.3.13.
18 See the Format of Legislation NZLC R 27, para 32.

Examples of information which may be usefully provided in a particular context are the Act's legislative history, cross-references to legislation in pari materia, references to law reform reports or other reports on which the Act is based, and internal cross-references. A particularly useful purpose that can be achieved by footnotes is to indicate the interrelationship between provisions in a way that does not complicate the text of the provisions themselves.

An example of a useful note of an internal cross-reference is a note beneath a section giving a right of appeal indicating a section stipulating the procedure for such an appeal. Another example is a note identifying sections containing the exceptions referred to in a provision that applies 'except where this Act provides otherwise'.

A possibility recommended by the Law Commission in New Zealand is the provision of notes beneath a provision referring to words used in that provision that are defined elsewhere in the Act or in interpretation legislation. A section and such a note might be in the following form:

> In proceedings for defamation, the defence known before the commencement of this Act as the defence of fair comment, shall, after the commencement, be known as the defence of honest opinion.
>
> ---
>
> Definitions: **defamation, fair comment,** s2; **commencement,** *Acts Interpretation Act 1924* s4.

There should be no doubt whether notes subscribed or otherwise related to a section form part of the statute for interpretative purposes. Notes of the kind described must be distinguished from material such as examples, flow charts, and other explanations which are intended to be part of the Act. In Queensland, the legal effect of footnotes is put beyond doubt by section 14(6) of the Interpretation Act 1954 which states

> A footnote to an Act or to a provision of an Act, and an endnote to an Act, are not part of the Act.

If an enactment contains a reference to another piece of legislation, it is helpful to the reader and therefore good practice to insert a note identifying the numerical reference to the legislation referred to. The numbering of statutes may itself be regulated by statute as is the case in the United Kingdom or it may be a matter of convention. In either case, the form adopted for marginal reference should be consistent, simple and unambiguous.

No useful purpose is served by enclosing the reference in brackets. Where the reference is to a Chapter number it should be thus—

> Cap 121 *not* (Cap 121) *or* (Chapter 121)

If the reference is to a numbered Act of a particular year, it should be shown

> 27 of 1968 *or* 1968 c 27 *not* (27 of 1968) *or* Cap 27 of 1968 *or* 1968 Chapter 27

If a subscribed note is inserted rather than a note placed in the margin, it could be as follows:

> Note: The Defamation Act 1965 is Cap 121.

Another worthwhile kind of marginal reference is found in English statutes. Where an Act is divided into Parts, a note is placed in the margin opposite the first line of each page indicating which Part of the Act is set out on that page. A similar note is used in respect of schedules. The Law Commission in New Zealand recommend an extension of this practice by the provision of additional information as headers to each page. The header on the page on the left would refer to the section number of the section first appearing on the page and an abbreviation of the title of the Act. The header on the right contains the Act number, the Part number and heading and the section number of the section last appearing on the page. For example, the header on the left might be—

s 21 DEFAMATION

The header on the right page might be

1992/105 PART 4 REMEDIES s26

It is suggested that the header on the left page should state the short title of the Act in full unless its length makes that impractical. If Parts of the Act are divided into Subparts, the header on the right page should also specify the relevant Subpart by number.

Examples

The use of examples is a tool for communication the value of which is being increasingly recognised. Examples are often included as part of an Act but they may be presented as explanatory notes not forming part of it. An easily understood example can provide an insight that is less easily communicated in a complex, technical provision. Examples are particularly useful in transforming difficult material to terms that are relevant to and easily understood by non-legally-trained users.[19]

Where an example is included in the statute, it can serve the additional function of making it clear that the circumstances described in the example do fall within the scope of the provision. In other words, the use of an example may remove a possible doubt. Note the Queensland provision referred to on page 159 which stresses the integration of the example and its provision by providing that the example and provision are to be read in the context of each other.

Work on an example also has a value to the drafter. It provides a benchmark against which the effectiveness of the provision to which the example relates can be tested. It is not uncommon for the example to disclose that the provision itself needs further development.

Examples of provisions incorporating examples follow:

> If a period of one month indicated in a written law begins on any date other than the first day of any of the 12 months of the calendar, it shall be reckoned from the date on which it is to begin to the date in the next month numerically corresponding, less one, or, if there is no corresponding date, to the last day of that month.
> *For example* a month beginning on 15 January ends on 14 February and a month beginning on 30 or 31 January ends on 28 February (or 29 February in a leap year).

19 See Lord Denning's support in *Escoigne Properties Ltd v IRC* [1958] AC 549 at 566–7.

Meat does not stop being meat because its nature is changed or it is mixed with another substance.

Examples of meat

1. Smallgoods.
2. Marinated meat, meat rissoles, meat sausages, schnitzels, shish kebabs, steak and kidney mix, stir-fry mix and veal cordon bleu.

Meat Industry Act 1993 [Q].

Here is an example in note form. It follows section 59 of the Evidence Act 1995 (Aust) which states the hearsay rule providing for the exclusion of hearsay evidence.

Note:

Example: D is the defendant in a sexual assault trial. W has made a statement to the police that X told W that X had seen D leave a night club with the victim shortly before the sexual assault is alleged to have occurred. Unless an exception to the hearsay rule applies, evidence of what X told W cannot be given at the trial.

Flow charts

The importance of devising a logical structure for an Act has been stressed.[20] One method of communicating the essence of that structure to readers is the use of a flow chart. A flow chart is 'particularly effective in explaining complicated procedural matters; in showing the interrelationships between different elements in a statute; in answering specific questions, especially those which relate to entitlements and liabilities; in reducing the amount of information which a user must remember at any one time; and in giving a quick overview of a statute.'[21]

Preparation of a flow chart can be a useful aid in developing a logical structure during the development stage of a draft. The chart can be a basis for checking the logic and the chronology of procedural steps included in the draft. (See opposite.)

Graphics including formulas, diagrams, pictures, maps, charts, and graphs

Legislation need not be restricted to words. If a concept can be explained or communicated effectively in some other straightforward and comprehensible way, that way is available. Formulas are often used successfully in tax legislation. Drafters who are more gifted than most mathematically must remember with compassion the failings of many of us by restricting formulas to those where the meaning is apparent. In simple cases, it may be helpful to express the variables in words rather than symbols. If this is not practical, as symbols for the variables use letters that are the initial letters of key words in the variables.

A map is often the best method of referring to a geographical area. Certainly this can be much clearer than a complicated and long description in words.

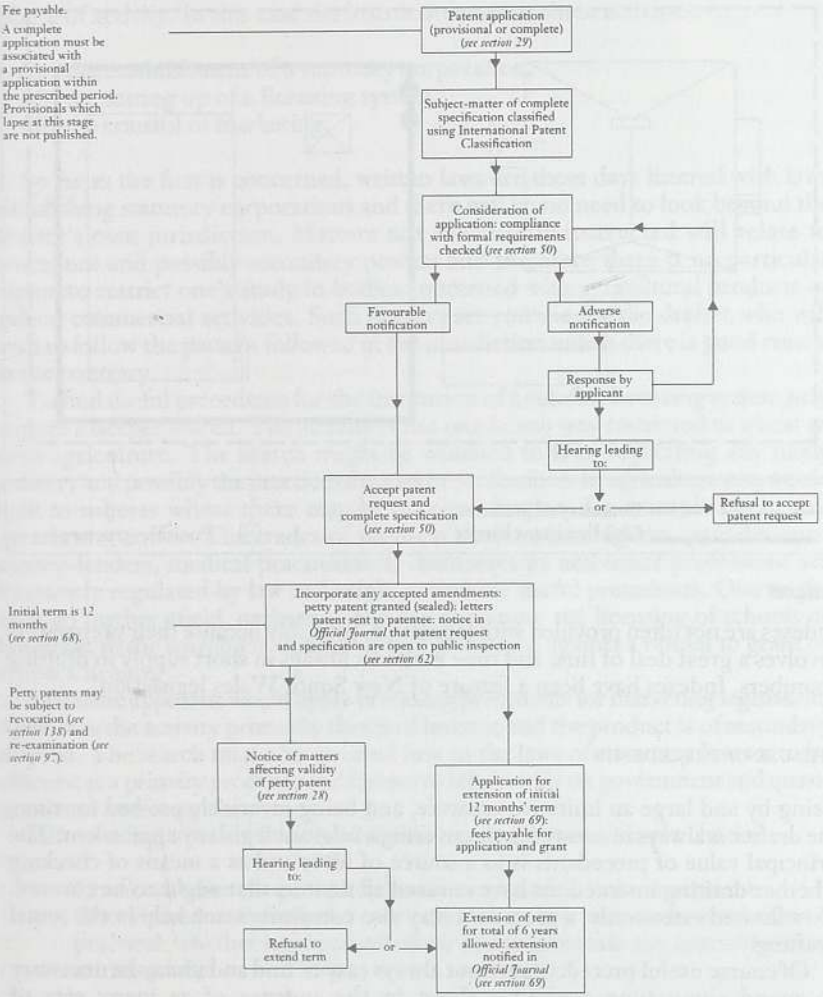
Diagrams can be effective tools for communication. An excellent example of their usefulness is found in the 7 diagrams in Schedule 1 of the Swimming Pools Act 1992 (NSW). Section 3 of the Act states

(3) The diagrams in Schedule 1 form part of this Act.

20 See p138.

21 Bullot, 'Legislation: Back to the Drawing Board!' (1993) 7 AULR 330, 337–341.

Flow chart example



Getting and maintaining a petty patent (Patents Act 1990 [Aus])

A principal section of that Act is as follows:

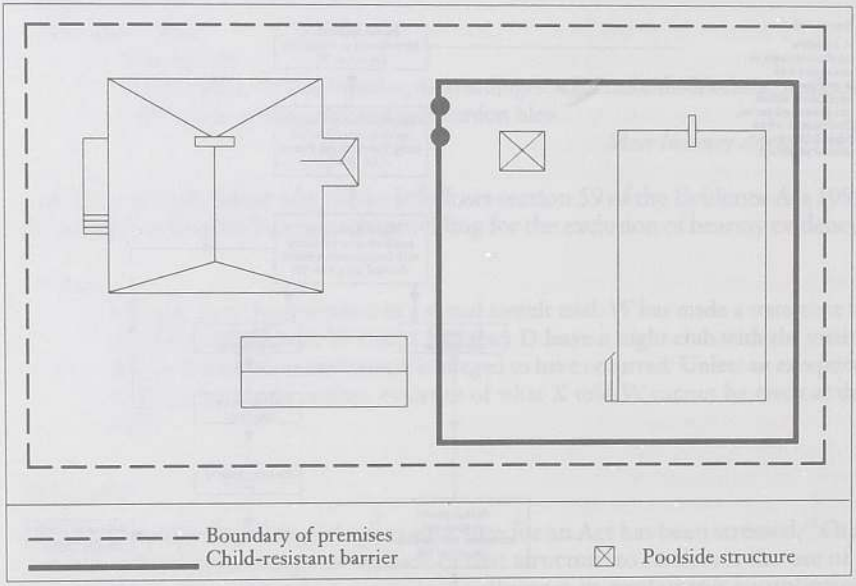
(1) The owner of the premises on which a swimming pool is situated must ensure that the swimming pool is at all times surrounded by a child-resistant barrier:
   (a) that separates the swimming pool from any residential building situated on the premises and from any place (whether public or private) adjoining the premises: and
   (b) that is designed, constructed, installed and maintained in accordance with the standards prescribed by the regulations.

Maximum penalty: 10 penalty units.

(2) The diagrams in Part 1 of Schedule 1 illustrate the provisions of this section.

Swimming Pools Act 1992 [NSW] s7.

Part 1 of Schedule 1 contains 3 diagrams, one of which is as follows:



Indexes

Indexes are not often provided with legislation, probably because their preparation involves a great deal of time and time is almost always in short supply in drafting chambers. Indexes have been a feature of New South Wales legislation.

THE USE OF PRECEDENTS

Being by and large an imitative creature, and being invariably pressed for time, the drafter is always interested in discovering a relevant legislative precedent. The principal value of precedents is as a source of ideas and as a means of checking whether drafting instructions have covered all matters that ought to be covered. To a limited extent only, a precedent may also constitute some help in the actual drafting.

Of course useful precedents are not always easy to find and it may be necessary to spend some time grubbing about in the indexes of as many sets of Commonwealth statutes as are available. If a number of relevant precedents can be found, so much the better. Avoid relying on a scarred precedent. The quality of drafting in a statute that has had an exciting passage through the legislature is bound to be suspect because the demands of political compromise may very well have resulted in politically acceptable but otherwise unsound amendments. Controversy generally produces bad legislation. Similarly, caution is necessary regarding an Act that has been amended many times. The likelihood is that the structure, coherence and consistency of language will have suffered as a result of the efforts of a succession of different drafters.

The use of precedents may be illustrated by taking a hypothetical example. Suppose the drafter is instructed to draft a Bill to regulate the wheat industry by setting up a board with powers to license wheat growers, to restrict the growing of wheat to licence holders, and also to control marketing. First thoughts may be

to search for statutes concerning wheat or other grains, but attention is better directed to finding laws similar in function or activity rather than similar in the sphere of activity. In this case the instructions cover three activities:

(i) the establishment of a statutory corporation,
(ii) the setting up of a licensing system,
(iii) the control of marketing.

So far as the first is concerned, written laws are these days littered with laws establishing statutory corporations and there will be no need to look beyond the drafter's own jurisdiction. Matters not specifically instructed will relate to procedure and possibly secondary powers and therefore there is no particular reason to restrict one's study to bodies concerned with agricultural products or indeed commercial activities. Such matters are routine for the drafter who will wish to follow the pattern followed in the jurisdiction unless there is good reason to the contrary.

To find useful precedents for the institution of a suitable licensing system may require a deeper search. The activity is not one in any way restricted to wheat or even agriculture. The search might be widened to laws regulating any likely industry and possibly the practice of trades or professions. In agriculture one would look to spheres where there may be over-production, for example sugar, tea, pyrethrum, coffee. The trades of used-car dealers, land agents, pawnbrokers, money-lenders, medical practitioners, chiropractors and other professions are frequently regulated by law and might constitute useful precedents. One might even go further afield, perhaps to the law governing the licensing of schools or hospitals, in the search for suitable appeal provisions against a refusal to grant or renew a licence.

The same approach would apply in seeking precedents for marketing legislation. Again it is the activity primarily that is of interest and the product is of secondary interest. The search might be directed first to the laws of a country known to be efficient as a primary producer and known to rely heavily on government and quasi-governmental controls.

Before using a precedent it is advisable to carry out two simple checks.

- Check whether the precedent has been amended since enactment.
- Check whether there is any case law relevant to it and, to the extent that is practical, whether legal periodicals or journals contain any appreciation or criticism of it.

If suitable precedents are available, the use to be made of them is a matter for discrimination and judgment. Careless borrowing may produce a law comparable in shape and efficiency to a motor vehicle running on wheels borrowed one each from the first four motorists to pass by. Careless use of precedents produces inconsistencies of language and style. The precedent must be adapted to fit the pattern and language of the draft to which it is introduced.

There is an additional pitfall to be avoided. If, as is usual, part only of a precedent is borrowed, the relationship to that part of the remainder of the precedent and other law of the jurisdiction, both statute and common law, must be considered. That which is borrowed may depend for its effectiveness on some other provision elsewhere in the statute, for example a definition, an application provision, a penalty, an appeal provision, an administrative provision (perhaps stipulating an essential procedure), a repeal or a transitional provision. Similarly, a provision in

the interpretation legislation or the general criminal law or the law of evidence of the jurisdiction might be an essential link in the scheme.

No matter what the source of a precedent it should not be taken on trust. The drafter must be wary of an understandable predilection towards accepting a precedent uncritically because it has survived the legislative process, perhaps in a jurisdiction of known high standards, and thereby acquired a certain stature as enacted law.

If part of a precedent seems ambiguous or difficult to understand, it must be adapted. The drafter must feel free, indeed obliged, to localise it and to subject it to the customary revisionary process. The localisation process requires the drafter to consider the precedent in the light of specific constraints applicable in the jurisdiction concerned. For example, in New Zealand, each draft Bill must have regard to the New Zealand Bill of Rights Act 1990, the Treaty of Waitangi, the Ombudsmen Act 1975, the Official Information Act 1982 and the Privacy Act 1993. The formalities of necessary financial arrangements are also likely to differ from jurisdiction to jurisdiction. The style of the precedent must be considered and localised. As more jurisdictions have increased their efforts to enact clear legislation, this point has increased in importance. An outdated style should not be followed simply because it is used in a precedent.

This general approach is subject to exception in that class of cases in which a country decides to adopt in terms the law of another country concerning particular subject-matter. For example, suppose a common law country decided to amend its law of torts in the manner achieved in the United Kingdom by the Occupiers' Liability Act 1957 and the Occupiers' Liability Act 1984. In such a case there is a distinct advantage in following the words of the United Kingdom legislation in order to gain the benefit of wider case law.

REFERENTIAL LEGISLATION

The nature of referential legislation

The expressions 'referential legislation' and 'legislation by reference' are used loosely to describe several different legislative techniques whereby two laws are bound together or the provisions of one are incorporated in the other.

The first technique is the direct amendment of a principal law by another law which refers to it. This is the ordinary, recommended technique for amendment and cannot seriously be challenged; for as Sir Cecil Carr has pointed out—

> The opposite method—namely, to amend a previous statute by implication and without referring to it—plunges us back into mediaeval methods from which we have painfully emerged.[22]

This section is concerned with two other techniques of referential legislation which it will be convenient to describe in turn; in both, provisions in a statute already enacted are used for a present purpose not by re-enacting those provisions but by referring to them.

The first of these techniques consists of legislating to extend the scope of an existing statute to make it applicable to additional circumstances specified in the new legislation. Although the method amounts in effect to an expansion of the

22 Sir Cecil Carr, 'Legislation by Reference and the Technique of Amendment', XXII Journal of Comparative Legislation and International Law (1940) 12 and also see p191. As to amending legislation generally, see Chapter 18.

existing law this effect is achieved by reference in the later legislation and not by directly amending the earlier legislation.

An example of this technique is seen in the final lines of s17(1) of the Veterinary Surgeons Act 1966 [UK] which applies the provisions of the Judicial Committee Act 1833 to disciplinary committees established under the former Act.

> A person in relation to whom a direction has been given under the last foregoing section may, at any time within twenty-eight days from the date of service on him of the notice of the direction, appeal against the direction to Her Majesty in Council in accordance with such rules as Her Majesty in Council may by order provide for the purposes of this section; and the Judicial Committee Act 1833 shall apply in relation to the disciplinary committee as it applies in relation to such courts as are mentioned in section 3 of that Act (reference to the Judicial Committee of the Privy Council of appeals to Her Majesty in Council).

The technique frequently used is to deem, either directly or inferentially, something arising under the later Act to be something else for the purposes of the earlier Act thus enabling it to fall within and make use of the earlier provisions. An example is seen in cl 8(1) of Schedule 3A of the Local Government Act 1974 [NZ] which deems the Local Government Commission to be a Commission of Inquiry. The subclause is as follows:

> The Commission is hereby deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908, and, subject to this Act, the provisions of that Act (except section 2 and 4A and sections 11 to 15), as far as they are applicable, shall apply accordingly.

The second of these techniques consists of legislating to adopt or incorporate in a statute provisions of an existing statute not by re-enacting those provisions but by referring to them.

An example of this technique is the very common practice of adopting existing statutory definitions by reference only. These examples are taken from the Food Act 1984 [UK]:

> 'importation' has the same meaning as it has for the purposes of the Customs and Excise Management Act 1979;
> 'ship' includes any boat or craft, and a hovercraft within the meaning of the Hovercraft Act 1968;
> 'shop' has the same meaning as in the Shops Act 1950.

Legislation by reference has been the subject of trenchant criticism for a century but it has also had its stout defenders and, despite intermittent criticism, the practice still continues. Valid arguments may be adduced both for and against and it may contribute to a balanced view if we consider briefly what is said on each side.

Criticism of referential legislation

Perhaps typical of the critical approach are an interesting few pages in *Craies on Statute Law*.[23] This passage, which is found in a section entitled 'Defects in Acts',

23 *Craies on Statute Law* (7th edn) pp29 et seq.

contains quotations from two old cases famous for their attack on the practice, *Knill v Towse*[24] and *R v Eaton*.[25]

Sir Alison Russell wrote—

> It is almost impossible to apply the provisions of an Act dealing with one matter to the provisions of another Act dealing with another matter, without doubts arising in the application. It is always a matter of great difficulty for any person, especially for the ordinary citizen who is alleged to understand the law, to keep, as it were, one eye on the one Act and the other eye on the other Act.[26]

Lord Radcliffe once stated—

> ... the deplorable habit of legislation by reference makes even accessible material incapable of being understood.[27]

Much of the criticism is directed at the incomprehensibility of the law resulting from the use of these techniques. If a reader is obliged to refer to and in some cases to adapt further sources there are certain to be communication difficulties of a kind which may only be resolved by the application of professional skill and labour.

In brief, the case against legislation by reference alleges that—

- legal complications and puzzles inevitably arise in construing legislation in relation to facts and situations it was not designed for;
- further complications arise where the legislation incorporated is subsequently amended or repealed;
- the technique may be employed by unscrupulous legislators or civil servants to conceal rather than reveal the substance of what is being enacted;
- it imposes too great a burden on the reader who must find another written law and it communicates at best inefficiently.[28]

Defence of referential legislation

Driedger, whose opinion commands great respect, while conceding that some of the criticism of referential legislation is deserved, considers the practice 'useful and necessary'. He says—

> There is no doubt that, carried to extremes, this device can make legislation unintelligible. On the other hand, if all our statutes were written without reference to other statutes, they would be almost as bad. After all, a set of statutes is not, and cannot be, a collection of isolated and unconnected enactments; it constitutes a body of law and rarely can a particular statute stand alone as a law by itself.[29]

Justifications of the practice of legislation by reference commonly include the following points:

24 (1889) 24 QBD 186 at 195.
25 (1881) 8 QBD 158.
26 Sir Alison Russell, *Legislative Drafting and Forms* (4th edn) p69.
27 Lord Radcliffe, 'Some Reflections on Law and Lawyers', 10 CLJ 368.
28 See Statute Law Deficiencies, the Statute Law Society, paras 91–92.
29 E. A. Driedger, *The Composition of Legislation* (2nd edn) p125.

- it avoids proliferation of statute law by obviating needless repetition;
- it saves the time of the legislature;
- it diminishes political difficulties by diminishing the area for debate;
- it is of value as a factor tending to uniformity in the law.

Summary

In very general terms, it may be said that valid considerations of a practical nature—a laudable desire to keep the statute book no longer than it need be and the political necessities of using the limited time of the legislature to the utmost advantage—support the practice of legislation by reference.

On the other hand, valid objections to the needless complication of the law and the creation of needless difficulties of construction are against the practice.

Verdict

It is justifiable in some circumstances to legislate by reference, but the obligation to communicate as well as to determine the law must not be overlooked. In every case, the scales must be taken off the shelf and the advantages and disadvantages weighed. Referential legislation is never the only method of achieving what is desired and other possible methods should be given generous consideration.

An example of circumstances where the advantages outweigh the disadvantages is found in s22 of the Electoral Referendum Act 1991 [New Zealand]. The purpose of that Act was to provide for the holding of a referendum on proposals for the reform of the electoral system. Section 22 applied, 'with the necessary modifications', about 18 sections of the Electoral Act 1956 to a petition for an inquiry. The sections so applied are of a procedural character.

Practice notes

1. The legislation referred to must be identified precisely.

Craies refers to a dreadful old example. Section 34 of the Elementary Education Act 1876 [UK] incorporated 'all enactments relating to guardians'.[30] A reader is quite unable to comprehend the scope of a provision of this nature.

The incorporation of great blocks of law of another country such as the statutes of general application, the common law, or the law relating to a particular topic is troublesome if sometimes necessary and raises difficult problems concerning the effect of later statute and case law in the country of origin.[31]

2. The legislation referred to must be studied in relation to the new circumstances to which it is to apply and if it does not fit exactly must be adapted by specific amendments.

If numerous amendments are necessary, it may be convenient to arrange these in a schedule.

If a great many amendments appear to be necessary, the decision to legislate by reference should be reconsidered.

30 *Craies on Statute Law* (7th edn) p30.

31 See Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, pp543 et seq, and A. Allott, *Essays in African Law*, Chapters 1 and 2

The practice of empowering the adaptation by subsidiary legislation of the legislation referred to should be resorted to only where the subject-matter is of a procedural or administrative nature.

The short cut of making use of laws by incorporating them 'mutatis mutandis' or 'so far as is applicable' or 'with such modifications as the circumstances require' or 'subject to necessary modifications' should generally be avoided. Sir Cecil Carr quotes an instance of an Act in 1861 (24 & 25 Vict c 20, s2) which—

> ... brings in those convenient words 'mutatis mutandis' to save space and to lend the comfortable authority of a dead language, like a tag from Horace or Virgil in the political oratory of the eighteenth century.[32]

The very use of such a formula is an admission of at least partial failure—an admission that the old law does not fit the new circumstances without amendment. Such a formula amounts to an invitation to the reader to take over the drafter's role and is thus a casting-off of responsibility.

> 3. Technical accuracy is no justification if reasonable intelligibility is lost in the process of achieving it.

A note in the *Modern Law Review* criticised s54 of the Finance Act 1950 in these words:

> Before one can even begin to try to understand these subsections it is therefore necessary to refer to seven other sections in six Acts going back to 1881. This is legislation by reference at its worst.[33]

Referential legislation must not degenerate into a game of hide and seek. This is surely the result of a general provision such as s51(2) of the Criminal Appeal Act 1968 [UK]. This states—

> Any expression used in this Act which is defined in s145(1) of the Mental Health Act 1983 has the same meaning in this Act as in that Act.

Section 145(1) of the Mental Health Act 1983 contains 21 definitions but how many of these are incorporated by reference into the Criminal Appeal Act 1968 can only be ascertained by a tiresome study of the 55 sections and seven schedules of that Act. The imprecision of the provision places an unnecessary burden on the reader.

> 4. The reader may be assisted in some circumstances by adding in brackets a brief note describing the content of the legislation referred to.

See the Veterinary Surgeons Act 1966 [UK] s17(1).

> 5. Legislation adopted by reference should be checked for consistency and suitability of language.

This is particularly necessary if the legislation referred to is old. Changes in word meaning can produce nonsense. Definitions contained in both the legislation applied and the new legislation should be checked for consistency.

32 Sir Cecil Carr, 'Referential Legislation', XXII JCL & IL 191, 192.
33 13 Modern Law Review 482, 486.

Stage 5—Scrutiny and testing

The process of composition and development includes much revisionary work, carried out both by the drafter personally and by the instructing officer. It involves much consultation with the sponsors, and perhaps other interested parties, and involves also various amendments to the draft from time to time to meet criticism, changes in instructions and supplementary instructions.

By the time the draft is in final shape it may be perhaps the tenth or even the twentieth version produced by the drafter. Inevitably the drafter, and probably the sponsors, of the Bill have reached the stage where they can no longer see the wood for the trees. There is a burgeoning temptation to regard the draft as finished. The drafter at this stage has a much reduced capacity to detect errors in the Bill.

> Criticism of a section read and seen countless times comes hard. In short, drafting is a field in which familiarity breeds satisfaction.[34]

The scrutiny and testing stage requires a great deal of self-discipline. It is far from easy but the drafter must somehow take a critical and objective gaze at the finished product. First, the drafter should read the draft and consider it as a whole. Then the following questions should be considered.

- Does the draft achieve all those objects that the drafter believes to be the intended objects of the proposal?
- Does the draft fit harmoniously into the general body of the law?
- Does the law comply with basic principles of the legal and constitutional system?
- Does the draft form a coherent well-structured whole and does the material flow in logical sequence?
- Are the content and the language of the draft as clear and comprehensible as the drafter can make them?

With the help of the instructing officer, the draft should be tested by applying it to various hypothetical circumstances. An effort should also be made to approach the draft from the position of users, perhaps with the aid of persons who have not been involved with the draft and who are not drafters. It may be practical where the constraints of time and confidentiality permit to use a small group of potential users to discuss the draft and review its comprehensibility.[35] Testing involving problem-solving may be particularly enlightening in some contexts.

Then comes the tedious necessity to check all matters of detail including

(i) consistency of language (Is the same word always used with the same meaning? Are different words used for the same meaning?)
(ii) references to other legislation (Are they up to date and accurate?)
(iii) internal cross-references (Are they necessary and if so are they accurate?)

34 Stanley S. Surrey and William C. Warren, 'The Index Tax Project of the American Law Institute', 66 Harvard Law Review 761, 830.

35 Methods of testing documents are discussed in Chapter 24 of R. D. Eagleson, *Writing in Plain English* (1990) AGPS, Canberra. See also the Annual Report of the Office of Parliamentary Counsel, Canberra for 1994–95, which contains an account of document testing techniques engaged in by that office.

(iv) the use of definitions (Is every definition necessary? Is every word defined actually used in the draft? Does every definition comply with the criteria in this chapter?)
(v) numbering and lettering of provisions (Do they comply with the accepted style and are they accurate?)
(vi) the use of paragraphs (Has the drafter suffered from paragraphing fever?)
(vii) capital letters (Are they all necessary?)
(viii) spelling
(ix) punctuation
(x) consistency of penal sanctions (Is the level appropriate and does the draft provide a sanction in every case where it should?)
(xi) arrangement of provisions within the appropriate Parts or Divisions (Assuming the structure is satisfactory, is every provision correctly located?)
(xii) the commencement provision (Does the provision adequately cover the whole draft?)
(xiii) geographical references and references to offices (Are they accurate?)
(xiv) suitability and accuracy of headings, including section headings or marginal notes
(xv) adequacy of the long title
(xvi) accuracy of the table of contents.

Finally, a drafting colleague who comes fresh to the exercise should be inveigled into scrutinising the draft and offering comments.

Chapter 9

Formalities and arrangement

INTRODUCTION

Writing in an artificial form, whether it be the drafting of a law or the composition of a sonnet, requires the acceptance and adoption of the conventions of the form. This chapter is concerned with certain conventional practices of a formal kind that pertain to written law—format, arrangement in Parts, headings, section headings, notes and references, tables of contents, and order of sections.

There are of course other conventions attached to the form of legislation and it may be that we are too much inclined to take their efficiency and their importance for granted. Consider, for example, the practice whereby the numbers of sections stand alone while those of subsections are placed in parentheses. This is a very simple and small matter, yet a sudden unannounced reversal of the practice would produce astonishment and confusion. It is also a convention that is not apparent to first-time readers of a statute.

The most important convention in relation to legislative form is undoubtedly the practice of paragraphing, a practice attributed by Ilbert to Lord Thring, the first holder of the office of Parliamentary Counsel to the Treasury.[1]

The justification for all conventional practices of the kinds mentioned is that they serve, or ought to serve, the practical purpose of facilitating communication. Consistency in the application of such practices is useful for that purpose, but the value of consistency is limited. A convention should stand or fall on its intrinsic merit. The quality and effectiveness of every convention deserve objective study. Improvement may be possible.

Some dissimilarity in the conventions of legislative drafting has, understandably enough, developed throughout the Commonwealth, but it is perhaps surprising how few the differences are. A useful development in a number of Commonwealth countries has been the removal of doubt as to the legal effect of such practices as headings, marginal notes and punctuation by substituting a provision in interpretation legislation in place of unsatisfactory and sometimes inconsistent case law.[2]

1 Sir Courtenay Ilbert, *Legislative Methods and Forms*, p69. As to paragraphing, see pp61–65.

2 See pp184, 187. A similar reform for the United Kingdom is suggested in a report of the Law Commission entitled 'The Interpretation of Statutes' (Law Comm No 21), pp25–27, App A. Support is found in the Renton Report, para 19.14.

FORMAT

The recurring precept of this text is that legislation should be drafted with the needs of users in mind. Users are cheered by an attractively laid out page with a clear typeface and adequate white space. They want to find their way around a statute without difficulty and in particular they want to find information on particular topics as quickly and as easily as possible. Of course, a thoughtful and logical organisation of the content of a statute is essential to assist users, but format and design can also contribute usefully to successful communication. There is no doubt that the format in which matter is presented on a page can make a noteworthy difference to the ease with which it is understood.

Ease of comprehensibility depends on the user being able to recognise quickly and accurately the structure of the sentence and identify its elements. Provisions should be set out in such a way that sections, subsections, paragraphs and subparagraphs should be able to be recognised as such at a glance. The format recommended by the Law Commission in New Zealand achieves this by

- raising the section heading and section number to a position above the text of the section,
- providing white space between subsections,
- presenting all identifying numbers and letters a little to the left of the text to which they refer by the use of hanging indents,
- positioning subsection numbers in the margin to the left of the body of the text,
- positioning paragraph letters indented to the right from subsection numbers but at the left margin of the body of the text,
- indenting subparagraph numbers,
- printing notes in a smaller font than text.[3]

The recommendations are illustrated in this example—

11 Discretion as to confidential information

(1) A court may, in the circumstances described in subsection (2), direct that a confidential communication or confidential information or information that would or might reveal a confidential source of information, must not be disclosed in a proceeding.

(2) A court may give a direction under this section if the court considers that the public interest in the communication or information being disclosed in the proceeding is outweighed by the public interest in

(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

(b) preventing harm to

(i) the relationship in the course of which the confidential communication or confidential information was made, obtained, recorded or prepared; or

(ii) relationships that are similar to the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

3 The Format of Legislation, NZLC R 27.

Some jurisdictions in Australia have adopted the practice of beginning new Parts and Divisions on a new page. Schedules and Parts of a schedule also start on a new page.

ARRANGEMENT IN PARTS

Practice

At the design stage of every Bill other than very short Bills, the drafter should consider the desirability of arranging the clauses in groups referred to as Parts. The best practice is to number Parts of an enactment as PART 1, PART 2, PART 3, etc and not begin with Part I, Part One, Part A or First Part. In the past the use of roman numerals has been more usual in many jurisdictions but roman numerals have long been replaced by arabic numerals in ordinary usage and arabic numerals are therefore recommended. The use of roman numerals is just a nuisance to many people.[4]

A descriptive heading, also usually printed in capitals, is placed beneath or adjacent to the number of each Part. The heading stands out better if it is printed in bold face. Capitals are usual but research has shown that lower case type is easier to read.[5] Part headings are not usually very long so the matter of capitals is perhaps not of major moment. Research also shows that it is advantageous for headings to be presented flush with the left margin rather than centred.[6]

The practice in most jurisdictions is for Part 1 of an Act to begin with s1. In New Zealand, on the other hand, Part 1 begins after the preliminary provisions. This practice is confusing because the first few sections of the Act are in consequence not contained in any Part.

All kinds of legislation, principal legislation, subordinate legislation, and schedules of either principal or subordinate legislation, may in suitable cases be arranged in Parts.

The old-fashioned practice of including in the text of an Act a provision describing the structure of the Act is not recommended. In the clause that follows, the numbers and other details are soon likely to become inaccurate by reason of later amendments to the Act. The need then to amend is either tedious or overlooked.

> The arrangement of this Act is as follows
>
> | | | |
> |---|---|---|
> | Part 1 | Preliminary | ss 4–7 |
> | Part 2 | Government Housing Authority | ss 8–15 |
> | Part 3 | Administration | ss 16–20 |
> | Part 4 | Finance | ss 21–28 |
> | Part 5 | Miscellaneous | ss 29–33 |

The purpose of communicating the structure to the reader is better performed by providing a table of contents, sometimes known as an arrangement of sections, presented before but not forming part of the Act. However, in the case of an

4 Godfrey Howard in the *Good English Guide* suggests that many people cannot work them out beyond 39 (XXXIX).

5 *A discussion paper, Review and redesign of NSW legislation* (Parliamentary Counsel's Office, NSW) 2.3.8. Lower case is now used for all headings in New South Wales legislation.

6 See the discussion paper referred to in the preceding footnote at 2.3.7.

exceptionally long statute, it may be helpful for the table of contents to be supplemented and followed by a summary of that table.

Purposes of arrangement in Parts

The arrangement in Parts of an enactment may serve two purposes—

1 Clarity of presentation.
2 Ease of reference.

1 CLARITY OF PRESENTATION

The advantages that are so readily apparent in the skilful paragraphing of an otherwise difficult sentence may also be recognised when a long or complicated enactment is arranged in Parts. In other words, the design of the enactment, and especially its fundamental structure, becomes quickly apparent. The reader is able to journey about the law more easily and is able to direct attention to the Part of the Act which is of interest without the necessity of reading through an unrelieved long list of section headings in the table of contents.

The effect is mainly visual. Arrangement in Parts indicates the close association of provisions which are cohesive in nature and also indicates their separation from provisions concerning dissimilar topics. Attractive presentation contributes to effective communication.

2 EASE OF REFERENCE

Quite often in the drafting of legislation, a need arises to treat or refer to a group of provisions, or perhaps more than one group, in a way different from the remainder. This need is facilitated if such provisions are arranged together in a separate Part which may conveniently be identified and referred to.

One example is found in legislation designed to enable different provisions to be brought into operation on different days, sometimes by a different authority. For example

> (1) This Act, other than Parts 7 and 9 and Schedule 4, comes into force on 15 January 1996.
>
> (2) Part 7 comes into force on a day appointed by an order made by the Minister of Agriculture.
>
> (3) Part 9 and Schedule 4 come into force on a day appointed by an order made jointly by the Minister of Agriculture and the Minister for Finance.

A further example is found in legislation designed to enable certain provisions to be applied differently from other provisions. Arrangement in Parts may facilitate the geographical application of certain provisions differently from others, a device commonly found in United Kingdom statutes with respect to their application to Scotland or Northern Ireland.[7] Alternatively, the need may be to apply certain

7 As to application provisions, see p208.

provisions to particular groups or classes of persons, perhaps citizens or residents, or to different circumstances.

Arrangement in Parts is particularly valuable to separate groups of provisions in circumstances where the similarity of the subject-matter of the provisions might make the scope of their application confusing in the absence of adequate sign-posting. To illustrate this point, let us consider the example of a legislative scheme for the licensing of air services in which broadly similar but not identical licensing procedures are to be established in respect of domestic air services and international air services. Both procedures are to have provisions for licence applications, their advertisement, objections, a hearing, the grant of licences and so on. The similarities of the two procedures present a grand opportunity for muddle and misunderstandings. The arrangement of the two procedures in separate Parts in such a case would bind together what should be construed together and separate it from what is not immediately relevant. The following provision might be included in the draft:

> Part 2 applies only to the licensing of domestic air services and Part 3 applies only to the licensing of international air services.

Another circumstance in which the arrangement of a law in Parts is useful occurs if it is necessary for a word or expression to bear different meanings with respect to different provisions in an enactment. This practice is undesirable but occasionally unavoidable. Thus—

> **Minister** in Parts 2, 3, and 4 means the Minister of Labour and in Part 5 means the Minister of Finance.

Arrangement in Parts may also facilitate directions as to citation or construction. For example, s98(4) of the Finance Act 1985 [UK] provides

> Part III of this Act shall be construed as one with the Stamp Act 1891.

Criteria for arrangement in Parts

It does not necessarily follow that because a statute is long it should be arranged in Parts, but as a Bill grows in length it becomes more likely that presentation in Parts will be beneficial. In each case the drafter should consider whether communication would be significantly assisted by such an arrangement.

The older view, expressed by Lord Thring and Ilbert, is that an Act should not be divided into Parts unless the subjects are so different that they may appropriately be embodied in separate Acts. But this view is certainly too restrictive. Indeed it is misleading if it may be taken to imply that an Act may be constructed of unrelated matters so long as they are placed in separate Parts. An Act must possess a broad unity of purpose.

Driedger answers the old view convincingly in this way—

> If the division of an Act into Parts will make it more readable, will enable the scheme of the Act to be more readily comprehended, or will facilitate the drafting or the passage of the measure, then it is not only proper but desirable so to divide it.[8]

8 E. A. Driedger, *Legislative Forms and Precedents* (2nd edn) p168.

Nevertheless, the class of cases contemplated by those who held the older view does illustrate one legitimate use of division into Parts. A straightforward example of this kind of use is to be found in the design of an annual Finance Act intended to implement budget proposals requiring the amendment of various taxes. Each of these taxes is charged under a separate Act and the amendment of each tax could quite properly, if not conveniently, be contained in a separate Bill.

However, the amendments do have a certain unity of purpose in that they are intended to implement the government's revenue proposals for the ensuing year and it is therefore convenient that they should be considered by Parliament together in one Bill. If the provisions relating to each of the major taxes are separated into distinct Parts, the appearance of the Bill is made more attractive. For example, in such a Bill, Part 1 might deal with customs, Part 2 excise, Part 3 income tax, Part 4 stamp duty, Part 5 inheritance tax and so on.

Some jurisdictions that do not present their annual taxing package in a Finance Act do nevertheless make extensive use of the practice of arranging in separate Parts of a Bill the amendments to various Acts necessary to achieve a single legislative purpose. For example, a Bill to abolish capital punishment might contain three Parts. Part 1 might contain the short title and a commencement provision. Part 2 might contain amendments to the Criminal Code and Part 3 might contain amendments to the Prisons Act.

In some cases the distinctions between the various legislative tasks to be performed are sharp, in others the technical device of collective reference is necessary and in all such instances the advantages of arrangement in Parts are manifest. However, there remains a substantial residue of cases where the decision is more difficult. The Canadian Legislation Drafting Conventions draw the line as follows:

> An Act may be divided into 'Parts' to enhance its readability but should not be so divided unless the subject-matter of each Part *is sufficiently different* from the other Parts.

The decision is best made at the design stage when the major topics of the legislation have been identified and developed. The relationship of these major topics to one another will be a major factor. If they are closely related, the needs of attractive presentation may be satisfied by the use only of italicised headings. If the topics are not closely related and concern a number of disconnected or only loosely connected matters, although they may be all aspects of one central purpose, then the proper decision is to arrange the material in Parts.

As an example, let us look at the structure of a Bill to establish a public authority and provide for its powers and duties. Let us suppose it is to be called the Technology Development Authority. A suitable structure would be—

PART 1 PRELIMINARY

This Part would contain clauses for the short title, commencement, definitions, and a purpose clause.

PART 2 TECHNOLOGY DEVELOPMENT AUTHORITY

This Part would provide for the establishment of the Authority and the composition of its board of management. A clause might provide for provisions concerning the constitution and proceedings of the Board to be in a schedule but non-procedural clauses might be included in this Part such as a clause giving

protection from personal liability, a clause establishing a right of board members to remuneration and a clause requiring the disclosure by board members of conflicting interests.

PART 3 FUNCTIONS OF AUTHORITY

This Part would contain clauses setting out the duties imposed on the Authority and also the powers conferred to enable those duties to be performed.

PART 4 ADMINISTRATIVE PROVISIONS

Clauses would be included giving power to employ staff and advisers and possibly, by arrangement, make use of government facilities. An obligation for staff to preserve secrecy might be included. Provisions for delegation of powers might be included and also requirements as to the keeping of records and the preparation of an annual report.

PART 5 FINANCIAL PROVISIONS

This Part would list the funds available to the Authority and confer borrowing powers. It would provide for investment, accounting provisions, accounts and audit, disposal of profit and for an annual report.

PART 6 MISCELLANEOUS

This Part might provide for power to make regulations and for transitional and repeal provisions.

Although such a Bill might be only about 25 clauses, its structure will be immediately obvious if so arranged in Parts.

The purposes of arranging material in Parts will not be promoted unless the Parts are arranged so as to follow a logical and, if appropriate, a chronological sequence. It is of course desirable to expose clearly the structure of the Bill, but if the structure is rickety, all that is exposed is the drafter's own frailties.

Sequence is important. Time spent by a drafter designing a logical sequence saves a great deal more time for readers of the statute. The advantages of a chronological progression are apparent in the following structure for a Bill regulating the conduct of referendums:

Part 1 Preliminary
Part 2 Writ for a referendum
Part 3 Voting at a referendum
Part 4 Ascertainment of result of referendum
Part 5 Return of writ and statement of result
Part 6 Disputed returns
Part 7 Referendum offences

Dangers arising from arrangements in Parts

The greatest danger arising from the arrangement of an enactment in Parts is that the arrangement of the material and the language of the heading may be construed in some way so as to enlarge or restrict the intended sense of language in the body

of the enactment. This danger arises because a heading may be referred to as an aid to the construction of provisions in the sections to which the heading relates and because written laws are construed as a whole.[9]

In consequence, care must be exercised to make sure that sections are not placed within a Part unless they really do belong there and belong there only.

To illustrate the danger which may result from the erroneous positioning of material let us revert to the facts of the example given earlier in this chapter concerning the licensing of domestic and international air services. Suppose Part 2 of the law concerns domestic air services and Part 3 international air services. If at the end of but within Part 3 appeal provisions are introduced granting a right of appeal to persons aggrieved by the issue or refusal of a licence, then, in the absence of clear words to the contrary, it is likely that the result of the positioning of the appeal provisions within Part 3 would be to restrict the right of appeal to licences for international air services.

If the same words were removed from Part 3 and positioned in a separate Part, under the heading 'Appeals', the right of appeal would probably be construed to apply to the grant of both domestic and international licences.

In addition to the possibility of unwittingly affecting the construction of the Act by dividing it into Parts, there is also a danger of misleading the reader. To take a simple example, a reader of a law who encounters a Part entitled 'Calf Subsidies' is entitled to expect that all the provisions contained in the law relating to calf subsidies will be grouped together in that Part. The reader is likely to look no further, and if the drafter has tucked away a genuine calf subsidy provision in the Miscellaneous Part at the end of the enactment or in some other Part, then he or she has failed to arrange the material in the manner which is most conducive to easy communication. The general or miscellaneous Part of a statute must not become a receptacle for the odds and ends which have only been thought of late in the day and really belong to other places.

Subdivision of Parts

It is common in Australian jurisdictions for the material in a Part to be further divided into groups known as Divisions and not unknown for Divisions to be further divided into Subdivisions. These are numbered 1, 2, 3 etc and each is accompanied by a descriptive heading. In the United Kingdom a Part is sometimes divided into Chapters.[10] A Division or Chapter might more revealingly be called a Subpart for that is what it is. That term has recently been used in New Zealand in the enactment of a reorganised income tax Act.

The Australian practice is illustrated by the following extract from the structure of an Act concerning the safety and inspection of mines.[11] Note that only some of the Parts are divided into Divisions.

Part 1 Preliminary
Part 2 General duties relating to occupational health, safety and welfare
Part 3 Administration of Act
  Division 1 Inspectors of Mines
  Division 2 Inspections

9 See p184.
10 See for example the Deregulation and Contracting Out Act 1994 [UK].
11 Whereas in the United Kingdom a Part may be divided into Chapters, in Queensland and New South Wales a Chapter may be divided into Parts.

Part 4	Management of mines	
	Division 1	Duties of employers and managers
	Division 2	Certificates of competency
Part 5	Health and safety representatives and committees	
	Division 1	Health and safety representatives
	Division 2	Health and safety committees
	Division 3	Discrimination
Part 6	Resolution of health, safety and welfare issues	
Part 7	Specific duties relating to occupational health and safety	
	Division 1	Health surveillance
	Division 2	Accidents and occurrences
	Division 3	Plans and records

Although arrangement in Parts and Divisions can help to illuminate the structure and flow of a statute, the drafter must be careful not to go overboard. The danger is much the same as that which can lead to excessive paragraphing. The result is an intricate structure that looks and is too technical and forbidding rather than helpful to the reader. An Act which has Chapters divided into Parts, Parts divided into Divisions and Divisions divided into Subdivisions would be very suspect but in a statute of exceptional length and complexity may be satisfactory.

All that appears in the preceding pages relating to arrangement in Parts applies to the arrangement of material in Divisions within a Part.

Many other jurisdictions do not use numbered Divisions but make use of italicised cross-headings within a Part.

HEADINGS (other than section headings or marginal notes)

Practice

Headings to Parts are usually printed in roman capitals.[12] Other headings or subheadings, sometimes referred to as cross-headings, are usually printed in italics.

In some jurisdictions a full stop is customarily placed at the end of the heading but this serves no useful purpose. The normal practice with regard to the use of capitals should be followed in italicised headings or any other headings not presented in capitals.[13]

Modern practice is for a heading to be quite separate grammatically from the provisions which immediately follow. A heading is not an introduction or a preamble, although it did serve that purpose in days gone by. Its proper purpose is that of a label or sign-post and no more. It should be brief and descriptive and ought to indicate the scope of the sections to which it refers.

The language used in a heading must be consistent with the remainder of the Act. It should not be in abbreviated form; thus if the heading refers to a body or an office it should refer accurately to the full and correct title of that body or office.

The form of headings should be settled late in the composition and development stage, and should be the subject of a specific revision. Changes in the substance of the draft made in the course of its development may make nonsense of the headings unless they are kept in step, and a failure to do this can cause serious problems of construction.

12 But see footnote 5 on p177.
13 As to the use of capitals, see p87.

Construction

In the United Kingdom, the case law is equivocal and the proper construction of headings remains in doubt. The House of Lords case of *DPP v Schildkamp* illustrates a continuing judicial diversity of approach.[14] Lord Hodson and Viscount Dilhorne took the view that while some attention might be paid to cross-headings, they could not be permitted to have a controlling effect. Lords Reid and Upjohn considered cross-headings a useful guide to the scope of the sections that followed, and Lord Upjohn considered that in some circumstances a cross-heading might control the meaning or ambit of following sections. However, in more recent cases it appears that English courts have been prepared to take account of headings.[15]

It is not really very sensible that the effect of headings should be open to argument and some jurisdictions have taken the worthwhile step of ensuring that this does not happen.

Section 5(f) of the Acts Interpretation Act 1924 [NZ] states

> The division of any Act into parts, titles, divisions, or subdivisions, and the headings of any such parts, titles, divisions, or subdivisions, shall be deemed for the purpose of reference to be part of the Act, but the said headings shall not affect the interpretation of the Act.

A contrary approach has been taken in Australia where, for example, s35C (1) of the Acts Interpretation Act 1954 of Queensland provides

> The heading to a Chapter, Part, Division, Subdivision, section, subsection, schedule or another provision of an Act forms part of the provision to which it is a heading.

Illustrations

The practice of giving a heading to each Part of an Act has been discussed above. Further headings may be used within a Part or a Division of a Part if it is considered they will be of assistance.

For example, Part I of the London Regional Transport Act 1984 [UK], which contains 35 sections, has the Part heading LONDON REGIONAL TRANSPORT and the following seven cross-headings

> Constitution and general functions of London Regional Transport
> Organisation of undertaking
> Planning and co-ordination
> Powers of disposal
> Financial provisions
> Pensions
> Miscellaneous and supplemental.

Headings can perform a valuable function in Acts that are not divided into Parts. Such Acts will already exhibit a coherence by reason of the subject-matter but their appearance may be made more attractive and the content more easily comprehensible if lightened a little by headings.

14 [1971] AC 1, [1969] 3 All ER 1640.
15 See *Dixon v BBC* [1979] 2 All ER 112 at 116. See also F. A. R. Bennion, *Statutory Interpretation* (2nd edn) p510.

The Cinemas Act 1985 [UK] provides a good example. It is 25 sections in length, is not arranged in Parts, but has the following headings:

Control of exhibitions
Exempted exhibitions
Exhibitions on Sundays
Enforcement
Appeals
Special provisions relating to Greater London
Miscellaneous and general.

SECTION HEADINGS also known as MARGINAL NOTES[16]

Practice

The object of section headings or marginal notes is to give a concise indication of the contents of the section to which they refer. Their greatest value is that a reader has only to glance quickly through such headings or notes in order to understand the framework and the scope of an Act. They also enable readers to direct their attention quickly to the portion of an Act which they are looking for.

To achieve this object, a section heading must be terse and it must be accurate. Its language must be consistent with that of the section to which it refers.[17] It must describe, but it should not attempt to summarise. It should inform the reader of the subject of a section. It cannot hope to tell what the section says about that subject.

Like a sign-post, a section heading must be brief and to the point, and it must be pointing where it says it is pointing.

A section heading need not constitute a complete grammatical sentence. Frequently a verb will not be necessary. Some drafters, in the pursuit of Plain English, choose to draft some section headings in the form of a question. Others consider that practice more appropriate to explanatory material and inappropriately discursive for legislation. This practice is likely to irritate readers if overdone but used with restraint is acceptable. A few examples of section headings of that kind are

What are the qualifications for an inspector?
What type of information can be disclosed?
Who may apply for compensation under Part 4?

If a section heading cannot be made short and clear, that may be an indication that the section requires amendment or division.

The following miscellaneous examples illustrate the appropriate style:

16 In many jurisdictions, the notes formerly known as marginal notes or sidenotes are no longer printed in the margin but either above or in the first line of the provision to which they refer. The term 'section headings' is used loosely in this chapter to include notes describing the content of a section whether printed in the margin or otherwise. Other terms in use for such headings are 'section headnotes' and 'shoulder headings'.

17 See for a cautionary example s2D of the Limitation Acts 1939 to 1975 [UK] the marginal note to which uses the word 'override' whereas the section uses 'disapply'.

Regulations	*not*	Power to make regulations *or* Minister may make regulations
Default orders	*not*	Minister may make default orders
Compensation	*not*	Right to compensation in certain areas
Records	*not*	Duty to keep records
Discrimination	*not*	Duty not to discriminate

Practice differs in different countries regarding the form of section headings used for sections amending existing legislation by the direct or textual method. Practice in many Commonwealth countries consists of no more than a numerical reference to the particular provision which is the subject of amendment. For example

23 Section 7 of Cap 172 amended
Section 7 of the Pig Industry Act is amended by repealing subsection (2).

According to the purpose of the provision, the section headnote might take one of the following forms:

Section 7 of Cap 172 repealed.

Section 7 of Cap 172 repealed and substituted.

Section 7A of Cap 172 inserted.

In some countries the words 'of Cap 172' would be omitted from the above examples.

Commonwealth practice in Australia is different. In the case of amendments, the existing note to the section which is being amended is presented as the section headnote of the amending section. Repeal sections are treated in the same way. Where a new section is inserted, or a new section is substituted for an existing one, there is a section heading to the amending section and a section heading of the substituted section is included.

For example

Repeal of section and substitution of new section
27. Section 7 of the Principal Act is repealed and the following section is substituted:

Time limit for prosecution
'7. A proceeding for an offence under section 14 must be commenced within 2 years after the offence was committed.'.

The Queensland practice is particularly helpful. The section heading of an amending section includes in parentheses the section heading of the section being amended. For example

Replacement of s29B (Determination of number of sitting days)
13. Section 29B

omit, insert

'Working out number of sitting days

'29B. In working out a particular number of sitting days of the Legislative Assembly, it does not matter whether the days are within the same or different Parliaments or within different sessions of Parliament.'.

The English practice varies. Instances occur where one or other of the practices described above is followed but frequently the practice is adopted of indicating the object or the subject-matter of the amendment in the marginal note to the amending section.

Construction

Marginal notes are part of an English Act.[18] They have on occasion been referred to for interpretative purposes but their brevity severly restricts their value for such purposes.[19]

In *DPP v Schildkamp*,[20] Lord Upjohn said—

> In *Chandler v DPP*, Lord Reid said the marginal or sidenote to an Act affords no guidance to the construction of a statute and I believe that to be a sound working general rule. A sidenote is a very brief précis of the section and therefore forms a most unsure guide to the construction of the enacting section, but it is as much a part of the Bill as a cross-heading and I can conceive of cases where very rarely it might throw some light on the intentions of Parliament just as a punctuation mark.

Many countries have resolved the uncertainties of the situation by including a provision in their interpretation legislation, making it clear whether a section heading can be used for purposes of interpretation.

Usage

The general custom is to restrict section headings to one to a section. Canadian practice is to provide a marginal note in respect of and opposite to each subsection and in definition sections to insert a marginal reference for each definition. If the definitions are marshalled properly in alphabetical sequence, it is surely just as convenient to glance through the list of words and expressions defined as through a series of marginal notes. The practice of including a marginal note for every definition therefore seems unnecessary.[21]

Subsection headings are not recommended except perhaps for sections of inordinate length and of course such sections are strongly discouraged.[22] However,

18 See *Bennion*, pp512–513.

19 Cf *Chandler v DPP* [1964] AC 763 at 789 with *Stephens v Cuckfield RDC* [1960] 2 QB 373 at 383. Lord Upjohn's dicta in the *Schildkamp* case were followed in *Limb & Co v British Transport Docks Board* [1971] 1 All ER 828 at 839 and see also *R v Kelt* [1977] 3 All ER 1099; *Puttick v A-G* [1980] Fam 1, [1979] 3 All ER 463; *Hailbury Investments v Westminster City Council* [1986] 1 WLR 1232 at 1242.

20 [1971] AC 1 at 28, [1969] 3 All ER 1640 at 1657.

21 It is particularly easy to find one's way through a series of definitions if the word or expression defined is printed in bold face. See p147.

22 See p78.

most jurisdictions already have sections of that kind in their laws and from time to time they are amended. It may be helpful when that is being done to introduce subsection headings to help readers find their way. Alternatively, the better course may be to split the existing long section into sections of more moderate length.

No fixed rules can be laid down concerning the use of headings or marginal notes in schedules because the form and content of schedules differ so much, but if the content of a schedule is such that headings would assist a reader, it is certainly desirable that they should be provided. Practice for subordinate legislation should follow that adopted in the case of Acts.

Usage regarding the printing style of section headings also differs. The long-established practice of setting marginal notes in the margin is described above, but in an increasing number of jurisdictions the note is not set in the margin but is printed in bold face as a heading.

In some jurisdictions, (eg Australian Commonwealth and Western Australia) the note is printed immediately above the section as follows—

Regulation
12 The Minister may make regulations for …

In New Zealand the Law Commission recommend a slight variation of the above. They prefer the section number to be on the same line as the heading and to the left of the text where it stands out. This is the practice in New South Wales. Thus

12 Regulation
The Minister may make regulations for …

In New Zealand the note follows the section number and shares the line with the beginning of the section—

15. Regulations—The Minister may make regulations for …

It is suggested that this last example is the least attractive alternative. The heading does not stand out as well and may be confused with the substance of the section.

TABLE OF CONTENTS

Part headings, section headings and all other headings may perform an additional function if they are set out in the form of a table of contents immediately before the text of an Act. The list should extend to the content of schedules and should list the headings in schedules in the same way as applies to the remainder of an Act. If definitions are assembled and presented in a dictionary contained in a schedule or presented at the end of the Act, the terms defined may be listed.

The practice of including a comprehensive table of contents is strongly recommended. A glance through such a table enables a reader to discover easily and quickly the framework and the general content of an Act. Much of the value of headings is lost unless they are assembled so that they may be looked at together in sequence and in their context.

'Table of Contents' and 'Table of Provisions' are suitable titles and are considered preferable to 'Analysis', 'Index' or 'Arrangement'.

Such an arrangement of sections might be set out in this form—

TABLE OF CONTENTS

There is no advantage in providing a table of contents in the following cases.

First, in a very short Bill of fewer than six clauses or two or three pages, the content of the Bill can just as quickly be seen from looking directly at the section headings or marginal notes as they stand in their normal position.

Secondly, in a Bill which consists entirely of direct amendments to other legislation no purpose is served by a table of contents if the section headings give no indication of the substance or purpose of the amendments. However, as mentioned on page 186, it is preferable for the section headings to indicate the topic of the amendment. On the other hand, a table of contents is useful in the case of an amending Bill that inserts new material if it contains the section headings of the new sections.

Although the primary purpose of providing a table of contents is to assist legislators at the enactment stage and users of the statute throughout its life, a table of contents is helpful to the drafter and also the instructing officer as early as the first draft stage. A table of contents assists in keeping the planned structure clearly before the drafter during the development of the draft and this may reveal misplaced provisions or suggest a need to revise the headings or even revise the structure itself.

Care must be taken to revise the table of contents as the draft is developed and altered.

In the case of regulations, rules or bye-laws, the same principles and practice are applicable.

A table of contents is not part of the legislation and it may therefore, as a matter of law, be provided for the first time upon printing of the enactment as an Act or on any further reprinting or revision.

RECOMMENDED ORDER OF ARRANGEMENT

When discussing the design of an Act in Chapter 7, reference was made to the need to comply with conventional practice as to the position in the framework of a statute to be given to various provisions of a formal or technical nature. Practice is not uniform throughout the Commonwealth and there is no absolute right or wrong position for particular provisions. However, consistency of practice within a jurisdiction undoubtedly facilitates the use of statutes by regular users.

Subject to the comments that follow the following order is recommended

Preliminary provisions
- Long title
- Preamble (if a preamble is necessary)
- Enacting clause
- Short title
- Commencement
- Duration/Expiry
- Application
- Purpose clause
- Definitions
- Interpretation

Principal provisions
- Substantive provisions
- Administrative provisions

Miscellaneous
- Offences and provisions ancillary to offences such as time limit for prosecution, continuing offences, offences by corporations, and vicarious responsibility.
- Miscellaneous and supplementary provisions such as evidentiary provisions, a power to make subordinate legislation, service of notices, powers of entry and search, seizure and arrest.

Final
- Savings and transitional
- Repeals
- Consequential amendments
- Schedules

With a few variables, this order, or something similar, is generally followed in Australia, New Zealand and many other Commonwealth countries.

At first sight, the rule that principal provisions should precede administrative provisions appears straightforward and logical. It certainly makes good sense to

present what is important and at the heart of the proposals before mere machinery. A problem sometimes arises when a statutory body is to be established to perform a particular function. Should the establishment of the body precede the statement of the function? It is usual to provide for the establishment of the body first and preferable for the relatively unimportant procedural provisions relating to the body to be presented in a schedule. This enables a speedier transition from the establishment provisions to those stating the functions of the body.

An acceptable variation with considerable merit is for savings and transitional provisions to be placed in a schedule. This is recommended if the savings and transitional provisions are significant in quantity. Similar treatment is suitable for numerous repeals and consequential amendments, particularly if they can conveniently be presented in a tabular form. The purpose is to present the Act in a form where matters of temporary concern are separated from the major provisions and objects of the statute. The Drafting Conventions of the Uniform Law Conference of Canada recommend that transitional provisions should follow the subject-matter to which they relate. If they relate to the Act as a whole, it is suggested that they should follow the regulation making powers. This recommendation has the unsatisfactory result that matter of temporary concern hinders the flow of matter of permanent significance. It is much better removed and presented with other matters of temporary concern.

Practice in the United Kingdom is for the main principles of the legislation to follow the enacting clause. The short title, definitions, interpretation, application, repeals, savings and commencement provisions are placed at the end of the Act.

The aspect of United Kingdom practice that most often comes up for discussion, and has done for a long time, is the position of the interpretation section near the end of the Act. It is interesting to note that the English practice was criticised by George Coode more than 100 years ago. He wrote, 'Definitions should challenge attention by being placed before, not as is the more common practice, after, the matter to which they have reference.'[23]

Two reasons are commonly put forward to justify placing the definitions near the end.

First, it is said that until the legislature has enacted the substantive and administrative provisions of an enactment, it cannot be known what definitions will be required and it is premature to anticipate the decision of the legislature. Secondly, it is said that it is appropriate that the attention of the legislature should immediately be directed to the essence of the legislation.

As to the first point, this can be met if the standing orders of the legislature provide an opportunity for the definition clause to be brought into line with amendments made to the substance of the measure during the legislative process. Some such procedure will be necessary in any event to enable other consequential amendments to be made. Alternatively, the standing orders might provide that the interpretation clause of a Bill be the last clause considered by the committee.

As to the second point, it can be said in support that definitions do not always make much sense out of the context in which the word defined is intended to be used. On the other hand, in many cases the effect and the scope of a substantive provision cannot be known until certain key terms are defined; accordingly there is a resulting dilemma.

Ilbert was clearly conscious of this when he advised that some definitions should come at the beginning and some at the end. He wrote:

23 George Coode, *On Legislative Expression* (reprinted in E. A. Driedger, *The Composition of Legislation* (2nd edn) p317, at p371).

> Definition sections should, as a rule, be placed towards the end of a Bill. But this rule only applies to what may be called subsidiary definitions. A substantial definition, which defines the scope and subject-matter of a measure, should come at the beginning.[24]

It is suggested that Ilbert's advice requires that an unnecessary and questionable distinction be drawn between that which is subsidiary and that which is substantial.

A recent development in some jurisdictions is for definitions to be assembled in a 'dictionary' and presented either as a schedule to the Act or at the end of the Act if the Act is a long one with many definitions. This practice offers an acceptable alternative.

On balance, the advantages of placing definitions near the beginning of an enactment outweigh the disadvantages in most cases. In this position definitions are more easily found and more conveniently used. The contrary decision of placing definitions near the end is in any event in practice frustrated where the enactment contains substantial schedules. In practical terms the result is that the definitions may be near the middle rather than the end.[25]

It is suggested that the short title of an Act is more readily noticed at the beginning. The short title is in the nature of a label and like a label it should be stuck where it can best be observed.

Commencement and application provisions are preliminary in nature. It is helpful if the reader is made aware of such provisions before studying the substance of the Act.

Driedger suggests an arrangement similar to the recommendation made above, except that he considers the 'final section should be the coming into force provision, if any'.[26] This course is recommended in the Drafting Conventions of the Uniform Law Conference of Canada. However, this view hardly seems consistent with his view expressed earlier that an early indication is desirable regarding restrictions as to area, time, persons or otherwise of the statute. The commencement provision ought surely to be considered as preliminary in nature and similar in function to restrictive application provisions.

24 *Ilbert*, p281.
25 Questions concerning the placement of definitions that relate only to a Part of an Act or a section are discussed at p153.
26 E. A. Driedger, *The Composition of Legislation* (2nd edn), p82.

Chapter 10

Preliminary provisions

LONG TITLE [1]

Function

Every Act begins with a long title the function of which is to indicate the general purposes of the Act. The long title is part of the Act, being considered, enacted, and subject to amendment, by the legislature. It is important because it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope.[2] It may not, however, be looked at to modify the interpretation of plain and unambiguous language.[3]

In some countries the long title is also of importance during the legislative process and may have effect to limit debate or amendment of the Bill. It would appear that the comprehensiveness of the long title in United Kingdom statutes is to some extent a consequence of the strictness of parliamentary practice in this regard. The Australian *Legislation Handbook* (Ch 2.47) states that 'Cabinet some years ago expressed a desire that the long title should be precise, as an aid to the restriction of the area of debate'. But such strictness has been relaxed in other jurisdictions and this has led to briefer and less informative long titles.[4]

Apart from parliamentary considerations, a comprehensive long title may serve a valuable purpose in assisting to communicate the intended spirit and scope of the Act. The long title presents one opportunity to the drafter to say in plain terms what he or she is about, but a purpose provision may be more effective. An abbreviated, truncated title serves no purpose other than that of a label, and that is the prerogative of the short title. For example, where an Act is to bear the short title 'Meat Industry Act', there is no value in a long title such as 'An Act relating to the Meat Industry'. A more informative long title, such as the following, might however serve some purpose:

> An Act to encourage, facilitate and assist the development of the meat industry in the Republic; to establish the Meat Industry Corporation and provide for its functions; to

1 The title is nowadays usually referred to as the long title in order to distinguish it from the short title, and this practice is adopted in this chapter. Nevertheless, in some jurisdictions the practice is to retain for formal use the word 'title', unqualified by 'long'.

2 *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at 128.

3 *Re Wykes' Will Trusts* [1961] Ch 229 at 242; *Ward v Holman* [1964] 2 QB 580, [1964] 2 All ER 729.

4 As to Canadian practice, see E. A. Driedger, *Legislative Forms and Precedents* (2nd edn) p153.

provide for the compulsory marketing of cattle and regulate the killing and processing of cattle for export; to repeal the Meat Works Act 1929 and to make provisions for connected and incidental purposes.

It has been suggested that the long title should be abolished and that, if a statement of the purposes of the Act is considered valuable, it should be included as a section of the Act. Certainly, most long titles do not seem to perform a very useful function.

Practice

The long title should be drafted in terms wide enough to embrace the whole of the contents of a Bill. A final review of the title must be made when the Bill is in final form to ensure that the development of the draft has not rendered the long title inaccurate or inadequate.

It is customary to distinguish the long title from the remainder of the statute by the use of larger print or bold face. The practice of using capitals to begin the more important words in the long title is not recommended.

The following examples are taken from statutes having one principal purpose.

An Act to increase the penalties for certain offences relating to controlled drugs within the meaning of the Misuse of Drugs Act 1971.

Controlled Drugs (Penalties) Act 1985 [UK]

An Act to prohibit the development, production, acquisition and possession of certain biological agents and toxins and of biological weapons.

Biological Weapons Act 1974 [UK]

An Act to prohibit female circumcision.

Female Circumcision Act 1985 [UK]

An Act to make provision in connection with Trinidad and Tobago becoming a republic within the Commonwealth.

Trinidad and Tobago Republic Act 1976 [UK]

An Act to make provision for and in connection with the ending of British Sovereignty and jurisdiction over Hong Kong.

Hong Kong Act 1985 [UK]

Where the Act is more complex, the long title should describe each of the principal purposes, following the same order of reference as in the Act. For example

An Act to make provision about milk marketing; to make provision about potato marketing; to provide for the payment of grants in connection with the marketing of certain commodities; to terminate national price support arrangements for wool and potatoes; to provide for the publication of an annual report on matters relevant to price support; to amend the Industrial Organisation and Development Act 1947 in relation to agriculture; and for connected purposes.

Agriculture Act 1993 [UK]

An Act to provide for the establishment of a Crown Prosecution Service for England and Wales; to make provision as to costs in criminal cases; to provide for the imposition

of time limits in relation to preliminary stages of criminal proceedings; to amend section 42 of the Supreme Court Act 1981 and section 3 of the Children and Young Persons Act 1969; to make provision with respect to consents to prosecutions; to repeal section 9 of the Perjury Act 1911; and for connected purposes.

Prosecution of Offences Act 1985 [UK]

Two points may be noted in the example immediately above. First, the use of semi-colons to separate the description of each of the major purposes of the Act. Secondly, the use of the concluding phrase 'and for connected purposes' to include miscellaneous related matters of a minor nature. The phrase 'and for connected purposes' is simpler than and to be preferred to alternatives containing archaic language such as

to provide for matters connected therewith and incidental thereto
and for purposes connected with the matters aforesaid
and for matters related to or connected with the foregoing.

In drafting a long title, vagueness and looseness of expression should be avoided so far as is compatible with the need to generalise. The expression 'etc' should not be used, nor should loose reference be made without qualification to 'other matters' or 'other purposes'. For example, the long title of the Finance Act 1991 [NZ] is

An Act to make provision with respect to public finances and other matters.

If the 'other matters' are connected with public finances, and the phraseology does not suggest this, it would be preferable to say so. If they are not, the 'other matters' should be described briefly.

AMENDING BILLS

If the Bill amends one or two provisions, these may be specified.

An Act to amend section 16 of the Opticians Act 1991.

If the amendments are more numerous, it is permissible to use the following simple form—

An Act to amend the Opticians Act 1991.

If it is practical to do so, it is useful to indicate briefly the scope of the amendment. For example

An Act to amend the Technology Development Act 1985 so as to alter the membership of the Technology Development Authority.

An Act to amend the Interpretation Act 1987 to provide for and regulate the delegation of certain powers by Ministers.

Where it is necessary in a long title to refer to another Act, the reference should be to the short title. A reference to the chapter or other number of the Act should not be included.

Repeals and repeals and re-enactments may be treated as follows:

> An Act to repeal the Deportation Act 1911.
>
> An Act to repeal and re-enact with amendments section 9 of the Salmon and Freshwater Fisheries Act 1923.
>
> *Salmon and Freshwater Fisheries Act 1965* [UK]

When drafting an amending Bill, the drafter must keep the long title of the Act that is being amended in view. If the amending Bill introduces new matter, the long title may not be sufficiently wide to cover the new material and it may need to be extended. If the amendment removes matter, the long title may require to be amended to make it accurately reflect the content of the Act as amended.

CONSOLIDATING BILLS

If consolidation is the sole purpose of a Bill, the long title may follow this form:

> An Act to consolidate certain enactments relating to the names under which persons may carry on business in Great Britain.
>
> *Business Names Act 1985* [UK]

If the purpose of a Bill is to amend or introduce new matter as well as to consolidate, these additional purposes should be referred to in the long title.[5] For example:

> An Act to consolidate and amend the Child Welfare Institutions Act 1922, and to provide for the care of children in need or at risk.
>
> An Act to consolidate the Badgers Act 1973, the Badgers Act 1991 and the Badgers (Further Protection) Act 1991.
>
> *Protection of Badgers Act 1992* [UK]
>
> An Act to consolidate the Medical Acts 1956 to 1978 and certain related provisions, with amendments to give effect to recommendations of the Law Commission and the Scottish Law Commission.
>
> *Medical Act 1983* [UK]

PREAMBLE

Construction

Like the long title, a preamble is part of an Act and may be used as an aid to construction.[6] The construction of the preamble may have effect either to extend

5 In the United Kingdom consolidation with minor corrections and improvements is effected under the Consolidation of Enactments (Procedure) Act 1949. For a forceful criticism of the practice of combining law reform with consolidation, see Sir Alexander Kingcombe Turner, 'Changing the Law', 3 NZULR 404, 414–417.

6 This may be established by interpretation legislation such as s5(e) of the Acts Interpretation Act 1924 [NZ] which states: 'The preamble of every Act shall be deemed to be part thereof, intended to assist in explaining the purport and object of the Act.' See also s9 of the Canadian Uniform Interpretation Act.

or to restrict general language used in the body of an enactment.[7] However, it has been laid down that the preamble is not to influence the meaning otherwise attributable to the enacting part unless there is a compelling reason for it.[8] 'It is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may legitimately prevail.'[9] 'Although a preamble to a statute may be an aid to interpretation in the event of ambiguity, it cannot be used to cut down the meaning of enacting words which are plain and unambiguous.'[10]

Function

The traditional function of a preamble is to explain the object of an Act or to explain the reasons why its enactment is considered desirable. However, it is only in exceptional cases that a preamble is nowadays used.[11] Information is now usually provided to members of the legislature and the public generally by annexing to the Bill on its publication an explanatory memorandum setting out its objects and reasons. Political justification should be left to the speech introducing the Bill to the legislature and on no account should intrude upon the preamble.[12]

It is no longer customary for the preamble to be made use of to communicate a general statement of the purposes or objects of an Act with a view to facilitating the construction of the Act. While conceding that a preamble can sometimes assist in construction, Driedger suggests that the chances are equally good that it will create a doubt or ambiguity.[13] On the other hand, the preamble has had its defenders.[14] In 1964 Lord MacDermott said—

> The Legislature should make greater efforts to state its mind more clearly. The time was when Statutes set out by way of preamble and recital the intention of Parliament more fully than is now the practice; sometimes, indeed, individual sections had their own introductory preambles. It is a pity that this practice should have fallen into comparative disuse for it is a valuable way of declaring the essential aim of any important piece of legislation.[15]

However, it must be conceded that there are dangers in attempting to declare the essential aims of an Act in short form. As Professor Reed Dickerson pointed out to the Renton Committee, general purpose clauses tend to 'degenerate into pious incantations ... such as ... the one in a recent Ecology Bill, which in substance said Hurrah for Nature!' Nevertheless, despite the dangers, there are undoubtedly circumstances where such a declaration is worthwhile. A preamble may not always

7 See 44 Halsbury's Laws of England (4th edn), pp493–494.
8 By Viscount Simonds in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 at 463. For an application of this principle see *The Norwhale* [1975] QB 589, [1975] 2 All ER 501. See also *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 1 All ER 213 at 224.
9 Lord Normand in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 at 467.
10 Gibbs J in *Southern Centre of Theosophy Inc v State of South Australia* (1979) 27 ALR 59 at 66. See also Mason J in *Wacando v Commonwealth of Australia and Queensland* (1981) 56 ALJR 16 at 24.
11 This is not necessarily so in the case of local or private legislation which may be required to have a preamble by practice or parliamentary standing orders.
12 See the preamble to the Meat-export Control Act 1921–22 [NZ] for an old example of a contrary practice not likely to be followed now.
13 E. A. Driedger, *The Composition of Legislation* (2nd edn) p94.
14 For example Lord Alverstone CJ in *LCC v Bermondsey Bioscope Co Ltd* [1911] 1 KB 445 at 451.
15 Lord MacDermott, 'Some Requirements of Justice', 1964 Juridical Review 103, 110.

make the burden of construction significantly lighter, but it may hope to increase the chances that construction will accord with the intention of the legislature.

In the great majority of circumstances, the preamble is not the best vehicle for a declaration of purposes. If such a declaration is desirable, it is generally better placed in a separate section in the early part of the body of the Act.[16]

The preamble is better preserved for those exceptional cases where an explanation of certain facts provides a necessary setting for the proper understanding of the Act. The function is to provide background information, but not with the intention of influencing the construction of the body of the Act nor in such a form as is likely to affect construction.

Practice

A preamble should only be provided if it will serve a demonstrably useful purpose in the particular circumstances. Preambles are slowly sliding out of favour as statements of purpose become more widely used. No tears need be shed on that account. Present day practice discloses the acceptable use of the preamble in two legislative areas; although this must not be taken to suggest that every enactment within these areas should necessarily be embellished in this way.

- Where the subject-matter of the legislation is of constitutional or international importance.
- Where the legislation is of a formal or ceremonial character, intended to mark a noteworthy event such as the death of a statesman, a royal visit or the anniversary of an historic occasion.

Let us look at each of these in turn.

Where the subject-matter of the legislation is of constitutional or international importance

The purpose of the Act may be to implement an international convention, as for example is illustrated by the preamble to the Merchant Shipping (Load Lines) Act 1967 [UK]:

> Whereas a Convention entitled 'the International Convention on Load Lines' (in this Act referred to as 'the Convention of 1966') was signed in London on 5th April, 1966:
> And whereas it is intended that the Convention of 1966 shall replace the Convention set out in Schedule 2 to the Merchant Shipping (Safety and Load Line Conventions) Act 1932:
> And whereas it is expedient to enable effect to be given to the Convention of 1966:

A recent example of a Canadian preamble follows:

> Whereas on November 20, 1989, the Convention on the Rights of the Child was adopted in the United Nations General Assembly;
> AND whereas the United Nations Convention on the Rights of the Child has been ratified by Canada;
> AND whereas it is desirable to promote in Canada an awareness of the United Nations Convention on the Rights of the Child
>
> *Child Day Act* [Can]

16 See para 11.6 of the Renton Report which is in substantial agreement. Lord Renton confirmed his views in 'The Interpretation of Legislation' [1982] Stat LR 7 at 11. See also p154 et seq.

Another example is seen in the preamble to the Seal of New Zealand Act 1977 [NZ], an Act by which Parliament assented to the design and use of a seal for New Zealand.

Alternatively, the purpose may be to translate an amendment to a convention into the domestic law, as is the case with the following preamble, taken from the Oil in Navigable Waters Act 1963 [UK]:

> Whereas on the 11th April 1962 the Conference of Contracting Governments to the International Convention for the Prevention of Pollution of the Sea by Oil 1954, adopted amendments to that Convention: And whereas it is expedient to enable effect to be given to those amendments, and otherwise to extend the Oil in Navigable Waters Act 1955:

More recent English statutes implementing or concerning amendments to conventions have not included preambles.

Most examples of the use of preambles in statutes of constitutional importance are found in legislation giving effect to international conventions but there are other instances. For example, see Royal Style and Titles Act 1973 [Aust], the Australia (Request and Consent) Act 1985 [Aust], the Australia Act 1986 [UK] and the Mount Egmont Vesting Act 1978 [NZ].

Where the legislation is of a formal or ceremonial character, intended to mark a noteworthy event such as the death of a statesman, a royal visit or the anniversary of an historic occasion

An example from the Sovereign's Birthday Observance Act 1952 [NZ] follows:

> Whereas Her Majesty Queen Elizabeth the Second was graciously pleased to approve of the observance in New Zealand of Her birthday in each year of Her reign on the date prescribed by or under this Act instead of the 21st day of April: And whereas legislation is necessary in order that full effect may be given to Her Majesty's pleasure in the matter of the observance of Her birthday.

Other examples may be found in the John F. Kennedy Memorial Act 1964 [UK] and the Tauranga Moana Maori Trust Board Act 1981 [NZ].

ENACTING FORMULA[17]

The appropriate form of enacting formula depends upon the constitution, the requirements of which must be followed strictly. It need be stated only once in each Act although this was not the practice before 1850 when each separate enactment in an Act was introduced by words such as 'And be it further enacted'. However, s8 of the Interpretation Act 1889 [UK], which provided that each section of an Act shall have effect as a substantive enactment without introductory words, has been widely adopted and even in its absence one enacting clause for one Act is undoubtedly sufficient.

The formula at present in use in England (except for money Bills and those enacted pursuant to the Parliament Acts 1911 and 1949) runs as follows[18]—

17 Enacting formulae for subordinate legislation are discussed in Chapter 19.

18 As to Bills of a financial nature, see 44 Halsbury's Laws of England (4th edn) 496.

> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The admirably clear and direct form now followed by the Australian Commonwealth avoids the archaic verb form 'Be it enacted ...' and consists of a statement in the active voice that Parliament is exercising its legislative powers. The form is:

> The Parliament of Australia enacts:

The Law Commission in New Zealand has recommended an extension of this form to include the title of what is enacted.[19] For example

> The Parliament of New Zealand enacts the
> *Interpretation Act 1996*

SHORT TITLE

Function

The short title has the characteristics of a label. It identifies, describes and gives a name to the Act. Its sole purpose is to enable facility of reference and the objective is therefore identification first and description second. Lord Moulton once described the short title as 'a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title'.[20]

Because its purpose is limited in this way, especially by contrast with the wider object of the long title, it has been held that the short title may not be used to assist in the construction of the body of an enactment. However, contrary dicta do exist and the law is uncertain.[21] It would be prudent for the drafter to assume that the short title may be looked at for interpretative purposes. It is, after all, enacted by the legislature and part of the context in which the enacted clauses stand.

English practice has been described in a report prepared for the Statute Law Society as 'inconsistent and haphazard' and the point made that 'a wrong or unwise choice of title can have the effect of adding confusion to the statute book where the referential system is in force, eg by making an Act a principal Act when it should be an amending Act'. It is urged that the aim in titling should be 'to assist in steering the Bill into its appropriate niche in the existing body of statute law'.[22]

19 See 'A New Interpretation Act' NZLC R17, paras 237–238.

20 From 1995, New South Wales Acts no longer refer to a short title. Instead the short title is referred to as the name of the Act.

21 Against the use of short titles are *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 and *National Telephone Co Ltd v HM Postmaster-General* [1913] AC 546 at 560, HL per Lord Moulton. For the use are *Re Vexatious Actions Act 1896, Re Boaler* [1915] 1 KB 21 at 40, CA per Scrutton LJ (cf to the contrary Buckley LJ and Kennedy LJ); *Middlesex Justices v R* (1884) 9 App Cas 757 at 772, HL per Lord Selbourne LC and *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456, per Lord Diplock at 462.

22 See 'Statute Law: A Radical Simplification' (Statute Law Society) paras 23–25, 88–95.

Practice

A long title need not be long, but a short title must necessarily be short. It should also be as informative and descriptive as is compatible with the essential requirement of brevity. It must be consistent with existing law.

The first word of the short title should be carefully chosen having regard to the purpose of a short title—to facilitate reference to the statute. The drafter should spare a considerate thought for users searching indexes.

Let us consider a few examples—

Crimes Act
Finance Act
Customs Act
Local Government Act
Road Traffic Act

Each of these titles describes a subject of very considerable dimensions and of such a nature that frequent legislation can be contemplated. Assuming separate Acts are necessary, one cannot have a string of laws all called by the one name, say, the Road Traffic Act, and means must therefore be adopted to make short titles distinctive.

This is done in four ways—

By adding the year of enactment to the title

Road Traffic Act 1995

When the legislature is meeting near the end of the year care should be taken to ensure that an Act when finally enacted bears the date of the year of enactment and not the date of the year of introduction to the legislature.

It may be argued that a good system of indexing renders the practice of adding the year of enactment strictly unnecessary, but the practice remains of value particularly in the case of regularly recurring legislation such as Finance Acts or Appropriation Acts.

By distinguishing numerically between Acts of the same name passed in the same year

If, for example, three Finance Acts are passed in one year, the short titles should be

Finance Act 1995
Finance (No 2) Act 1995
Finance (No 3) Act 1995

Acceptable alternative styles are used in Australia and Canada. In Australia and New Zealand—

Finance Act (No 2) 1995

In Canada—

Finance Act No 2, 1995

Where the scope of the legislation is restricted to a distinct sector of a general topic, the statement of the general topic may be followed by a parenthetic reference to the particular topic

For example

Road Traffic (Hovercraft) Act 1995
Housing (Slum Clearance) Act 1995
Shops (Early Closing Days) Act 1995
Air Navigation (Charges) Act 1995
Local Authorities (Members' Contracts) Act 1995
Customs (Motor Spirits Duty) Act 1995.

This method must not be allowed to career out of control. Given the chance, brackets breed like rabbits. Do not draft short titles like—

Marine Fisheries (Lobsters and Crabs) (Minimum Size) (Northern Province) Act 1995.

Where the purpose of the Act is the direct amendment of another Act, the word 'Amendment' may be included in the short title

The word 'Amendment' may, but need not, be enclosed in brackets. The short title of an amending Act should state the subject-matter but not the complete short title of the Act that it amends. Thus—

Road Traffic Amendment Act 1995
not
Road Traffic Act 1964 Amendment Act 1995.

Similarly, where the purpose of an Act is to repeal another without replacing it, the word 'Repeal' may be included in the short title. For example

Lake Victoria Fisheries (Repeal) Act 1995.
Estate Duties Repeal Act 1995.

Where a legislative exercise involves the amendment of two or more Acts, an acceptable short title is formed by following the words 'Acts Amendment' with a bracketed reference to the topic of the amendments. For example

Acts Amendment (Lotteries) Act 1995.

If a legislative exercise involves the amendment of a large number of Acts as a consequence of the principal purpose of the exercise, the consequential amendments might be gathered in a separate enactment. For an example, see the Satellite Communications (Consequential Amendments) Act 1984 [Aust] and the Satellite Communications Act 1984 [Aust]. The usual practice however is for consequential amendments to be presented in a schedule rather than in a separate statute.

Where the Acts that are amended have a common distinctive feature (eg all are concerned with health matters), the short title may begin with reference to the common feature. For example

Health Legislation Amendment Act 1995.

Criminal Law Amendment Act 1995.

Amendment and repeal functions may be effected in one statute and both may be referred to in a short title.

Health Legislation Amendment and Repeal Act 1995.

The language of a short title should be consistent with the language of the body of the enactment. The need to be brief does not justify inaccuracy or abbreviation. The abbreviation 'etc' has no place in a short title. Avoid titles such as

Health and Safety at Work etc Act 1995.
Boilers, Cranes, and Escalators Etc Act 1994.

If the short title refers to a legal person, the name of that person should be stated in full. Thus—

New Zealand Tourism Board Act 1991.
not
Tourism Board Act 1991.

It is usual to begin major words in a short title with a capital letter. In some jurisdictions, the conventional practice is to print short titles in italics. Both practices are intended to set the short title apart from the other words of the statute.

Apostrophes in short titles cause difficulties. They are best avoided if possible, even at risk of grammatical impurity. For example 'Dentists Registration Act 1995' would be acceptable. Of course, where the short title incorporates the name of a body or institution containing an apostrophe, that name must be accurately reproduced, warts and all. For example

Thames Boys' and Girls' High School Act 1995.

Do not inject an apostrophe where one is not warranted.[23] For example, 'Teachers Act' is correct, but 'Teachers' Act' is incorrect. Such an Act is concerned with teachers but it is not 'of' or 'possessed by' teachers in the sense which would justify an apostrophe. On the other hand 'Teachers' Superannuation Act' is correct. The subject of the Act is the superannuation of teachers.

Citation by means of short title

When an Act is cited or identified by means of the short title, the first word of the short title is usually preceded by the word 'the'. This word is not part of the short title and should not begin with a capital letter.

The short title should not be enclosed by inverted commas. Thus

This Act may be cited as the Forests Act 1995.
This Act is the Forests Act 1995.[24]
not
This Act may be cited as 'The Forests Act 1995'.

23 As to apostrophe practice, see p44.
24 It is not necessary to use the established but stuffy word 'cited'.

Where the subject-matter of an Act is similar to that of a previous statute or group of statutes, provision may be made enabling the collective citation of the whole group of statutes. For example, s5(1) of the Coal Industry Act 1985 [UK] provides

> This Act may be cited as the Coal Industry Act 1985, and the Coal Industry Acts 1946 to 1983 and this Act may be cited together as the Coal Industry Acts 1946 to 1985.

Collective citation is not normally necessary where the technique of direct amendment is followed. With regard to amending Bills every operative clause of which amends a section in an existing Act directly, there is little to be gained by collective citation of the amending Act with the principal Act, for, immediately on enactment, the amending Act ceases to exist for all practical purposes as a separate entity. Interpretation legislation usually provides that a reference to the principal Act is construed as including a reference to that Act in its original form and as amended from time to time.[25] On the other hand, where less direct methods of amendment are used, or the amending law contains additional supplementary or complementary material which is not fitted into the structure of the principal Act, collective citation will serve to indicate the relationship of the two laws.

Although collective citation indicates the view of the legislature that statutes are in pari materia, this practice is clearly distinguishable from a direction that statutes are to be construed together. Such a direction should be given separately where desired, unless provision is already contained in interpretation legislation.

COMMENCEMENT

The *commencement* of an Act must be distinguished from its *passing*. An Act commences when it comes into force. It is passed and in a technical sense becomes part of the law of the land when all legislative steps have been completed, the final step commonly being the assent of Her Majesty or Her representative, or in a Republic the assent of the President or other head of state.[26] An Act that has been passed may not have commenced.[27] The concepts of *commencement* and *passing* must both be distinguished from the question of when a law *has effect*. Enactments may be expressed to have effect in respect of events occurring before either passing or commencement. For example, a tax may be imposed on income earned in the preceding year or a defective action that has already occurred may be validated.

Consideration of the commencement requirements is a necessary part of every drafting exercise. In some instances, the problems of commencement and application are closely related and it is not enough to rely only on a time of commencement. It may be necessary to relate the impact of the legislation to circumstances existing at the time of commencement. This practice will be considered in the next section under the heading 'Application', and also later under 'Transitional' in Chapter 17.

The commencement of an Act that is intended to regulate future conduct should not be permitted to occur before the text of the Act is published and available to the public. Commencement on assent is therefore not suitable in many instances.

25 See Acts Interpretation Act 1901 [Aust] s10.

26 See F. A. R. Bennion, 'Modern Royal Assent Procedure at Westminster' [1981] Stat LR 133; *R v Smith* [1910] 1 KB 17.

27 But see J. W. Bridge, 'Judicial Anticipation of the Commencement of Statutes', 88 LQR 390.

The availability of the text is not the only factor. It may be essential for copies of the Act to be distributed throughout the jurisdiction before commencement and also for administrative steps, such as instructing police officers or public servants or providing application forms, to be taken. Similarly, legislative steps involving the making of rules or regulations may be necessary and members of the public may need time to ready themselves for the operation of the Act.

A specific commencement provision should be expressed in direct unambiguous terms. The form adopted must meet two requirements. It must ensure certainty and, if the Act has practical implications for the public, it must ensure adequate public notice.

Commencement provisions are best presented in one separate section or subsection where they can be easily found.[28]

There are four possibilities:

- the legislation may make no specific provision;
- it may specify a date for the commencement;
- it may empower some person or persons to specify a commencement date;
- it may provide for the Act to commence upon the occurrence of a stipulated event.

Practical considerations may require a combination of two or more of these courses of action for different provisions or purposes of an Act, but before passing to such complications let us first examine each alternative in simple form.

Where the legislation makes no specific commencement provision

Interpretation legislation or possibly the constitution generally provides a default provision applicable to Acts which do not contain a specific commencement provision. The general rule applicable in default may provide for commencement on the day of assent or on the day of publication in the *Gazette*. Alternatively, as in Australia, the general rule is for commencement on the 28th day after assent. The drafter must be absolutely sure which rule applies in his or her jurisdiction.

Where the legislation specifies a commencement date

The following simple form is adequate:

> This Act comes into force on 1 June 1995.[29]

It is preferable to use the words 'comes into force' or 'comes into operation' rather than 'commences' simply because inexperienced users of statutes may be unaware of the legal effect of commencement and may confuse it with passing.

Where retrospective operation is necessary, the following form is suitable:

> This Act is deemed to have come into force on 1 June 1994.

28 See Alec Samuels, 'Commencement of Acts of Parliament' [1981] Stat LR 174 and 'Commencement—the Latest' [1983] Stat LR 42.

29 In some jurisdictions the word 'operation' is used instead of 'force'. Either is acceptable, but it is desirable that one or the other be used consistently.

The commencement of a statute or part of a statute may take place at a specified point in time. This may be required on the imposition of a tax or an alteration in a tax rate. For example

> This Act is deemed to have come into force at 6 pm on 1 June 1994.

Where some person is empowered to specify a commencement date

For example

> This Act comes into force on such day as the Minister appoints by notice in the Gazette.
>
> This Act comes into force on a day to be fixed by the President by proclamation.

A condition may be attached to the exercise of the power.[30] For example

> This Act comes into force on a day to be appointed by the Minister by notice in the Gazette, but the Minister cannot appoint a day that is earlier than 3 months after the passing of the Act.
>
> This Act comes into force on a day to be appointed by the Minister by notice in the Gazette, but the Minister cannot appoint a day that is earlier than the day on which the State Enterprises Act 1994 comes into force.
>
> The provisions of this Act come into force on such day or days as may be appointed by the Minister by notice in the Gazette, but any provision that has not been brought into force within 6 months after the passing of this Act shall come into force on the expiry of that period.

Where the Act is to commence upon the occurrence of a stipulated event

The event need not be one which will inevitably occur, but its nature must be such that no doubt can arise whether it has or has not occurred. It is preferable, in the interests of certainty and public information, that the occurrence of the event be a matter of public record, such as the commencement of another statute or the publication of some kind of instrument in the *Gazette*. Some examples follow:

> This Act comes into force at the end of one month beginning on the day on which it is passed.
>
> This Act comes into force on the day that the Minister, by notice in the Gazette, certifies to be the day on which the Fishing Limits Convention comes into force as regards the Republic.
>
> This Act comes into force on the same day as the Apple Tax Act 1995 comes into force.

The last of the above forms is suitable only when there is a relationship linking the operation of the two Acts.

30 See Foreign Investment Review Act [Can] s31; Crimes (Protection of Aircraft) Act 1973 [Aust] s2.

Multiple commencement dates

Where different provisions or purposes of an Act are to come into force at different times, the following examples may be adapted:

The provisions of this Act come into force on such days as are appointed by the Minister by notice in the Gazette.

(1) Except for Part 2 and Schedule 3, this Act comes into force on 1 January 1996.
(2) Part 2 and Schedule 3 come into force on 1 July 1996.

This Act comes into force on a day to be appointed by the Minister by notice in the Gazette, except that a later day may be appointed for section 14 to come into force than that appointed for the remainder of the Act.

(1) This Act comes into force on such day or days as the Minister may appoint by notice in the Gazette.
(2) A notice may appoint different days for different provisions or for different purposes of the same provision.

A particular section may require special treatment. For example

This section shall come into force on the exchange of instruments of ratification of the Joint Declaration of the Government of the United Kingdom and the Government of the People's Republic of China on the question of Hong Kong which was signed in Peking on 19th December 1984; and notice of the date on which those instruments are exchanged shall be given in the London Gazette.

Hong Kong Act 1985 [UK] s1(2).

Conditional commencement date

If the commencement of an Act depends for its efficacy upon the prior commencement of some other Act, a conditional commencement provision can be enacted.

(1) Subject to subsection (2), this Act comes into force on 1 July 1995.
(2) If Part 2 of the Financial Administration Act 1994 does not come into force on or before 1 July 1995, subsection (1) does not apply and this Act comes into force on a day to be fixed by proclamation of the President.

Alternative commencement dates

This Act comes into force on 1 July 1995 or the day on which the Dogs Act 1994 comes into force, whichever is the later.

Automatic commencement when commencement provision fails

If an Act confers a commencement power on the Minister, or otherwise on the executive arm of a government, and that commencement power is not exercised

within a reasonable time, it is possible that the will of Parliament as exhibited by the enactment may be thwarted by the executive. If the usual form of enabling a Minister to bring an Act into force by notice in the *Gazette* is included, the executive can delay the coming into force permanently if they choose to do so.

This situation can be averted by including a provision like one of the following either in the particular Act or in interpretation legislation.[31]

> If this Act has not come into force within 1 year after the day on which it is assented to, it automatically comes into force on the next day.

> If a provision of this Act has not come into force by 1 January 1996, it comes into force on that day.

APPLICATION

Application to circumstances existing at commencement

An application section may give an early indication of the area of application of a statute. Such a section may serve to remove uncertainties and solve problems as to the manner in which a new law is to affect the variety of complete and incomplete situations and transactions existing at the moment in time when that law comes into force.

Application provisions may concern the application of the legislation to

- the circumstances existing when the legislation comes into force
- a territorial area
- specific persons or things
- the Crown or the Government.

A specific application provision may be desirable, for instance, in the case of a tax or a charge or benefit the nature of which is related to a period or point in time not easily reconcilable with the time of commencement of the Act. Similarly, if an Act confers obligations, privileges or remedies on certain persons, it may be essential to relate those obligations, privileges or remedies to possible current situations. This is particularly so when an Act that is apparently prospective is intended to have a measure of retrospective operation as regards existing circumstances.

Although the relationship between commencement and application may be close in practical terms there is a clear distinction in principle and presentation is clearer if separate sections or subsections are used. The following sentence would be improved if it were reduced to two sections.

> This Act is deemed to have come into force on 14 July 1994, and applies with respect to advances approved by the Housing Corporation on or after that date regardless of when the application was made.

The following examples illustrate some of the functions that application sections may fulfil. Other problems arising on the commencement of an Act may be better dealt with by transitional clauses and some guidance as to the appropriate technique

31 See s15DA of the Acts Interpretation Act (Queensland). This provision permits the automatic commencement period of 1 year to be extended for a further year by regulation.

to meet a particular problem may be had by comparing the examples that follow with those in Chapter 17.

TAXATION EXAMPLES

Specific application provision is necessary where a tax is periodic in nature and an Act is passed on a date falling within a period. It is usual to apply legislation of this kind to a particular period and subsequent periods. For instance

(1) Subject to subsection (2), this Act comes into force on 1 January 1995 and has effect in relation to the tax on income derived in the 1994/1995 income year and each subsequent income year.

(2) Section 4 is deemed to have come into force on 1 January 1994 and has effect in relation to the tax on income derived in the 1993/1994 income year and each subsequent income year.

This Act has effect with respect to the rates for any period beginning on or after 1 April 1995.

Not all amendments to such periodic taxes need to be treated in this way. For example, amendments relating to administrative duties, such as the duty of secrecy, may be intended to apply immediately and the commencement of such legislation can be treated in the usual way.

An application provision may be necessary in case of the imposition or amendment of a tax that is not related to a period of time. For instance—

The amendments effected by this Act apply with respect to the estates of deceased persons dying on or after 1 June 1995.

This Act applies to apples of the 1995 season and each subsequent season.

The levy is payable in respect of cattle slaughtered at a registered meat-works on or after 1 July 1995.

STATUTORY CHARGES

(1) The amendments of the Principal Act made by this Part apply in relation to a charge payable in respect of a flight completed on or after 1 October 1982 or a take-off or landing on or after that date.

(2) The amendments of the Principal Act made by section 4 apply in relation to a year of registration of an aircraft commencing on or after 1 October 1982.

Air Navigation (Charges) Amendment Act 1982 [Aust] s5.

STATUTORY BENEFITS

The amendments made by this Act, in so far as they increase the amount of pensions payable under the principal Act, apply to the first instalment of pension falling due on a day after the day when this Act comes into force and to every subsequent instalment.

PRIVILEGES

This Act shall be deemed to have come into operation on 1 July 1965, but not so as to affect any cause of action arising, or liability to criminal proceedings incurred, before the passing of this Act.

Commonwealth Secretariat Act 1966 [UK] s2(2).

REMEDIES AND OBLIGATIONS

The amendments made by this Act have effect only in respect of medical appliances manufactured in or imported into the Republic after the commencement of this Act; and the principal Act continues to have effect in respect of medical appliances manufactured or imported into the Republic before that time as if this Act had not been passed.

A complaint may not be made under this Act with respect to the conduct or inaction of a person before this Act came into force.

This Act applies only to a credit agreement made after this Act comes into force.

This Act applies to every civil proceeding commenced after this Act comes into force.

Territorial application

Notwithstanding that a statute is apparently concerned only with matters arising in a particular territorial part of the jurisdiction, it does not follow that the application of the statute should be restricted specifically to that part. It is very likely that it will be necessary to enforce the statute throughout the jurisdiction.

Simple forms extending or restricting territorial application are adequate but care must be taken to avoid ambiguity. The application of a statute to part only of the territory under a legislative jurisdiction may be declared either affirmatively or negatively. For example

This Act extends to Scotland.

This Act does not extend to Scotland.

Part 2 and section 17 apply to Stewart Island only.

This Act extends to Zanzibar as well as to Tanganyika.

This Act does not extend to the Southern Province, but the President may provide, by order published in the Gazette, that any provision specified in the order also extends to the Southern Province subject to any exceptions that are specified in the order.

This Act applies to the metropolitan area of the State (as defined in section 2) and to such other area as the Minister may from time to time declare by order published in the Gazette.

Although it is uncommon to restrict the application of an enactment to part

only of the jurisdiction, it is less uncommon to restrict the application to actions, circumstances or things arising in a specified area of the jurisdiction. For example

> Part 2 does not apply to the area of a mining tenement granted under Part 4.

Extra-territorial application

If legislation is intended to have extra-territorial effect, this must be made clear. The application of the law should be limited to the class or classes of persons with whose conduct the legislature is legitimately concerned.[32] Examples usually concern the ships, aircraft, fisheries, military forces, security or official secrecy of the country concerned. Only in exceptional circumstances and in relation to matters that are properly the concern of the legislature should an offence be established which may be committed by an alien out of the jurisdiction. Some examples follow:

> This Act extends, except so far as the contrary intention appears
> (a) to acts, omissions, matters and things outside Australia, whether or not in or over a foreign country; and
> (b) to all persons irrespective of their nationality or citizenship.
>
> *Crimes (Protection of Aircraft) Act 1973* [Aust] s5.

> The Institute is not limited, in the performance of its functions and the exercise of its powers, to Australia and the territorial waters of Australia and this Act applies both within and outside Australia and extends to all the Territories of the Commonwealth not forming part of the Commonwealth.
>
> *Australian Institute of Marine Science Act 1972* [Aust] s6.

> The provisions of this Act shall apply in respect of
> (a) any matter or thing done, to be done, or omitted to be done within New Zealand or New Zealand fisheries waters;
> (b) any act or omission, occurring on any New Zealand ship or aircraft, or by any New Zealand citizen, wherever that ship or aircraft or person may be.
>
> *Antarctic Marine Living Resources Act 1981* [NZ] s1(3).

Application to specific persons and things[33]

Legislation is presumed to relate to the conduct of all persons, whether aliens or citizens, within the area to which the legislation applies. This presumption may be displaced by the language of the statute and this very often is the case in legislation of extra-territorial application. Legislation may be expressed to apply only to some class of persons within the jurisdiction but this is unusual and to some extent dangerous for it often happens that legislation which is apparently concerned with the regulation of the conduct of some class of persons exclusively, does, upon close examination, extend in scope some little way beyond the members of that

32 See 44 Halsbury's Laws of England (4th edn) 577 and Roberts-Wray, *Commonwealth and Colonial Law*, pp387 et seq. See also s1(3) and (4) Antarctic Treaty Act 1967 [UK].

33 As to the application of enactments, see F. A. R. Bennion, *Statutory Interpretation* (2nd edn) p255 et seq.

class. The drafter may, for example, be instructed to draft a Bill requiring all young citizens to register for and perform national service. Such a Bill is clearly concerned primarily with the duties of citizens and the drafter might be tempted to limit the application of the Bill to citizens by a clause such as

> This Act applies only to citizens of the Republic.

Such a provision would, however, preclude the statute from establishing any offence which might be committed by a non-citizen; and almost certainly provision would be necessary in such a statute for offences (such as incitement to desert or mutiny) which might be committed by non-citizens as well as citizens.

It is often necessary to restrict the application of wide general words in order to remove domestic or small-scale activities from the scope of an enactment, or to remove matters covered by some other enactment.[34] The usual technique is illustrated by the following examples:

> This Act does not apply to restrict or affect in any way the slaughter of any animal of which the meat or any meat product derived from it is not intended for sale or export for human consumption, nor to impose any obligation in relation to the carcase of any animal slaughtered but not intended for sale or export for human consumption.

> This Act does not apply to a sale of goods at a bazaar or fair the proceeds of which are intended for religious, charitable or public purposes.

> This Act does not apply to residential tenancy agreements.

A further example of restrictive application occurs where new regulating provisions are made to apply only to licences or other authorities issued after a certain date.

> The provisions of this Part apply only in the case of licences issued on or after 1 July 1995.

The purpose of many application provisions is to draw the boundaries of the scope of the legislation with precision. This can be done very clearly in some contexts.

> This Act applies to the banks listed in Schedule 2.

> This Act does not apply to a complaint concerning the conduct of a security guard which took place before this Act came into force.

> This Act does not apply to a vessel belonging to the naval, military, or air forces of the State or any other country.

It may be necessary to provide for the manner of application of legislation in circumstances where it would be inconsistent with and might be construed as impliedly repealing other existing legislation. For example

34 See Slaughterhouses Act 1974 [UK] s35.

Where any provision of this Act is in conflict with the Health Act 1981, or where the exercise of any power conferred by or under this Act would be inconsistent with the exercise of a power conferred by or under the Health Act 1981, the provisions of this Act do not apply in so far as this Act so conflicts and any power conferred by or under this Act cannot be exercised so as to limit or restrict the exercise of the power conferred by or under the Health Act 1981.

This Act does not apply to any workplace that is a mine to which the Mines Safety Act 1993 applies.

Application to Crown or to Government

The traditional rule of law, which has been reduced to legislative form in some countries, is that an enactment does not bind the Crown or Government unless it so provides either expressly or by necessary implication.[35] The phrase 'necessary implication' is vague and troublesome and it is desirable to place the matter of the application of a statute to the Crown beyond argument by means of a provision such as the following:[36]

This Act binds the Crown.

This Act does not bind the Crown.

The rule remains in force in those Commonwealth countries which have a republican form of government. Thus—

This Act binds the Republic.

This Act binds the Government of the Republic.

The traditional rule does not apply in every country. In some jurisdictions, for example British Columbia, the presumption has been reversed by a provision similar to the following:

Every enactment binds the Crown unless it otherwise provides or the context otherwise requires.

This simple declaratory form is not always adequate. The subject-matter of the legislation may require more detailed reference to agents or servants of the Crown or property of some particular kind of the Crown.[37] This is a matter easily overlooked. When a statutory body is to be established, the drafter must consider and seek instructions if necessary whether the body is to operate as an agent of the Crown. For example

35 See 44 Halsbury's Laws of England (4th edn) 578; *Bombay Province v Bombay Municipal Corpn* [1947] AC 58 at 61; *Premchand Nathu & Co Ltd v Land Officer* [1963] AC 177 at 188, *Lord Advocate v Dumbarton District Council* [1990] 1 All ER 1. But also see the principles established in Australia in *Bropho v State of Western Australia* (1990) 93 ALR 207 at 218–219.

36 See *Bropho v State of Western Australia* (1990) 93 ALR 207 at 212–3 and 218–9.

37 See Road Traffic Act 1988 [UK] s183. The exemption of the Crown extends to its 'servants or agents' and difficult questions have arisen as to whether particular bodies may be so regarded. Where a doubt may arise such questions are best avoided by specific provisions in the Act setting up the body concerned. See the forms at p257.

This Act shall apply to land an interest in which belongs to Her Majesty in right of the Crown and land an interest in which belongs to a government department or is held in trust for Her Majesty for the purposes of a government department; but in its application to any land an interest in which belongs or is held as aforesaid this Act shall have effect subject to such modifications as may be prescribed by regulations made by the Secretary of State.

Freshwater and Salmon Fisheries (Scotland) Act 1976 [UK] s8(1).

Except as is otherwise provided, this Act does not bind the Crown or apply to any means of telecommunication established or maintained by the Crown or to any apparatus for telecommunication possessed or used by the Crown for the purpose of or in connection with any means of telecommunication.

This Act does not apply to any activity of the Government which the President certifies is necessary for reasons of national security.

(1) Subject to subsection (2), the provisions of this Act do not apply in relation to any act or thing done or omitted to be done by a member of the Defence Force, or by an officer of the Department of Defence, in the performance of functions or duties as such a member or officer, as the case may be, in relation to command and control, intelligence or weapons systems.

(2) The regulations may make provision for the application, in specified circumstances, of any or all of the prescribed provisions of this Act to a member of the Defence Force, or to an officer of the Department of Defence, in the performance of functions or duties as mentioned in subsection (1).

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(1) Subject to subsection (2), this Act binds the Crown.

(2) This Act shall not be construed as requiring
   (a) any Minister of the Crown;
   (b) any department of the Government or any statutory corporation representing the Crown;
   (c) any prescribed public statutory authority; or
   (d) any officer or employee of the Crown or of any Minister, department, corporation or authority referred to in this subsection in the performance of his functions as such an officer or employee,

   to hold a licence.

Radiocommunications Act 1983 [Aust] s8(1) & (2).

Provision may also be made enabling the Act to be applied to the Crown or the Government at some future time. For example

(1) The Minister may, by order published in the Gazette, provide for the application to the Government of any of the provisions of this Act, or any regulations made under this Act, as may be specified in the order and subject to any modifications that may be specified in the order.

(2) An order under this section may provide for the enforcement of any provision applied by the order, and, in particular, may make provision as to the person liable to be proceeded against for any offence under any such provision.

DURATION

Expiry

In the absence of special provisions to the contrary, legislation is perpetual in duration; it continues in force until either it is repealed or it expires. If an Act, or any part of an Act, is intended to be of temporary duration, the provision for its expiry may be made by the adaptation of any of the techniques available in respect of the commencement of statutes. Thus, an Act may specify a date when it will expire, it may empower some person or authority to fix such a date, or it may provide for expiry upon the occurrence of a stipulated event. Temporary statutes are few in number and almost all specify an expiry date.

> This Act continues in force until 31 July 1997 and then expires.

> Part 6 continues in force until 31 December 1997 and then expires.

> The provisions of this Act, other than Part 2 and sections 37 and 38, continue in force until 30 June 1997 and then expire.

> This Act ceases to be in force and expires on a day to be fixed by the President by order published in the Gazette.

The phrase 'and expires' is not strictly necessary but is included as it does make apparent the fact that the law is one of temporary duration.

Commencement and duration provisions may be combined.

> This Act comes into force on 1 January 1995 and continues in force for 3 years after that date.

In every case where a temporary Act is proposed, the drafter must decide, in the light of the content, whether special savings provisions need be included, and, of course, this decision must be taken with due regard to any relevant statutory provision as to the effect of expiry.[38]

It is possible to build in a very considerable flexibility if the circumstances so require. For example:

> (1) This Act comes into force on 1 September 1996 and expires on 31 August 1998.
>
> (2) The President may provide by proclamation
> (a) that all or any of the provisions of this Act that are in force shall expire on a day specified in the proclamation;
> (b) before 1 September 1998 that all or any of the provisions of this Act that have expired shall come into force again on a day specified in the proclamation.

A complex provision for cessation and reapplication may be seen in s17 of the Prevention of Terrorism (Temporary Provisions) Act 1984 [UK] (now repealed).

38 In some jurisdictions, interpretation legislation equates the effect of expiry with that arising on a repeal.

Sunset and review provisions

Increasing criticism of the growing weight of statute law, and in particular the predilection of governments for the creation of statutory bodies, has led in some jurisdictions to the practice of including 'sunset' clauses in legislation. In simple form, a 'sunset' clause is no more than an expiry provision of the kind set out above; however, the simple form is inadequate where there will, or may be, some kind of going concern operating under the Act when the sun sets on it. Property, debts, contractual obligations and benefits, staff and continuing functions must all be provided for. The difficulty is to foretell at the time a Bill is being drafted what the circumstances will be, and therefore what transitional provisions will be necessary, at the time when the Act will or may expire.

One possible solution is to include a provision empowering the making of regulations before the sun sets to deal with transitional arrangements.

An alternative to the 'sunset' clause is the 'review' clause. The purpose of a review clause is to oblige the responsible Minister or some other identified authority or person to review the operation of legislation after a specified period and to report to Parliament with appropriate recommendations. One important consequence of such a clause is that Parliament is not permitted to lose sight of its creation.

A review clause also has the advantage, when compared with a sunset clause, that no attempt to speculate on the likely state of affairs years ahead is necessary; in other words the clause does not presume to legislate in the early dawn for the post-sunset night. The following form is capable of adaptation. If desired, an initial review might be required after a fixed period and further reviews after fixed intervals.

(1) The Minister is to carry out a review of the operation and effectiveness of this Act as soon as is practicable after the expiration of 5 years from its coming into force and, in the course of that review, the Minister must consider and have regard to
  (a) the attainment of the objects of the Act; and
  (b) the effectiveness of the operations of the Mines Consultative Safety Board and the Mines Survey Board having regard to their functions and the objects of the Act; and
  (c) the need for the continuation of the functions of the Mines Consultative Safety Board and the Mines Survey Board; and
  (d) such other matters as appear to be relevant to the operation and effectiveness of this Act.

(2) The Minister is to prepare a report based on the review and as soon as practicable after the report is prepared must cause it to be laid before Parliament.

A variety of expiry provisions exists in interpretation legislation. In the United Kingdom so far as Acts passed after July 1978 are concerned, for example, the savings provisions applicable on repeal are also applicable on expiry and this is adequate for most cases. If interpretation legislation does not in a particular jurisdiction equate expiry with repeal, a temporary Act may need to contain a provision along the following lines—

Upon the expiry of this Act, the Interpretation Act applies as if this Act had been repealed by another Act.

Examples enabling the extension of a temporary statute follow:

Sections 67 and 68 expire upon the expiration of 12 months after the day those sections come into force unless the National Assembly otherwise appoints by resolution passed before the sections expire.

This Act expires on 30 April 1995 or on such earlier day as may be fixed by proclamation, unless before 30 April 1995, or before any earlier day fixed by proclamation, both Houses of Parliament, by joint resolution, direct that this Act shall continue in force until a day specified in the resolution, in which case this Act expires either on that specified day or on such earlier day as may be fixed by proclamation.

Public Order (Temporary Measures) Act 1970 [Can] s15.

This Act continues in force until the end of 1997 and then expires unless the President, by order in the Gazette, extends its duration for such further period or periods as the President may from time to time order, but so that in any event the Act does not continue in force later than the end of 1999.

Chapter 11

Powers and duties

INTRODUCTION

The purposes of legislation are legion but drafters are called upon to perform some tasks more often than others. In many instances, the essence of a legislative task is to confer powers and to impose duties. This chapter begins with a consideration of powers and duties generally and follows with discussion of some particular statutory powers which are frequently required and are of some importance.

The distinction between a power and a duty appears to be straightforward and clear cut.

A power implies a measure of discretion. The holder of the authority is authorised or permitted to exercise it but need not do so. The authority is classified as permissive and therefore a power. The word 'may' should invariably be used to confer a power.[1]

If the holder of the authority is obliged to exercise it and some act must be performed, the authority is classified as obligatory and therefore a duty. A duty may be expressed either as a particular rule or as a standard, It may be expressed positively or negatively. The words 'shall' and 'must' are commonly used to impose a duty.

In practice, the distinction between powers and duties often becomes blurred. A power may be coupled with a duty. In many instances a person is under a duty to respond to the exercise of a power by another person. In other instances, an authority may have a duty to exercise a discretion. For example, an authority may have a power to issue a licence of some kind and may have power to attach conditions if in its discretion it decides to issue a licence. At the same time, the authority may be under a duty to consider every application for a licence and exercise a discretion in the particular case before attaching conditions. A power to revoke television licences has been held to imply a duty not to exercise the power without good cause.[2]

Although 'may' has been construed many times so as to impose an obligation, the drafter should never presume such a construction.[3] 'May' should never be used if 'must' or 'shall' is intended. This is a common error. If the exercise of an authority

1 The words 'may', 'must' and 'shall' are discussed at p103.
2 See *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697.
3 Examples where the courts have construed 'may' as obligatory may be found in 44 Halsbury's Laws of England (4th edn) 581. For an example see *A-G v Antigua Times Ltd* [1976] AC 16; *Car Owners' Mutual Insurance Co Ltd v Treasurer of Commonwealth of Australia* [1970] AC 527.

is intended to be permissive and it is considered necessary in an exceptional case to stress the point and to establish it as a discretion beyond doubt, words such as 'if he or she thinks fit', 'but shall not be obliged to' or 'in his or her discretion' may be introduced. Ordinarily this is not necessary and the practice should only be followed if the context is such that there is a danger that a duty might be implied.

The courts are no longer content to adopt a literal approach to phrases such as 'if he thinks fit' which appear to confer a complete subjective discretion.[4] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 is a landmark and subsequent cases continue to confirm that in future courts will approach statutory discretions as did Lord Reid (p 1030)—

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court.

The implications for the drafter are of tremendous importance. If the courts are to consider the exercise of statutory discretions in the light of the policy and objects of a statute, then patently that policy and those objects must be brightly lit. Carefully drawn statements of purpose, whether applicable generally to the whole statute or applicable to an element of it, can be of great value.[5] In many cases the intended limits of discretion may be conveniently defined by setting out those factors which are to be taken into account.

DRAFTING STATUTORY POWERS

Necessity for power

Before complying with an instruction to draft a provision conferring a power, the drafter must consider whether further provision for the power is really necessary. Duplication of powers which already exist is undesirable in most cases, whether the power exists under the common law or by statute. In this task, the starting point for the drafter is the interpretation legislation which may possibly contain a relevant power of general application. For example, interpretation legislation may provide that—

- a statutory function may be performed 'as occasion requires' or 'from time to time',
- a statutory function conferred on a specified officer may be performed by the person occupying or acting in the office,
- the validity of a function conferred on a body is not affected by a vacancy in the membership of the body,
- power to make an instrument or a decision includes power to amend or revoke the instrument or decision,
- appointments may be made by name or office,
- acting appointments may be made to a statutory office,
- appointees to an office may be suspended, removed from office or reappointed,

4 See de Smith, *Judicial Review of Administrative Action* (4th edn by J. M. Evans), at pp290–298.
5 As to purpose provisions, see p154.

- various powers incidental to delegation are applicable if a statute confers power to delegate a function.

In some cases the power required may already exist under some other statute. For example, the powers of search and arrest already available to the police may obviate the need for particular powers.

Statement of power

Clarity is essential. The nature and extent of the power must be manifest and so must the circumstances in which the power may be exercised. Exactness is a necessity. On the one hand, the statement of what may be done must be sufficiently broad to ensure that the holder of the power can achieve the intended purpose; on the other hand the demands of principle may require that the power be made subject to explicit controls, limitations or conditions.

Who should be given the power?

The holder of a statutory power must be identified precisely. The recommended practice of drafting in active rather than passive language provides a reminder to identify the holder of a power. Statutory powers should not be conferred on 'the Department' or 'the Ministry', or a specified Department or Ministry, but should be conferred on appropriate individuals. It is far from clear, and impossible for the public to be sure, who has the capacity to exercise a power that is conferred on a Department. Individuals should not be identified in relation to specified Departments because of the disease, endemic to politicians everywhere, which drives them to restructure the public service at regular intervals.

In the case of powers to be conferred on the executive branch of government, the first question to be determined is whether the Minister should be given the power and be responsible for its exercise or should the power be conferred directly on a specified official.

A number of factors are relevant to the choice of an appropriate person or persons to be given a statutory power. The pre-eminent matter is the nature of the power and its importance to both the individual concerned and the public interest. But these matters do not stand alone. Other factors that need to be taken into account include

- the procedure to be followed in the exercise of the power and any safeguards attached to its exercise. For example, if an applicant is given the right to a fair hearing before a decision is taken this may affect what is appropriate;
- whether the holder of the power is required to seek advice or engage in consultations or take any other action before taking a decision;
- provision for a review or appeal process;
- the degree of expertise required for the proper exercise of the power. For example, a decision to exercise the power to grant a licence or permit of some kind may call for specialist knowledge in order to assess the suitability of the applicant;
- the desirability of the power being conferred on some individual within or associated with the government or alternatively on some person independent of the government.

Exercise of the power

An important matter is whether the statute should declare the principles and policies that should determine the manner in which a power is exercised. This may be done specifically for the particular power or it may be more convenient to state the principles and policies applicable to the statute, or the relevant part of it, in a separate purposes provision.[6] The approach should be to draft as tight a statement of those principles and policies as is practicable and, where possible, to state the factors that the legislature considers relevant to the way the power is exercised. Such a statement is helpful not only to those who exercise the power but also to those who want or do not want the power to be exercised. For example, a statute regulating public assemblies might include the following:

> The Commissioner must have regard to the following matters when considering an application for a permit to hold a public assembly in Republic Square:
> (a) the right of peaceful assembly contained in Article 1 of the International Covenant on Civil and Political Rights; and
> (b) any likelihood that if the assembly were to take place
> (i) serious public disorder would occur; or
> (ii) the safety of any person would be placed at risk; or
> (iii) damage to property would occur; or
> (iv) the assembly would cause an unreasonable obstruction to public passage.

A statute providing for public access to personal information held by the government might include the following:

> A chief executive is to administer this Act and deal with every application for access to a document in such a way that
> (a) assists the public or the applicant to obtain access to documents; and
> (b) facilitates prompt access to documents at the lowest reasonable cost; and
> (c) assists the public to ensure that personal information contained in documents is accurate, complete, up to date, and not misleading.

The nature or importance of the power may require that procedural provisions be included in the statute. In some circumstances, it may be appropriate for such provisions to be contained in subordinate legislation; in other circumstances, no procedural provisions may be either necessary or desirable. How to proceed can only be decided if the drafter has a practical understanding of how the statute is intended to operate.

Possibilities for consideration include

- summary exercise of the power with no procedural requirements
- provision for a hearing by an official or tribunal
- a requirement for consultation before exercise of the power. The requirement might be to consult a specified body or bodies or might be expressed more generally
- provision for a decision to be made after a written application
- provision for interested persons to make written representations
- provision for publication of details of a proposed exercise of the power and opportunity for public comment on the proposal

6 See p154.

- provision for notice of the intended exercise of the power to be given to an affected person with an invitation to submit representations.

It is generally desirable to provide that reasons for a decision should be given by the decision maker on the application of a person affected. It may also be desirable to require specifically that the instrument giving the reasons should set out findings on material questions of fact and indicate the evidence or material on which those findings were based. A provision requiring reasons to be given tends to enhance the quality of the decision-making process as well as enabling persons affected either to understand and accept the decision or to apply for a review or appeal on a sounder and more sharply defined basis than would otherwise be possible.

The following may be adapted:

> If the Authority refuses to issue the applicant with a permit, the Authority must inform the applicant in writing of
>
> (a) the reasons for the refusal; and
>
> (b) the findings on any material questions of fact underlying those reasons and the material on which those findings were based; and
>
> (c) the right of review under this Act and the procedure to be followed to exercise that right.

Correction of clerical or technical errors

Even the most careful of us make mistakes, some large, some small, all embarrassing. In the case of clerical or technical errors, such as numerical or typographical errors or omissions, occurring in the exercise of statutory powers, it is convenient to have a simple and unequivocal means of correcting them. The following provision may be adapted suitably (or included in interpretation legislation):[7]

> A clerical or technical error or omission in anything done in an exercise of a power conferred by this Act may be corrected although the power may not generally be capable of being exercised more than once.

Provision for review or appeal

Provision may be made for a person aggrieved by the exercise of a power to apply for the exercise to be reviewed. The review function may be conferred on the person or body that exercised the power or some other person or body. A review process does not usually involve a hearing but may do so. In some jurisdictions it is not uncommon to find provisions enabling persons dissatisfied with the rulings of public officers or authorities to seek review by the responsible Minister. Examples follow:

> (1) A person who is aggrieved by a decision refusing an application under this Part has a right to have the decision reviewed by the Review Commission.

7 The form is taken from clause 13 of the draft Interpretation Act recommended by the Law Commission in New Zealand in NZLC R17. See paras 336–339.

(2) An application for a review must
   (a) be in writing; and
   (b) give particulars of the decision which the aggrieved person wants to be reviewed; and
   (c) include any material or representations that the aggrieved person wants to be taken into account in the review; and
   (d) give an address to which notices can be sent; and
   (e) be delivered to the office of the Review Commission within 30 days after the aggrieved person is given notice of the refusal of the application.

(3) The Review Commission may confirm, vary or reverse the decision under review.

(4) No fee or other charge is payable in respect of a review.

The following clauses provide for a review application to the responsible Minister and include powers for the Minister to commission an investigation and for a case to be submitted for a judicial opinion.

Applying for a review

(1) A person who is entitled to apply for a review under this section must deliver a written review application to the Minister within 30 days after being given notice of the decision or direction that the person wants reviewed.

(2) The Minister has a discretion to accept a review application delivered out of time if the Minister thinks it is equitable to do so.

Review applications

A review application must
   (a) state the name and address of the applicant; and
   (b) set out or otherwise identify sufficiently the decision or direction that is to be reviewed; and
   (c) set out the grounds for the review and state briefly the facts on which the applicant relies.

Minister to cause inquiry

(1) On receiving a review application, the Minister must cause an inquiry to be conducted concerning the matters raised in the review application by such person or persons as the Minister appoints in writing for the purpose.

(2) Despite subsection (1), the Minister may dismiss a review application and need not cause an inquiry to be conducted if the Minister, after considering the review application, considers it to be trivial or frivolous.

Conduct of inquiry

(1) The applicant and the person who made the decision or gave the direction must be given a reasonable opportunity of being heard by and making written submissions to the person conducting the inquiry.

(2) An inquiry must be conducted fairly according to the substantial merits of the case without regard to technicalities.

(3) A person conducting an inquiry is not bound by any rules of evidence and may conduct the inquiry and obtain information as that person considers appropriate.

(4) On completing the inquiry, the person conducting it is to report to the Minister giving that person's findings and recommendations.

Stating a case to the District Court

(1) If the person conducting an inquiry considers it desirable and necessary to do so, the person may, either on that person's own initiative or after having regard to an application by the applicant or the person who made the decision or gave the direction that is the subject of the review, refer a question of law arising in the inquiry for determination in the District Court.

(2) If a question of law is referred to the District Court, the conduct of the inquiry must not be concluded until the determination of the Court has been made and taken into account.

Ministerial review

(1) When the Minister receives the report of the person conducting the inquiry, the Minister must consider and determine the review application and may
(a) allow the application wholly or in part; or
(b) dismiss the application; or
(c) refer the application back to the person conducting the inquiry with a request for consideration or further consideration of some fact or issue.

(2) The Minister must have regard to, but is not bound by, the findings and recommendations of the person conducting the inquiry.

(3) The decision of the Minister on a review application is final and must be given effect.

TRANSFER AND REVOCATION OF STATUTORY FUNCTIONS[8]

Transfer of functions

A function conferred by statute cannot be transferred either by the depository or by anybody else without statutory authority.[9]

It is not usual for legislation to authorise the assignment of statutory functions, although a general power of transfer vested in the President or other Head of State may, in the case of functions vested in public officers, be of great practical value in countries where rapid constitutional or administrative developments are taking place. For example

(1) If the President is empowered under a written law to exercise a power or to perform a duty, the President may, by order published in the *Gazette*, transfer the power or the duty to some other person.

(2) If a public officer is empowered under a written law to exercise a power or to perform a duty, the President may, by order published in the *Gazette*, transfer the power or the duty to some other person, including to himself or herself.

8 See *de Smith*, pp299–311.
9 See *Craies on Statute Law* (7th edn) p283; 44 Halsbury's Laws of England (4th edn) 587.

(3) An order under this section has effect to amend the written law in respect of which it is made.

(4) An order under this section may make such amendments to the written law to which it refers as are reasonably consequential upon the transfer and necessary for carrying the order into effect.

The following form is useful to deal with the situation where an office on which a function has been conferred has been abolished or is vacant:

If an Act confers a power or imposes a duty on the holder of a public office and either that office has been abolished or the office is vacant, the power and duty may be exercised or performed

(a) in the case of power to make subordinate legislation, by the President; and

(b) in any other case, by the holder of such public office as the President may direct by order published in the *Gazette*.

The need for transfer provisions of the kind set out above may be reduced if a flexible strategy is adopted when powers and duties are provided for. It must be accepted as a tiresome fact of the drafter's life that ministries and departments and other public agencies are in a continuous state of change. Extensive amendments to the statute book can be avoided if functions are not conferred on specified Ministers but on 'the Minister'. For this to be possible, a definition of 'Minister' should be included in interpretation legislation along the following lines:

Minister means the Minister of the Crown responsible for the administration of the enactment.

Similar use may be made of the term 'chief executive' if it is practical to give up unnecessarily different titles for the executive heads of departments, ministries and other public agencies. A prerequisite is a definition in interpretation legislation such as

chief executive means the chief executive of the Ministry, department, or other unit of the public sector principally assisting the Minister of the Crown responsible for the administration of the enactment.

The efficacy of these definitions depends on the existence of a conventional practice under which the Head of State or Prime Minister distributes responsibility for public business and the administration of enactments among Ministers. It is preferable for such allocations of responsibility to be notified in the *Gazette* for public information and to facilitate proof should that be necessary.

Revocation

When drafting a provision to confer a power or duty, the drafter must of course think positively, but negative thoughts have their place too. Thought should be given to the possible desirability of including a power to revoke the exercise of the power or duty or alternatively a provision to ensure that the exercise cannot be revoked.

Provision that the exercise of a function 'is final and conclusive' will in most contexts preclude revocation.

BREACH OF POWER OR DUTY

Where a statute prescribes the time or manner of performance of a power or duty, the question arises as to the validity of the act if the prescribed procedure is not followed. If the validity depends on obedience to what is prescribed the provisions are said to be mandatory; if validity does not so depend, the provisions are said to be directory.

It is not often that legislation states the consequences of disobedience to procedural requirements and it would be unrealistic to contemplate meticulous directions in respect of every requirement. It would also be wholly impractical. Nevertheless, this is a matter the drafter should consider during the design stage for the circumstances may be such that the possibility of doubt should be removed. For example, a procedural code governing applications or appeals might include a provision to the effect that

> The time limits in this Part are mandatory.

Express words of obligation in an independent sentence are more likely to be construed as mandatory than a less direct formula, but the nature of the obligation and its context will be considered as determining factors.[10] If the drafter makes no specific provision, the intention of the legislation will be ascertained, not according to any general rule or formula, but by construing the statute as a whole and considering the provision which has been disobeyed in its context in relation to the general object to be secured.[11]

Provision is sometimes included with the aim of curing any disregard of procedural requirements. For example, in matters such as deviation from statutory forms, provision similar to the following is commonly made:

> If a form is prescribed or approved under this Act, deviations from the form not materially affecting the substance nor likely to mislead do not invalidate the form used.

A similar purpose is achieved by the use of the word 'substantially' or by the requirement of 'substantial compliance'. For example

> Strict compliance with the forms in Schedule 3 is not required and substantial compliance is sufficient.

> An appeal against a direction may be instituted by the appellant sending to the Minister a written notice of appeal which must be substantially in accordance with Form 1 in Schedule 2 and must set out the grounds of the appeal.

Another possibility is to vest in some authority a specific power to validate or disregard irregularities.[12]

Where a time is to be prescribed for the performance of an act, consideration should be given to the desirability of including power to extend the time.[13]

10 See *R v Liverpool City Council, ex p Liverpool Taxi Fleet Operators' Association* [1975] 1 All ER 379.

11 See 44 Halsbury 583 et seq; *de Smith*, pp142–146; F. A. R. Bennion, *Statutory Interpretation* (2nd edn) pp 23 et seq; *Simpson v A-G* [1955] NZLR 271; *Cullimore v Lyme Regis Corpn* [1962] 1 QB 718, [1961] 3 All ER 1008. For an instance in which part of a provision was held to be mandatory and part directory see *Howard v Secretary of State for the Environment* [1975] QB 235, [1974] 1 All ER 644.

12 As to validation, see p303.

13 For forms for the extension of time, see p111.

Remedies for breach of statutory duty[14]

> To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said what that intention may probably be supposed to be.[15]

Lord du Parcq's call, nearly 50 years ago, for Parliament to reveal its intention when imposing a statutory duty has only occasionally evoked a response. Basic principle requires that legislation should answer questions rather than pose them. A drafter has a duty to see that the legislature makes its meaning plain and should ensure that policy consideration is given as a matter of practice to the consequences that should follow in case of breach of statutory duty.

CIVIL LIABILITY

It is important in the first place to avoid doubt as to whether civil liability may arise in respect of a breach.

The Law Commission considered that a statutory presumption of general application might be helpful but this view is not without its critics.[16] However a presumption would at least ensure that the subject of civil liability was not just overlooked. The Law Commission suggested this form—

> Where any Act passed after this Act imposes or authorises the imposition of a duty, whether positive or negative and whether with or without a special remedy for its enforcement, it shall be presumed, unless express provision to the contrary is made, that a breach of the duty is intended to be actionable (subject to the defences and other incidents applying to actions for breach of statutory duty) at the suit of any person who sustains damage in consequence of the breach.

The following form excludes a civil remedy arising from a breach of the statute but leaves unaffected any other rights of action that may exist:

> This Act does not
> (a) confer a right of action in respect of any contravention of it or of the terms or conditions of a licence granted under it; or
> (b) derogate from any right of action or other remedy (whether civil or criminal) that may exist otherwise than under this Act.

The converse situation may also be provided for if it should be intended that the remedies for contraventions of an Act should be restricted to those set out in the Act and other civil and criminal remedies excluded. For example

> A contravention of this Act attracts no sanction or consequence, whether criminal or civil, except to the extent expressly provided by this Act.

14 See P. P. Craig, 'Negligence in the Exercise of a Statutory Power' (1978) 94 LQR 428.
15 Lord du Parcq in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 410.
16 See Law Commission Report on the Interpretation of Statutes (Law Comm No 21) para 38 and R. A. Buckley, 'Liability in Tort for Breach of Statutory Duty' (1984) 100 LQR 204 at 233. Support is found in A. Samuels, 'The Interpretation of Statutes' [1980] Stat LR 86 at 104–105.

The following forms are examples of provisions where specific provision for a civil remedy is made:

No criminal proceeding lies against a person on account of a contravention of section 9; but the obligation to comply with that section is a duty owed to any person who may be affected by a contravention of it and a breach of that duty is actionable accordingly subject to the defences and other incidents applying to actions for breach of statutory duty.

(1) An obligation imposed by safety regulations shall be a duty owed to any person who may be affected by a contravention of the obligation, and, subject to any provision to the contrary in the regulations and to the defences and other incidents applying to actions for breach of statutory duty, a contravention of any such obligation shall be actionable accordingly.

(2) This Act shall not be construed as conferring any other right of action in civil proceedings, apart from the right conferred by virtue of Part I of this Act, in respect of any loss or damage suffered in consequence of a contravention of a safety provision or of a provision made by or under Part III of this Act.

(3) Subject to any provision to the contrary in the agreement itself, an agreement shall not be void or unenforceable by reason only of a contravention of a safety provision or of a provision made by or under Part III of this Act.

(4) Liability by virtue of subsection (1) above shall not be limited or excluded by any contract term, by any notice or (subject to the power contained in subsection (1) above to limit or exclude it in safety regulations) by any other provision.

(5) Nothing in subsection (1) above shall prejudice the operation of section 12 of the Nuclear Installations Act 1965 (rights to compensaton for certain breaches of duties confined to rights under that Act).

(6) In this section 'damage' includes personal injury and death.

Consumer Protection Act 1987 [UK] s41.

OTHER REMEDIES

Of course civil liability is just one of the possible remedies for the enforcement of statutory duties. Other remedies may be more effective or more suitable in particular circumstances, perhaps one of the following:

- provision for a criminal offence
- power to suspend or cancel a licence or other authority to engage in some activity
- provision for an injunction[17]
- power for an officer (such as an inspector) or a court to issue compliance orders, abatement notices or give directions to remedy and mitigate
- provision for consultative committees and their functions and membership.

17 As to injunctions, see p380.

Once a particular remedy is determined to be suitable, the question arises as to who can apply for it. Although particular problems may demand particular remedies, there is some room for consistency in the drafting of provisions that establish and regulate methods of enforcing remedies for breach of statutory duties and also those that regulate the availability of remedies other than those in the statute itself.

POWER TO DELEGATE EXECUTIVE FUNCTIONS[18]

The maxim *delegatus non potest delegare* is not a rule of rigid application but a rule of construction to the effect that 'a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute'.[19]

A power of delegation should not be left to become a matter of doubtful inference. If power to delegate is necessary and intended, a specific power should be conferred. The following form provides a basis for adaptation:[20]

(1) The Minister may, either generally or as otherwise provided by the instrument of delegation, delegate to any person any power or duty conferred or imposed on the Minister by this Act, other than
  (a) this power of delegation; and
  (b) the power to make regulations; and
  (c) the duty to hear appeals.

(2) A delegation may
  (a) be made subject to such conditions, qualifications and exceptions as are set out in the instrument; and
  (b) be revoked or varied by a subsequent instrument.

(3) The Minister may exercise a power or perform a duty although the Minister has delegated its exercise or performance.

(4) An act or thing done by a person under a power or duty delegated under this section has the same force and effect as if it had been done by the Minister.

In some circumstances a requirement to publish a delegation in the *Gazette* may be advisable for reasons of certainty and to provide information of the delegation to the public. A power to delegate with retrospective effect is objectionable in principle because it bears the stamp of indirect and possibly concealed validation.

A simple form may be sufficient to allow the delegation of routine executive functions. For example

> The Commissioner may, either generally or as otherwise provided by the instrument of delegation, by signed instrument delegate to a person any of his or her powers or duties under this Act, other than this power of delegation.

18 The delegation of legislative power is discussed at pp329–348.
19 John Willis, 'Delegatus non potest delegare' (1943) 21 Can Bar Rev 257, 259.
20 See also item 42 on p265.

Very many statutes contain a power of delegation and much repetition may be avoided if interpretation legislation contains provisions of general application to delegation provisions. Of course all or part of such provisions can be easily disapplied if they are inappropriate in particular circumstances. The following form illustrates such general provisions:

(1) Where a written law confers power upon a person to delegate the exercise of a power or the performance of a duty conferred or imposed on that person by a written law
   (a) delegation does not preclude the person delegating from exercising or performing at any time a power or duty so delegated; and
   (b) a delegation may be made subject to such conditions, qualifications, limitations or exceptions as the person delegating may specify in the instrument of delegation; and
   (c) if a delegation may be made only with the approval of some person, the delegation, and any amendment of the delegation, may be made subject to such conditions, qualifications, limitations or exceptions as the person whose approval is required may specify; and
   (d) a delegation may be made to a specified person or to persons of a specified class, or may be made to the holder or holders for the time being of a specified office or class of office; and
   (e) a delegation may be amended or revoked by instrument in writing signed by the person delegating; and
   (f) in the case of a power conferred upon a person by reference to the term designating an office, the delegation does not cease to have effect by reason only of a change in the person lawfully acting in or performing the functions of that office.

(2) The delegation of a power is to be taken to include the delegation of any duty incidental to or connected with that power and the delegation of a duty is to be taken to include the delegation of any power incidental to or connected with that duty.

(3) If under a written law an act or thing may or is required to be done to, by reference to, or in relation to, a person and that person has under a written law delegated a relevant function conferred or imposed on that person with respect to or in consequence of the doing of that act or thing, the act or thing is to be regarded as effectually done if done to, by reference to, or in relation to the person to whom that function has been delegated.

If power to subdelegate is required it must be explicitly conferred. For example

A delegation under this section may authorise the delegate to subdelegate all or any of the delegated powers or duties.

To counter the doubt that may exist as to the fate of a delegation when the person making the delegation ceases to hold the office on which the power to delegate is conferred, the following form may be used or adapted:

A delegation under this section made by a person who is at that time the Minister continues in force notwithstanding that at some subsequent time a different person is the Minister or there is no person who is the Minister, and such a delegation may be revoked or varied by any person who is for the time being the Minister.

If the delegating authority is a body corporate, it may be desirable to stipulate the manner in which the delegation is to be executed.

> An instrument of delegation must be executed under the common seal of the Authority.

If the context is such that the delegate is to be kept on a continuing tight rein, this can be achieved as follows:

> The Authority may give directions to a person to whom it has delegated the exercise of a power or the performance of a duty with respect to the exercise of that power or the performance of that duty.
>
> A delegate must, in the exercise of a delegated power, comply with such directions, conditions, qualifications, guidelines and exceptions as the Minister may from time to time communicate in writing to the delegate.

In some instances, the performance of a statutory function is dependent on the state of mind or opinion of a person. It is a reasonable implication that if the function is delegated, its performance would depend on the state of mind of the delegate. If the context might leave some doubt of this, the following provision might be included as a precautionary measure:

> If the exercise of a power or the performance of a duty conferred or imposed by this Act is dependent on the opinion, belief, or state of mind of the Minister in relation to a matter and that power or duty is delegated to some other person, the power or duty may be exercised or performed upon the opinion, belief, or state of mind of the person to whom the power is delegated.

Agency—the *Carltona* principle

Power to delegate should not be included lightly in draft legislation. In many circumstances it is appropriate that the Minister should be and remain responsible to the legislature for the due performance of a function conferred on that Minister and in such cases it is inappropriate to permit the Minister to divest a measure of his or her responsibility by an act of delegation.

At the same time, the courts have recognised that, in the case of many functions, a Minister or the chief executive of a Ministry or department on whom a statutory power or duty has been vested cannot reasonably be expected to act personally. It is clear that such a person cannot validly delegate a function without statutory authority, but may exercise the power or perform the duty through an authorised officer in all cases except where the statute expressly or by implication requires him or her to act personally. This ability to act through an agent, which is sometimes referred to as the *Carltona* principle or the alter ego principle, provides practical flexibility while the responsibility stays where it belongs.

In the *Carltona* case, a notice of requisition was upheld although it had not been issued by the Commissioners of Works in whom the statutory power was vested but by a responsible officer of the Department.[21] Lord Greene said—

> The duties imposed upon ministers and the powers given to ministers are normally exercised upon the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the

21 *Carltona Ltd v Works Comrs* [1943] 2 All ER 560 at 563, per Lord Greene MR.

decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament.

In cases of this nature the official is acting as the agent not the delegate of his principal and remains subject to the fullest control. The official's act is in law that of the authority for whom the agent is acting. The principle appears of equal application in colonies and dependencies where statutory functions are vested in the governor, colonial secretary or major departmental heads. In a number of cases, the principle has been held to apply beyond Ministers, for example to Commissioners of Customs and Excise, a deputy commissioner of income tax, the senate of an Australian university, a police commissioner and the treasurer of a local authority.[22]

The application of the principle can be specifically applied by a provision to the effect that a statutory function may be performed by a member of the staff of the person on whom the function is conferred who is authorised either generally or specially by that person. For example

> (1) Where a power or duty is conferred or imposed on the Minister under this Act, the Minister may authorise another person or the holder of any office, by signed instrument in writing, to exercise or perform on the Minister's behalf all or part of that power or duty.
>
> (2) The Minister may revoke or amend an authorisation.
>
> (3) The giving of an authorisation does not prevent the exercise of a power or the performance of a duty by the Minister personally.

Carltona has no application where the statute expressly or by implication requires the function to be performed personally. Such an implication is likely in matters involving personal liberty, for example in relation to powers to deport aliens or to detain persons without trial on security grounds. It is always open to a court to construe a power as one that the legislature intended to be exercised personally. If a function is intended to be exercised in person only, it is preferable that the legislation should specifically require that depositary to act 'personally'. The same purpose is not necessarily achieved by the use of phrases such as 'in the opinion of', 'to the satisfaction of', or 'if it appears to'. These phrases may be construed as going no further than indicating that the criteria relative to the performance of the function are subjective.

POWER TO GIVE DIRECTIONS

Directions concerning the performance of statutory functions

The relationship between a Minister and the Minister's department and officials is governed by the constitutional responsibility of the Minister for the activities

22 See also *Lewisham Metropolitan Borough and Town Clerk v Roberts* [1949] 2 KB 608 at 629; *Re Golden Chemical Products Ltd* [1976] Ch 300, [1976] 2 All ER 543; *R v Skinner* [1968] 2 QB 700, [1968] 3 All ER 124; *O'Reilly v Comr of State Bank of Victoria* (1982) 44 ALR 27; *Oladebinde v Secretary of State for the Home Department* [1990] 3 All ER 393.

of the Minister's department and officials and by the Minister's inherent powers to direct that department and those officials. In ordinary circumstances, there is no need to include a Ministerial power to direct officials. Different considerations arise if a statute confers a power or imposes a duty directly on a specified body or official.

An authority entrusted with a discretion cannot lawfully in the purported exercise of the discretion act under the direction of another body or person.[23] If it is desired that a higher authority (eg a Minister) should be empowered to give directions to a lower authority as to the exercise of a discretion, the following options are open:

- the function should be vested in the higher authority with power to delegate (if the application of *Carltona* does not make delegation unnecessary);
- the function should be vested in the lower authority and specific power given to the higher authority to intervene and direct.

In all but exceptional cases, the following criteria should be incorporated when power for a Minister to give directions to the depositary of a statutory function is being drafted:

- the direction should be in writing and signed by the Minister
- in the case of a direction to a statutory body, the text of the direction should be included in the annual report of the body
- if the body does not produce an annual report, the text of the direction should be published in the *Gazette*
- unless precluded from doing so, the Minister should be obliged to consult the body directed before giving the direction.

Directions should not descend from the general to the particular. They should be restricted to principles and policies. A power should not be conferred that enables a Minister to give a direction as to a particular proceeding or a particular matter that concerns a person or organisation. For example, a power to direct should not be so widely drawn as to enable a Minister to intrude upon the statutory disciplinary proceedings of a member of a profession or become involved in the particular exercise of any judicial or quasi-judicial powers.

If there is a right of appeal from a decision under a power that is subject to ministerial direction, the question arises whether the appellate authority is bound to give effect to the direction. To avoid doubt, the status of the direction in the appellate authority should be covered in the statute.

The following form is suitable for straightforward cases:

> (1) The Minister may give directions of a general character in writing to the Authority with respect to the performance of its functions and the Authority must give effect to every such direction.
>
> (2) The text of every direction given under this section and an outline of the action taken by the Authority in response to it must be included in the next annual report of the Authority.

Prior consultation is required in this form:

23 See *de Smith*, p309.

(1) The Minister may give the Authority a written direction as to government policy that is to be applied by the Authority in the exercise of its powers and the performance of its duties and the Authority must comply with the direction.

(2) The Minister must consult with the Authority before giving the direction and ask the Authority to advise whether, in the opinion of the Authority, application of the policy would be in the best interests of the industry.

(3) The Minister must cause a copy of the direction to be published in the *Gazette* within 21 days after it is given and lay a copy of the direction before the Parliament.

Performance directions

The proper enforcement of many enactments requires statutory powers to be conferred on inspectors or other officials enabling them to give directions requiring action to remedy contraventions, remove hazards or otherwise ameliorate some disturbing or dangerous situation. Factors that should be covered precisely include the identity of the person who is to exercise the powers. This may require provision for the appointment of such persons and for them to be issued with a certificate of identity and authority.[24] The extent of their powers and the circumstances in which they may be exercised must also be dealt with clearly. The extent of the powers may not for practical reasons be able to be described with particularity and if very general words are necessary, it is desirable that they should only be exercisable 'for the purposes of this Act'. This provides at least some element of protection against unreasonable extension or misuse. It is desirable that provision be included for the person directed to be informed of the authority for the direction.

(1) An inspector may for the purposes of this Act give a written direction to the manager of a mine if, in the opinion of the inspector,
   (a) a contravention of a provision of this Act constitutes or is likely to constitute a hazard to any person at the mine; or
   (b) the mine, or any plant or hazardous substance at or related to the mine, is dangerous or is likely to become dangerous so as to constitute a hazard to any person.

(2) A direction may direct
   (a) that the contravention be remedied or the hazard or likely hazard be removed and may specify the nature of the action that the inspector requires to be taken to remedy the contravention or remove the hazard or likely hazard, and the time within which that action must be taken;
   (b) that work at the mine must stop and any person or persons must be removed from the mine or a specified part of the mine until the provisions of the Act are not being contravened and the hazard or likely hazard has been removed.

(3) An inspector may give a direction under paragraph (a) or (b) of subsection (2) or under both paragraphs.

24 See the form at p238.

(4) A direction must specify the provision of the Act which in the opinion of the inspector has been contravened, or the nature of the danger or likely danger and the reasons for that opinion.

The exercise of powers of this kind may have very serious financial and other implications for persons directed. A review or appeal process is most desirable.[25]

POWER TO MAKE APPOINTMENTS

Provisions for the performance of statutory functions may involve the establishment of and appointments to an office if that office is not already clearly established. However, restraint is necessary. It is undesirable to burden the statute book with unnecessary administrative detail concerning minor matters. Nor is it desirable to add to bureaucratic processes by providing for minor appointments to be made from the very top level. In the case of appointments of persons within the public sector, use should be made of the general legislation regulating the public sector wherever practical.

When drafting powers to make appointments, care should be taken with respect to

- the identification of the appointing authority
- the manner of appointment, including appointments by name or office
- notification of appointments
- appointment of assistants to the holder of the office
- qualification for appointment
- duration of holding office
- reappointments
- resignation, suspension, dismissal and disqualification
- acting and other temporary appointments
- appointments of deputies or alternates
- remuneration and expenses.

This is yet another field which is often partly covered by provisions in interpretation legislation. Particular attention should be paid to the manner of appointment. This will vary according to the nature of the office, but the appointment of a person who is to perform a statutory function should always be required to be made or evidenced in writing, either by instrument or by notice in the *Gazette*.

If the duration of the appointment is not fixed by law, this should be provided for in the instrument of appointment. For example

> The Minister is to appoint a barrister of not less than 10 years' standing to be the Licensing Appeal Authority and is to make the appointment by signed instrument specifying the period for which the appointment is made.

Appointment by notice in the *Gazette* may seem unnecessarily formal but this method has one notable advantage in that it establishes the appointment as a matter of public record and therefore results in certainty. It also facilitates proof in court, should that be necessary. The form may commence

25 See p222.

The Minister may, by notice in the *Gazette*, appoint ...

If this form is used, publication in the *Gazette* is mandatory. If on the other hand publication in the *Gazette* is not intended to be mandatory, but is nevertheless thought desirable, the following form may be adapted:

The Minister may, by instrument in writing, appoint a Chief Investigator and every such appointment is to be notified in the *Gazette*.

POWER TO REQUIRE INFORMATION

An increasing number of jurisdictions have enacted laws concerning the collection of information, the privacy of personal information, and the regulation of access to personal information held by bodies in the public and the private sector. There is an increased awareness of the need to ensure that legislation conferring power to demand information is both fair and reasonable. These criteria apply across the board—to the demand itself and beyond that to the question of what happens to the information once it has been obtained. There may be a sound case in the public interest for a particular body to be given power to acquire certain information but the fairness and reasonableness of that case may dissipate unless provisions effectively secure the confidentiality and restricted use of the information. A typical form follows (it must of course be supplemented by a sanction provision if it is to be effective):

(1) The Commissioner may, by notice in writing, require a person, within such period as is specified in the notice, to supply the Commissioner with such information as the Commissioner requires on reasonable grounds for the purpose of inquiring into or ascertaining that person's liability under any provision of this Act and may require that person to produce all books and other papers in that person's custody or control relating to that liability.

(2) The Commissioner may require the information to be given on oath and either orally or in writing and for that purpose the Commissioner may administer an oath.

(3) If documents are produced to the Commissioner as required under this section, the Commissioner
  (a) may take possession of and make copies of or take extracts from the documents;
  (b) may retain possession of the documents for such period as is reasonably necessary for the purpose of the inquiry to which the documents relate;
  (c) must permit a person who would be entitled to inspect a document if it was not in the possession of the Commissioner to inspect it at all reasonable times while it remains in the possession of the Commissioner.

Documents no longer have a monopoly on the storage of information and the computer age has resulted in the necessity for a provision such as—

If information is recorded or stored by means of an electronic or other device, a duty imposed by this Act to produce a document recording that information is to be construed as a duty to provide a document containing a clear reproduction in writing of the information.

Specific confidentiality provisions may be required as a supplement to the requirement. For example

(1) A person who is, or has at any time been, the Commissioner, or a member of the staff of the Commissioner, or has at any time been authorised to perform or exercise any function of or on behalf of the Commissioner, being a function conferred on the Commissioner under this Act must not, either directly or indirectly, except in connection with this Act or in the performance or exercise of such a function
(a) make a record of, or divulge or communicate to any person, any information relating to the affairs of another person acquired by reason of the first-mentioned person's office or employment or function under this Act; or
(b) make use of any such information as is mentioned in paragraph (a); or
(c) produce to any person or permit access by any person to a document relating to the affairs of another person supplied for the purposes of this Act.
Penalty: $2 500 or imprisonment for 3 months, or both.

(2) A person who is, or has at any time been, the Commissioner, or a member of the staff of the Commissioner, or has at any time been authorised to perform or exercise any function of or on behalf of the Commissioner, being a function conferred on the Commissioner under this Act must not be required except where it is necessary to do so for the purposes of this Act
(a) to divulge or communicate to a court any information relating to the affairs of another person supplied for the purposes of this Act; or
(b) to produce in a court a document relating to the affairs of another person of which the first- mentioned person has custody or access for the purposes of this Act.

(3) In this section, **court** includes any tribunal, authority, or person having power to require the production of documents or the answering of questions.

A power to require a person to state his or her name and address may be necessary for the enforcement of an Act. The following may be adapted:

(1) An inspector may require a person to state his or her name and residential address if that inspector has reasonable grounds to suspect that that person has committed an offence against this Act or the regulations under this Act.

(2) A person who is required under this section to state his or her name and residential address must not
(a) refuse or fail to state that name or residential address; or
(b) state a false name or residential address.
Penalty: $2 000.[26]

The following provisions may also be desirable in some contexts:

At the same time as the Commissioner issues a requirement under this section, the Commissioner must warn the person that it is an offence to fail to comply with the notice unless the person has a reasonable excuse.

26 This form of creating an offence is discussed at p355.

The Commissioner must return to the person each document produced under this section as soon as practicable.

POWERS OF ENTRY, SEARCH AND SEIZURE[27]

The right to be protected from unreasonable search or seizure of the person or property is one to be honoured and treasured. In some jurisdictions, it is regarded as of such importance as to merit inclusion in the Constitution or Bill of Rights.[28] But there are competing interests that must be balanced carefully. The interests of society and those of the individual may be in opposition. The effective enforcement of the criminal law and much other social law requires that in some circumstances a power of entry, seizure and search must necessarily be available. Factors such as time, place and the nature of the offence or other activity involved are relevant both to the necessity for a power and also to the conditions, such as a judicial warrant, that may be appropriate before the power becomes available.

The importance of such powers imposes a particular duty on drafters to be explicit and to be clear. The exercise of the powers is likely to be easier and more trouble-free if persons exercising the power understand the extent and conditions of the power and if others concerned can see in plain terms that the inspector or other person exercising the powers is clearly acting within the scope of the law.

Powers of entry and search are given in two distinct areas, first in the context of the investigation of an offence or suspected offence, and secondly in the context of the administration of a regulatory law (for example a law regulating building safety).

A power of entry may well be justified in both areas but in the second it may be practical and acceptable for a less heavy-handed approach to be taken and more protection to the individual to be provided. A major consideration when drafting a power of this kind is whether a judicial warrant should be provided for. If so, instructions should identify the court or judicial officer that may issue the warrant and enable restrictions and conditions to be attached to the warrant.

Some criteria apply in both areas. Care should always be taken to limit powers to the fullest extent compatible with achieving the essential purposes of the statute. Every power to enter should be restricted to entry for the purposes of the statute and should be drafted in such a way that the grounds on which the power may be exercised are objective. The identity of the person who may exercise the power should be explicit. If that person is an inspector or other official, there should be provision for some kind of identity document and an obligation on that person to produce it on the request of a person in respect of whose property the power is being exercised. For example

> (1) Every inspector must be provided with a certificate of his or her appointment as an inspector signed by the chief executive and bearing a photograph of the inspector.

27 See D. A. Thomas, 'The Law of Search and Seizure: further ground for rationalisation', 1967 Criminal Law Review 3; D. J. Stephens, 'Search and Seizure of Chattels', 1970 Criminal Law Review 74, 139; L. H. Leigh, 'Recent Developments in the Law of Search and Seizure', 33 Modern Law Review 268; D. L. Bates, *Powers of Entry, Search, Inspection and Seizure in New Zealand*; Stone, *Entry, Search and Seizure* (1985).

28 See, for example, section 21 of the New Zealand Bill of Rights Act 1990 which states: 'Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.'

(2) An inspector must, if requested to do so, produce that certificate for inspection to any person in relation to whom the inspector is about to exercise, is exercising or has exercised a power under this Act.

(3) A certificate appearing to have been provided under subsection (1) is, without proof of the signature of the person who signed it or that person's authority to sign it, evidence of the appointment to which the certificate appears to relate.

If the occupier of property is absent when an entry and search are carried out, an obligation to inform that person of the entry and search may be appropriate.[29]

In the case of powers not dependent on the existence of an offence or suspected offence, consideration should be given to a provision for reasonable notice to be given to the occupier of the property concerned. Of course, this is out of the question if notice might defeat the purpose of the entry. Similarly, the exercise of the power might be restricted to reasonable times or perhaps daylight hours. Any powers, such as surveys, tests, or measurements, which may be exercised on the land once entry has been made, should be described clearly and not left to be implied. In the case of entry required by a public agency requiring to perform some work on a property, a requirement for notice might be along the following lines:

An authorised officer who intends a power of entry conferred by this section to be exercised must, not less than 14 days before the proposed exercise of the power, give notice to the occupier of the land specifying

(a) that entry on the land is authorised under this section; and
(b) the part of the land on which entry is to be made; and
(c) the work proposed to be carried out; and
(d) the identity of the person or firm that is to enter on that land to carry out that work.

Consideration should also be given to requiring either the consent of the occupier or a warrant or other judicial authority for entry to residential premises. Any exceptions to this approach should be strictly and clearly limited.

If items are seized in the absence of the occupier, a descriptive list of what is taken should be provided within a prescribed time. If no general provision is available, a specific provision will be necessary regulating the return or disposal of property that has been seized. For example

(1) If a police officer seizes anything under this Act, the Commissioner of Police must retain it in secure custody except while it is being used in evidence or is in the custody of any court, until it is disposed of under this section.

(2) In any proceeding for an offence relating to anything seized under this Act, the court may order, either at the hearing or on application, that the thing be delivered to the person appearing to the court to be entitled to it, or that it be disposed of otherwise in such manner as the court thinks appropriate.

(3) A police officer may, unless an order has been made under subsection (2), at any time return the thing to the person from whom it was seized or apply to a magistrate for an order as to its disposal and a magistrate may make any order that a court might have made under subsection (2).

29 See the form at p242.

(4) If no proceeding is taken in respect of an offence relating to the thing within 3 months after the seizure under this Act, or, if a proceeding is taken but no order of forfeiture is made, the thing must be returned to the person from whom it was seized.

Consideration should be given to the possibility of providing an avenue of appeal against seizure either to a Minister or to a court. In some circumstances, provision for compensation may be necessary and if so the manner of its assessment and possibly a review or appeal mechanism may be desirable.

(1) A person who suffers loss or damage as a result of the exercise of the power of entry conferred by this Act may within 6 months of the exercise of the power apply to the chief executive for compensation for that loss or damage.

(2) The amount of compensation payable for loss or damage is to be determined by agreement between the applicant and the chief executive or, if agreement cannot be reached within a reasonable time, by the magistrates' court nearest to the land concerned on the application of either the applicant or the chief executive.

It is suggested that the considerations listed above should be taken into account whenever a power of entry is contemplated. However, broad powers are still commonly given in many jurisdictions. The power in the following form does not require a warrant for its exercise but in its favour it can be said that it is restricted to police officers and does depend on an objective assessment of reasonable grounds for suspecting that a limited range of offences has been committed:

If a member of the police force suspects on reasonable grounds that a person has committed or is committing an offence against ..., that member of the police force may, for the purposes of this Act and using such force as may be necessary for the purpose,

(a) stop and search any such person;

(b) stop, detain, and search any vehicle that the member of the police force reasonably suspects may contain evidence of the commission of an offence against ...;

(c) at any time enter and search any premises that the member of the police force reasonably suspects may contain evidence of the commission of an offence against ...

The inherent dangers associated with certain industries may justify a range of powers ancillary to a right to enter. For example

(1) An inspector may, for the purposes of this Act

(a) at all times of the day or night, enter, inspect, and examine any mine and examine any plant, substance, or other thing at the mine (but must do so in such a manner as not unnecessarily to impede or obstruct the working of the mine); and

(b) when entering a mine, take with the inspector such equipment and materials as the inspector considers necessary; and

(c) take and remove samples of any substance or thing at a mine, free of any charge; and

(d) take possession of any plant or thing for further examination or testing or for use as evidence; and

(e) take photographs and measurements and make sketches and recordings at the mine; and
(f) require the production of, examine, and take copies of or extracts from, any document; and
(g) require any person at the mine to state his or her name and residential address; and
(h) require the manager or any person who works at the mine to give such reasonable assistance to the inspector as the inspector considers necessary for the performance of the inspector's functions under this Act.

(2) When exercising a power under this Act, an inspector may be accompanied by any other person whose assistance the inspector considers necessary, and that person may do such things as are reasonably necessary to assist the inspector in the performance of the inspector's functions.

(3) An inspector who intends to inspect and examine a mine under the powers conferred by this section must, where practicable on entering the mine, give notice of his or her intention to do so to the manager or some other apparently responsible person.

If entry is to be by warrant, the powers of the court must be wide enough and precise enough to avoid misunderstandings or worse. The following example is adapted from recent New Zealand practice:[30]

Magistrate may issue entry and search warrant

(1) A magistrate may issue a warrant authorising the entry and search of premises on one occasion within 14 days after the date of issue of the warrant at any time that is reasonable in the circumstances if, on an application made in writing on oath, the magistrate is satisfied that there is reasonable ground for believing that there is in or on any premises anything
(a) in respect of which an offence has been or is suspected of having been committed against this Act that is punishable by imprisonment; or
(b) which there is reasonable ground to believe will be evidence of an offence against this Act that is punishable by imprisonment; or
(c) which there is reasonable ground to believe is intended to be used for the purpose of committing an offence against this Act that is punishable by imprisonment.

(2) The magistrate may attach and specify conditions to a warrant.

(3) A person who applies for a warrant must, after making reasonable enquiries, disclose in the application
(a) details of every other application which that person knows to have been made within the previous 20 days in respect of the same place or vehicle; and
(b) the offence or offences alleged in each such application; and
(c) the result of every such application.

Form and content of entry and search warrant

(1) An entry and search warrant must be directed either to a member of the Police by name or to every member of the Police, but in any case the warrant may be executed by any member of the Police.

30 See Resource Management Act 1991 [NZ], ss334, 335.

(2) An entry and search warrant authorises the person executing it to
   (a) use such assistance as is necessary in the circumstances; and
   (b) use such force both for making entry and for breaking open anything in or on the premises as is reasonable in the circumstances; and
   (c) search for and seize anything referred to in the warrant, and while at the premises in accordance with the warrant, to seize any other thing that that person believes on reasonable grounds to be evidence in respect of which that person could have obtained a warrant under section ... [the section above].

(3) A person called on to assist in the execution of the warrant has the powers conferred by subsection (2)(b) and (c).

(4) Unless the magistrate orders otherwise because of exceptional circumstances, a person excecuting a warrant must
   (a) produce it for inspection upon initial entry and in response to any later reasonable request; and
   (b) if requested to do so, provide a copy of the warrant not later than 7 days after the request is made; and
   (c) if the owner or occupier is not present at the time of the entry and search, leave in a prominent place on the premises a written notice showing the date and time of the execution of the warrant, the name of the person in charge of the entry and search and the address of the Police station or other office to which enquiries should be made; and
   (d) if the owner or occupier is not present at the time of the entry and search, leave in a prominent place on the premises, or deliver or send by registered mail to the owner or occupier within 10 days after the search, a written inventory of all things seized on execution of the warrant.

(5) In this section, **premises** includes any building, aircraft, ship, vehicle, box, receptacle, or place.

POWER TO TAKE SAMPLES

The success of many prosecutions depends on the existence of a power to take samples and careful adherence by an inspector or other person to the procedure prescribed. A drafter must recognise the need to balance the interests of the public with those of the individual to ensure that adequate samples may be taken when necessary in the interests of sound administration of the statute and at the same time the person concerned is treated fairly and given the same opportunity to deal with the sample as the inspector.

A draft may need to :

- identify who may take a sample
- state the circumstances in which a sample may be taken
- require the inspector to pay or tender current market value for the sample
- inform the person from whom it is obtained of the intention to submit it for analysis
- oblige the person in possession of the matter concerned to permit the inspector to inspect any package containing the material and take the sample
- provide that in the case of an unopened container the inspector must buy the whole container

- make it an offence for a person not to comply with a requirement made by the inspector in accordance with the sampling provision
- define who may analyse the sample
- provide for division of the sample into 3 parts, leaving one with the person from whom the sample was taken
- provide for a method of analysis
- require a copy of the analyst's certificate to be available to the person from whom the sample was taken
- provide for an analyst's certificate to be admissible in evidence (perhaps to be sufficient evidence)
- require notice to be given to the accused of intention to adduce an analyst's certificate
- permit the accused to give notice requiring the attendance of the analyst
- enable the court to require the attendance of the analyst
- provide that an analyst's certificate cannot be ruled inadmissible if there has been reasonable compliance with the Act and regulations in relation to the sampling and analysis
- make it an offence for a person to refuse to sell or make available a sample lawfully required under the Act.

As to breath tests and samples of blood or urine see Road Traffic Act 1988 [UK] ss4–8.

For comprehensive provisions regarding sampling and analysis see Food Safety Act 1984 [UK] ss29–36.

POWERS CONCERNING CODES OF PRACTICE[31]

Codes of practice offer a convenient technique for the prescription of detailed requirements or guidance as to the manner in which a statutory power or duty is to be carried out or a statutory discretion exercised. Such codes may be authorised and regulated by empowering written law, and of course that is essential if breach of the code is to have significant legal consequences.

Drafters of provisions for the issue of codes must achieve clarity on three fronts.

- who may issue a code and how
- content of codes
- what are to be the consequences of breach of the code.

Who may issue a code

The question of who is to be given the power or duty of issuing a code will depend on the nature of the code and the context in which it is to operate. The consequences of breach of the code are especially to the point. If, for example, a breach of the code were to constitute a criminal offence, it would not be appropriate for the code to be issued by any lesser functionary than a Minister. Any other provision would result in effect in a transfer from the Government of the power to make a criminal law that would constitute an abdication of responsibility unsound in principle. Similarly, if the code has a substantial policy content, it will

31 See A. Samuels, 'Codes of Practice and Legislation' [1986] Stat LR 29; Mayhew, 'Can Legislation Ever be Simple, Clear and Certain' [1990] Stat LR 1.

probably be convenient for its issue to remain in the hands of a Minister. On the other hand, a code may be an instrument for the self-regulation of a trade, industry, or professional body and, perhaps with some regulatory procedural steps built in, it may be appropriate for the executive of the body to issue the code. In such a case, there may be a requirement for ministerial approval.

There are numerous procedural possibilities for consideration. Should a consultative process be a prerequisite? Should the approval of some person or body be a prerequisite? For example

> After consulting with such persons or bodies as seem to the Minister to be broadly representative of the interests concerned, the Minister may issue a code of practice ...

> (1) The Minister may, by notice in the *Gazette*, issue codes of practice for the purposes of this Act and may amend or revoke them in the same manner.
>
> (2) The Minister must not issue, amend or revoke a code of practice except on the recommendation of the Director-General made after the Director-General has
> (a) consulted with such persons, or representatives of such persons, as the Director-General believes will be affected by the proposed code of practice; and
> (b) agreed in general terms with those persons or representatives the content of the proposed code or the proposed amendment or revocation of the code.

Should there be some procedure for public inquiry concerning the code or public participation in determining its contents? Should there be provision for a draft code to be submitted to the Minister for approval? Such a code might be submitted on the initiative of the Minister or when required by the Minister. For example

> (1) The Minister may, by notice in writing, require a person who operates a controlled business[32] to submit for approval a code of practice to be observed in the course of carrying on that business.
>
> (2) A notice must—
> (a) prescribe the matters to be dealt with in the code, including provisions for a training programme for persons in the business; and
> (b) advise of the offence established by subsection (3) and those established by section 44 .
>
> (3) A person who, without reasonable excuse, fails within 6 months of receiving a notice under this section to submit a code for approval complying with the notice commits an offence and is liable to a fine not exceeding $750.

Another possibility is a requirement that the code should be laid before Parliament. A resolution of Parliament approving the code might be a prerequisite or perhaps there might just be a requirement for the code to be laid before Parliament. That might be supplemented by a prescription of a period before the expiry of which the code cannot be issued in order to give Parliament the opportunity to make its views known.

32 The example assumes a definition of the term 'controlled business'.

(1) The Ministers may from time to time after consultation with such persons or bodies as seem to them representative of the interests concerned
  (a) prepare and issue codes of practice for the purpose of providing practical guidance in respect of any provision of this Part of this Act or of regulations; and
  (b) revise any such code by revoking, varying, amending or adding to the provisions of the code.

(2) A code prepared in pursuance of this section and any alterations proposed to be made on a revision of such a code shall be laid before both Houses of Parliament, and the Ministers shall not issue the code or revised code, as the case may be, until after the end of the period of 40 days beginning with the day on which the code or the proposed alterations were so laid.

(3) If, within the period mentioned in subsection (2) above, either House resolves that the code be not issued, or the proposed alterations be not made, as the case may be, the Ministers shall not issue the code or revised code (without prejudice to their powers under that subsection to lay further codes or proposed alterations before Parliament).

(4) For the purposes of subsection (2) above
  (a) where a code or proposed alterations are laid before each House of Parliament on different days, the later day shall be taken to be the day on which the code or the proposed alterations, as the case may be, were laid before both Houses; and
  (b) in reckoning any period of 40 days, no account shall be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(5) The Ministers shall cause any code issued or revised under this section to be printed and distributed, and may make such arrangements as they think fit for its distribution, including causing copies of it to be put on sale to the public at such reasonable price as the Ministers may determine.

(6) A failure on the part of any person to follow any guidance contained in a code issued under this section shall not of itself render that person liable to proceedings of any kind.

(7) In all criminal proceedings any such code shall be admissible in evidence; and if any provision of such a code appears to the court conducting the proceedings to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Food and Environment Protection Act 1985 [UK] s17.

A further point for the drafter to keep in mind is the necessity to ensure that the code is readily available to those persons affected by it. This is often attended to by a requirement for publication in the *Gazette* but an instance of a more effective requirement is seen in subsection (5) of the example immediately above. Here is another alternative—

(1) The chief executive must ensure that copies of a code of practice issued by the Minister are available at every provincial headquarters of the Department at all reasonable times for inspection and copying by the public.

(2) The chief executive may charge a reasonable fee for supplying a copy of a code of practice or supplying photocopying facilities.

If it may be necessary to prove the code in court, a provision along the following lines may be necessary:

> The production in a proceeding of a copy of a code of practice or amendment of a code of practice appearing to have been issued under this section and published in the *Gazette* is, in the absence of evidence to the contrary, to be taken to be sufficient evidence that it has been so issued and published.

Content of codes

A major reason for the popularity and usefulness of codes is that they may be produced in a style that avoids the conventional formalities and constraints involved in written law. A more discursive style, a looser structure, more practical detail, and greater informality both of presentation and of content are usual. The degree of looseness and informality that is appropriate will depend on the consequences of a breach of a code; the more serious the consequences, the tighter the language will need to be.

A difficulty often arises when it is desired that the code should incorporate by reference material contained in other publications.[33] The availability to the public of this material is one important consideration but the issue that can cause serious problems is the question of the application of later amendments of that material and their incorporation in the code. If the consequences of breach of the code can be serious, this problem must be dealt with carefully and fairly. The following is an example of provision for incorporation of external material:

(1) A code of practice may consist of any code, standard, rule, specification or provision relating to occupational health, safety or welfare that is prepared by any appropriate body and may incorporate by reference any other such document either as it is in force at the time the code of practice is approved or as it may from time to time subsequently be amended.

(2) The Minister must cause a copy of every code of practice and every document incorporated in it by reference, and every revision or revocation of a code of practice to be laid before Parliament within 14 sitting days.

(3) The Minister must cause a copy of every code of practice, including every revision of the code and every document incorporated in it by reference, to be made available, without charge, for public inspection during ordinary office hours.

Consequences of breach of a code

A provision empowering the issue of a code must leave no doubt as to the consequences, if any, arising from a breach of a code. There are various alternatives.

33 See the discussion of legislation by reference at p168.

A code may be of an advisory character and for guidance only and therefore no consequences will flow directly from a breach. It may be desirable to include a provision similar to the following:

> A failure of a person to follow any guidance contained in a code issued under this section does not of itself render that person liable to proceedings of any kind.
>
> A person is not liable to any civil or criminal proceeding only because the person has not complied with a provision of a code of practice.

Breach of a code may be taken into account in disciplinary proceedings in the following form although a breach is not to be taken of itself to constitute unprofessional conduct:

> Where any person is alleged to have failed to comply with any provision of the Code, that failure
>
> (a) shall not be taken , of itself, to constitute unacceptable professional conduct on his part; but
>
> (b) shall be taken into account in any proceedings against him under this Act.
>
> *Chiropractors Act 1994* [UK] s19(4).

Evidence of breach of a code may under some statutes be relied on by the prosecution as tending to establish the guilt of a person in proceedings for an offence against the Act under which the code is issued.

> If in a proceeding against a person for a contravention of a provision of this Act it is shown that the person failed at a material time to follow any guidance contained in a code issued under this section, being guidance relevant to the provision concerned, that failure may be relied on by the prosecution as tending to establish the person's guilt.

Conversely, evidence of compliance with a code may constitute a defence in some cases. It may be desirable to state that compliance with a code is not the only way a provision may be complied with. For example

> A court may, in determining whether a person charged with failing to comply with a provision of this Act has complied with the provision, have regard to a code of practice issued under this Act that
>
> (a) was in force at the time of the alleged offence; and
>
> (b) related at that time to matters of a kind to which the alleged offence relates
>
> If it is alleged in a proceeding that a person has contravened a provision of this Act in relation to which a code of practice was in effect at the time of the alleged contravention, the code of practice is admissible in evidence in that proceeding and proof that the person complied with the relevant provision of the code or complied with the provision of the Act otherwise than observing that provision of the code of practice is a satisfactory defence.

Breach of a code itself rarely constitutes an offence directly, but the indirect effects may be just as serious. For example, it may be provided that a breach may be taken into account in consideration of the cancellation or suspension of, or failure to renew, some kind of licence or authority to perform some act or engage in some activity. Another possibility is seen in the Police and Criminal Evidence

Act 1984 [UK] ss66 and 67 under which breach of a code by a police officer amounts to a disciplinary offence and evidence of the breach may be admissible in other proceedings, but the breach does not of itself give rise to criminal or civil liability.

Chapter 12

Substantive and administrative provisions: Part 1

INTRODUCTION

The following three chapters deal with some of the most common legislative topics. Those chapters have a close relationship with the preceding chapter because the topics contained in them inevitably include provisions for conferring powers, imposing duties and providing remedies for breaches of duties.

A check list is provided for most topics but check lists have their limitations. They cannot distinguish between what is essential or important and what is not and they cannot respond to the various needs of particular instructions. Further, a check list is likely to list some items that are incompatible with one another. It is not suggested that the order in the check lists provided should necessarily be followed in the draft. The design of every statute must be separately developed. In some cases, the use of schedules may enable the removal of a lot of detail away from the essential substance of the draft.

The value of a check list is to remind the drafter of topics that might otherwise be overlooked. A check list is an aid not a solution.

The legislative topics selected are

in this chapter
- Statutory corporations and other bodies

in Chapter 13
- Licensing and registration
- Government finance
- Taxation

in Chapter 14
- Validation
- Implementation of international Conventions
- Tribunals

STATUTORY CORPORATIONS AND OTHER BODIES

A statutory corporation has only such powers as are given it directly or indirectly by statute. The powers of a statutory corporation extend beyond powers expressly

given to powers necessarily and properly required for carrying into effect the purposes of incorporation and to powers incidental to or consequential upon the powers expressly given.[1] A drafter is not entitled to assume a liberal construction of a corporation's powers, and prudence requires that nothing of importance should be left to implication.

The first step for the drafter must be to ascertain thoroughly what are the intended functions of the body. Are they advisory, administrative, judicial, or a mix and how are they to be performed? The answers to these questions will enable an answer to be found to the preliminary but fundamental question whether further legislation is necessary to achieve the intended purpose of the exercise. There is a tendency to assume that distilled drops of wisdom added to the existing sea of legislation present the only possible solution to a problem. It may be overlooked that in many situations the common law, including the prerogative, or existing legislation may be adequate. If a new body is contemplated, it may be overlooked that incorporation under existing law as a limited liability company or an incorporated society or association may be adequate. If the new body is to be advisory in character and can be serviced by existing structures, it may be adequate for the body to be set up by administrative means. If the new body is to have judicial or quasi-judicial functions, the question arises whether the functions could appropriately be given to an existing court or tribunal.

The next question is whether the proposed new body should be corporate or unincorporate. Corporate status should be provided for only if that would serve a demonstrable purpose such as facilitating commercial activities, the holding of property, or the management of finances. On the other hand, a body that is advisory only, or is judicial or quasi-judicial, and serviced by a government department or other body may have no need of corporate status.

There is one other important preliminary matter to be settled before the drafter can proceed with the design stage of the project and that is the degree of independence that the body is to enjoy. The relationship of the new body to the Crown and the Minister must be known. The drafter must be aware whether or not the body is to be a Crown agency.

Check list for legislation establishing corporations

Constitution, management and functions of the corporation

1 Purpose of statute[2]
2 Establishment of corporation (or continuation of existing body)
  (a) body corporate
  (b) unincorporate status
3 Name of corporation
4 Constitution
  (a) composition/membership
  (b) appointing, nominating or electing authorities
  (c) qualifications or criteria for membership
  (d) co-opted members

1 See 9 Halsbury's Laws of England (4th edn) 775, 779–780, and *Charles Roberts & Co Ltd v British Railways Board* [1964] 3 All ER 651, [1965] 1 WLR 396. See also Chapter 12, *Garner's Administrative Law* (7th edn) (ed B. L. Jones).
2 See p154.

(e) variation of composition
5 Management
(a) directors/board members
(b) principal executive officers
(c) committees
(d) advisory bodies
6 Functions of corporation
(a) major powers and duties
7 Relationship to government/Minister
(a) agent or non-agent of the government
(b) ministerial power to give directions
(c) obligation to consult
(d) ministerial power to require reports or information

Financial provisions and accountability

8 Available resources
(a) appropriations
(b) grants
(c) levies
(d) fees, charges
(e) trading income
9 Capital structure
10 Financial duties as to conduct of activities
11 Duty to submit estimates and financial projections
12 Special funds or accounts
(a) reserve funds
13 Power to open and operate bank accounts
14 Borrowing powers
(a) Treasury loans
(b) issue of bonds, stock and other securities
15 Treasury guarantees of loans
16 Investment of funds
17 Lending powers
18 Application of revenues or profits
19 Establishment of financial year
20 Limitation on acquisition or disposal of property
21 Limited power of unauthorised expenditure
22 Liability to taxes or exemptions
23 Accounts and reports
24 Audit

Administrative powers and procedures

25 Powers as to property (acquiring, hiring, holding, leasing, owning, selling, disposing of)
26 Provision for headquarters, offices and places of business
27 Power to employ staff, services, agents
28 Personnel policy (obligation to be good employer)
29 Equal opportunities policy
30 Power to engage consultants and experts
31 Superannuation, retirement plans

32 Secrecy and non-disclosure of information
33 Returns and information (by and to corporation)
34 Power to form companies
35 Power to participate in joint ventures
36 Control of subsidiaries
37 Powers to make or recommend subordinate legislation/bye-laws
38 Personal immunity of members and officers
39 Insurance
40 Contracts of corporation
41 Execution of documents, and seal
42 Delegation
43 Joint action, consultation, use of governmental facilities
44 Holding of inquiries or investigations (summoning of witnesses, administration of oath, receipt of evidence)
45 Corporate planning
46 Annual (or other periodic) planning
47 Periodic review[3]

Procedural provisions concerning Board or other governing body

48 Oath of office
49 Duration of office
50 Eligibility for re-election or re-appointment
51 Resignation
52 Vacation of office, disqualification and compensation on vacation of office
53 Extraordinary vacancies, leave of absence
54 Deputy, alternate or temporary members or directors
55 Calling of meetings
56 Quorum
57 Meetings to be held in public
58 Attendance at meetings by designated non-members
59 Service of notices
60 Chairperson, Vice-Chairperson
61 Presiding at meetings
62 Voting
63 Minutes
64 Assent to resolution without meeting
65 Disclosure of interest of members
66 Remuneration and expenses of members
67 Power to regulate procedure
68 Vacancies or defects in appointment not to invalidate proceedings

Provisions for replacement of existing corporation by new corporation

69 Dissolution of existing body
70 Vacation of office of members without compensation
71 Vesting of assets and liabilities
72 Delivery of movables
73 Transfer of records
74 Effect on existing agreements

3 As to review clauses, see p216.

75 Staff of existing body
76 Continuance of pending legal proceedings
77 Completion of acts commenced by existing body
78 Final accounts and report of replaced body
79 Resolution of problems by regulations or ministerial or similar order or certificate
80 References in legislation to existing body.

Forms relating to statutory bodies[4]

Constitution, membership and functions

[1, 2, 3, 4]

(1) The National Aerospace Corporation is established.

(2) The Corporation is a body corporate with perpetual succession and a common seal and may
  (a) acquire, hold and dispose of real and personal property; and
  (b) sue and be sued; and
  (c) so far as is possible for a body corporate, exercise the rights, powers and privileges and incur the liabilities and obligations of a natural person of full age and capacity.

(3) Schedule 1 has effect with respect to the constitution and proceedings of the Corporation.

The above precedent adopts the admirable practice of removing procedural provisions to a schedule, thus facilitating early and prominent presentation of the essential purposes of the legislation.

The phrase 'continue to be' in the form that follows is suitable for use where a body which is already in existence is to continue in existence although the legislation under which it was first established is to be replaced. Where a reorganisation requires the functions of a body corporate to be altered and the body itself to be reconstituted, it will probably be preferable to preserve the existing body corporate in existence despite the changes, even if they are extensive. The very considerable advantage of this technique is that the transitional problems that would follow from the dissolution of one body and incorporation of another are avoided. The following form may be adapted.

(1) The body corporate constituted under section 7(1) of the Environment Authority Act 1990 as the Environment Authority is preserved and continues to be a body corporate for the purposes of this Act so that its corporate identity and its rights and obligations are not affected by the repeal of that Act.

(2) The Authority
  (a) under its corporate name has perpetual succession and a common seal;
  (b) is capable of suing and being sued in its corporate name;
  (c) has the functions conferred or assigned by this Act.

4 The number in square brackets preceding the form or group of forms that follow it is the number of the relevant item in the check list.

(3) Schedule 1 has effect with respect to the directors and the procedure of the Board.

If the body is to continue under a new name, the following may be adapted.

(1) The body corporate constituted under section 7(1) of the Environment Authority Act 1990 as the Environment Authority is preserved and continues in existence as a body corporate for the purposes of this Act but is to be known after this section comes into force as the Conservation Authority.

(2) The corporate identity and the rights and obligations of the body corporate are not affected by its change of name.

[4, 5]

(1) The Corporation is to have a Board of management comprising 5 members appointed by the Minister, of whom

(a) one is to be an officer of the Department of Agriculture, who shall be appointed to be chairperson; and

(b) two are to be persons nominated for appointment by the Primary Industry Association; and

(c) one is to be a person nominated for appointment by the body known as the Cattle Breeders' Association; and

(d) one is to be a person appointed after consultation with primary industry organisations, who has commercial expertise that is relevant to the functions of the Board.

(2) The Board is the governing body of the Corporation with authority, in the name of the Corporation, to exercise and perform the functions conferred or imposed on the Corporation under this Act.

(3) Before the first occasion on which an appointment is to be made of a member referred to in paragraph (b) or (c) of subsection (1), and on each later occasion when an office of member becomes vacant, the Minister must, in writing, request the body referred to in the appropriate paragraph to nominate, within 28 days of receiving the request, a person or persons for appointment to the Board.

(4) If a nomination is not received by the Minister within the period requested, the Minister may appoint such person as the Minister thinks appropriate and a person appointed in accordance with this subsection is to hold office as if nominated as required by subsection (3).

A power enabling the Minister to reject a nomination may be desirable. For example

(1) If the Minister is not satisfied as to the suitability of a person nominated for appointment to the Board, the Minister may, by notice in writing given to the nominating body, reject the nomination and request a further nomination.

(2) A further request under subsection (1) has the same effect as a request under section xx.

---

(1) Before appointing a person to be a member of the Corporation the Secretary of State shall satisfy himself that that person will have no such financial or other

> interest as is likely to affect prejudicially the exercise and performance by him of his functions as a member of the Corporation, and the Secretary of State shall also satisfy himself from time to time with respect to every member of the Corporation that he has no such interest; and a person who is, or whom the Secretary of State proposes to appoint to be, a member of the Corporation shall, whenever requested by the Secretary of State so to do, furnish to him such information as the Secretary of State considers necessary for the performance by the Secretary of State of his duties under this paragraph.
>
> *London Regional Transport Act 1984* [UK] Sched 1, para 5(1).

For provision of a selection committee nominating persons for appointment to a statutory authority, see sections 201 and 202 of the Fisheries Act 1994 [Q].

Where the sponsors of legislation believe that their purpose is to incorporate a college, a hospital or some other institution (rather than to add legal personality to an existing unincorporated association of persons), difficulties may arise concerning the identity of the appropriate persons or body which it is proper to incorporate. In such cases, it is generally appropriate that the governing council, by whatever name it is known, and not the institution itself should be given corporate status.

This raises the question whether a corporation must necessarily have members. According to the traditional view, incorporation is the grant of corporate status to a physical association of persons and accordingly one finds in United Kingdom statutes that a corporation such as London Regional Transport consists of a chairman and not less than 4 nor more than 11 members. But the growth of the national corporations in the United Kingdom and elsewhere, and perhaps the growth of giant limited liability companies, has obscured the traditional legal view and has led to a popular belief that a corporation such as London Regional Transport is a being in itself and not corporate clothing covering actual physical members. The members are not thought of as essential, although of course some governing body is. This popular view is reflected in statute law in some jurisdictions where memberless corporations exist without any apparent sense of deprivation.

> [4]
> The Commission consists of a chairperson and not less than 3 nor more than 5 other members all of whom are to be appointed by the President on the nomination of the Minister.
>
> The Authority consists of the person who holds or acts for the time being in the office of Commissioner for Conservation.
>
> [5]
> The Corporation has a board of directors which is the governing body of the Corporation and is responsible for the performance of the functions conferred on the Corporation by this Act.
>
> (1) The Board must appoint a managing director of the Corporation.
>
> (2) The managing director is the chief executive of the Corporation and is responsible for the management of the affairs of the Corporation in accordance with the policies and directions of the Board.
>
> ---
>
> (1) The Board may appoint one or more committees

(a) to inquire into and advise the Board on such matters within the scope of the Board's functions as the Board refers to it;
(b) to exercise such of the powers and perform such of the duties of the Board as the Board delegates or refers to the committee.

(2) A committee consists of a chairperson and such other persons, whether members of the Board or not, as the Board determines.

(3) A committee is subject to the control of the Board and may be discharged or reconstituted at any time by the Board.

(4) The delegation or referral of a power or duty to a committee does not relieve the Board of responsibility for the execution or performance of the power or duty or for the actions of the committee.

(5) Subject to any directions that may be given by the Board, a committee may regulate its own procedure.

---

(1) The Board may co-opt a person to help the Board in dealing with a matter if the Board is satisfied that the person's experience or qualifications are likely to help the Board.

(2) A member co-opted to help the Board with any matter is entitled to take part in the Board's proceedings concerning that matter but has no vote and cannot take part in any other proceedings of the Board.

[6]

(1) The functions of the Council shall be
(a) to prepare or cause to be prepared development plans for the river basins of Tanganyika and project feasibility reports in relation thereto;
(b) to advise the Government generally on the utilisation and development of the water resources of Tanganyika.

(2) The Council shall have power for the purpose of carrying out its functions to do all such acts as appear to it to be requisite, advantageous or convenient for or in connection with the carrying out of its functions or to be incidental to their proper discharge and may carry on any activities in that behalf either alone or in association with any other person or body.

(3) Subsection (2) relates only to the capacity of the Council as a body corporate and does not authorise the disregard by the Council of any enactment or rule of law.

National Water Resources Council Act 1967 [Tanz] s4.

The purposes of the Corporation are
(a) to construct the Mass Transit Railway and to operate it having regard to reasonable requirements of the public transport system of Hong Kong;
(b) to engage in other such activities, and to perform such functions, as the Governor may, after consultation with the Corporation, permit or assign to it by order published in the Gazette.

Mass Transit Railway Corporation Ordinance [HK] s3(2).

See also:

National Heritage Act 1983 [UK] ss2, 10, 18, 24, 33;
Petroleum and Submarine Pipe-lines Act 1975 [UK] ss2 and 3;
Australian National Railways Commission Act 1983 [Aust] Pt II;
Australian Meat and Livestock Research and Development Corporation Act 1985 [Aust] ss5, 6.

[7]
The Corporation is an agent of the Crown.

The Corporation is not an agent of the Crown and does not enjoy any status, immunity or privilege of the Crown.

---

(1) The Minister may give written directions to the Authority concerning the performance of its functions, powers and duties, either generally or in relation to a particular matter, and the Authority must give effect to those directions.

(2) The Authority must
(a) cause a copy of any direction given to it by the Minister to be published in the Gazette; and
(b) publish any such direction in its annual report.

---

(1) The Minister may give the Authority a written direction concerning any of its functions if the Minister is satisfied it is necessary to give the direction in the public interest because of exceptional circumstances and the Authority must comply with the direction.

(2) Before giving the direction, the Minister must consult with the Authority and, in particular, ask the Authority whether complying with the direction would be in the financial interests of the Authority.

The Corporation shall, to the greatest possible extent consistent with the performance of its duties under this Act, consult and co-operate with departments, branches and agencies of the Government of Canada and of the governments of the provinces having duties related to, or having aims or objects related to those of the Corporation.
Canadian Film Development Corporation Act [Can] s10(4).

The Authority must provide a report to the Minister on any matter relating to the Authority's functions when requested to do so by the Minister.

For an example of the specification of matters requiring ministerial approval, see Development of Inventions Act 1967 [UK] s4.

For a ministerial power to give 'guidance' see the Civil Aviation Act 1971 [UK] s3, and *Laker Airways Ltd v Department of Trade* [1977] QB 643, [1977] 2 All ER 182. That power has since been replaced by a power to give directions. See Civil Aviation Act 1982 [UK] ss6, 20 and 21.

See also British Shipbuilders Act 1983 [UK] s2.

Financial provisions and accountability

A capital structure involving shares or stock is neither necessary nor desirable in the case of most statutory corporations, but this rule may be subject to exception in the case of a trading corporation which must appear to the commercial world to be solidly based to enable it to perform its functions.

[8]

The funds and resources of the Corporation consist of

(a) money appropriated by Parliament for the purposes of the Corporation; and

(b) any money and property paid or provided to the Corporation by way of grants, fees, subsidies, donations, gifts, charges, rent, interest and other income derived from the investment of the Corporation's funds; and

(c) any money derived from the disposal of or dealing with real or personal property held by the Corporation; and

(d) money borrowed under this Act or derived from financial accommodation extended to the Corporation under this Act; and

(e) all other moneys lawfully received by or made available to the Corporation.

[9]

(1) The authorised capital of the Corporation is ten million dollars divided into ten shares of the par value of one million dollars each.

(2) The Minister shall subscribe for the ten shares of the capital stock of the Corporation and shall pay the amount of such subscription out of the Consolidated Revenue Fund at such time as the Corporation may require.

(3) The shares of the capital stock of the Corporation are not transferable and shall be registered in the books of the Corporation in the name of the Minister and held by him in trust for Her Majesty.

Canada Deposit Insurance Corporation Act [Can] s7.

[10]

The Corporation is to perform its functions in accordance with prudent commercial principles and must ensure as far as possible that its revenue is sufficient both to meet its expenditure properly chargeable to revenue and to derive a profit.

(1) It shall be the duty of the Commission so to conduct their affairs as to secure that their revenues become at the earliest possible date, and continue thereafter, at least sufficient to enable them to meet their obligations and to discharge their functions under this Act.

(2) Any excess of the Commission's revenues for any financial year over the sums required by them for that year for meeting their obligations and discharging their functions under this Act shall be applied by the Commission in such manner as the Secretary of State may direct with the approval of the Treasury and after consultation with the Commission.

(3) A direction under sub-paragraph (2) may require the whole or any part of any excess of the revenues of the Commission to be paid into the Consolidated Fund.

Broadcasting Act 1990 [UK] Sched, 1 para 12.

For more complex forms, see London Regional Transport Act 1984 [UK] s15 and Australian National Airlines Act 1945 [Aust] s32F (inserted in 1984).

[11]

The Authority, in framing and carrying out proposals involving substantial outlay on capital account, shall act on lines settled from time to time with the approval of the Secretary of State.

Airports Authority Act 1975 [UK] s3(2).

See also New Zealand Tourism Board Act 1991 [NZ] s8.

(1) The Board must cause annual estimates of the receipts and payments of the Corporation relating to its administration of this Act to be prepared and to be submitted to the Minister who, if he approves the estimates, must cause them to be submitted to the Treasurer not later than such date as is specified by the Treasurer.

(2) For the purpose of facilitating the accounting procedures of the Treasurer and the preparation of Treasury estimates, the Board must furnish to the Treasurer within the period and in the manner the Treasurer specifies such information relating to the estimates, accounts and financial affairs of the Corporation as the Treasurer requires.

[13]

(1) The Board must open and maintain such bank accounts as are necessary for the performance of its functions.

(2) The Board must ensure that all money received by or on behalf of the Board is banked as soon as practicable after being received.

(3) The Board must ensure that no money is withdrawn from or paid out of any of its bank accounts without the Board's authority.

[14]

(1) The Authority may, to the extent that it thinks necessary from time to time for carrying out its objects
(a) borrow moneys by way of loan, advance or overdraft; and
(b) obtain and provide credit; and
(c) pay commission or brokerage; and
(d) give, take or arrange security.

(2) A loan, advance or overdraft under this section may only be made with the prior approval of the Treasurer and upon such terms and conditions as the Treasurer approves.

(3) Any moneys borrowed by the Authority under this section may be raised as one loan or as several loans and in such manner as the Treasurer may approve, but the amount of the moneys so borrowed must not in any one year exceed in the aggregate such amount as the Treasurer approves.

(4) Subject to any directions given by the Treasurer, either generally or specifically, the Authority may
(a) obtain credit; or
(b) arrange for financial accommodation to be extended to the Authority in ways additional to or other than borrowing money or obtaining credit.

See also Canadian National Railways Financing and Guarantee Act 1970 [Can] ss3 and 4; Iron and Steel Act 1975 [UK] s16.

[15]

(1) The Treasury may guarantee, in such manner and on such conditions as they may think fit, the repayment of the principal of, the payment of interest on and

the discharge of any other financial obligation in connection with, any sums which London Regional Transport borrow from a person other than the Secretary of State in exercise of their powers under section 18 of this Act.

(2) Immediately after a guarantee is given under this section the Treasury shall lay a statement of the guarantee before each House of Parliament; and where any sum is issued for fulfilling a guarantee so given the Treasury shall, as soon as possible after the end of each financial year, beginning with that in which the sum is issued and ending with that in which all liability in respect of the principal of the sum and in respect of interest on the sum is finally discharged, lay before each House of Parliament a statement relating to that sum.

(3) Any sums required by the Treasury for fulfilling a guarantee under this section shall be charged on and issued out of the Consolidated Fund.

(4) If any sums are issued in fulfilment of a guarantee given under this section, London Regional Transport shall make to the Treasury, at such times and in such manner as the Treasury may from time to time direct, payments, of such amounts as the Treasury may so direct, in or towards repayment of the sums so issued and payments of interest on what is outstanding for the time being in respect of sums so issued at such rate as the Treasury may so direct.

(5) Any sums received under subsection (4) above by the Treasury shall be paid into the Consolidated Fund.

London Regional Transport Act 1984 [UK] s20.

[17]

See Housing Associations Act 1985 [UK] s79; Development of Tourism Act 1969 [UK] Part II.

[18]

(1) At the end of each financial year, the Board is to consider the application of the net profits of the Corporation for that financial year after allowing for expenses of operation during that year and making adequate provision for bad and doubtful debts, depreciation of assets, contribution to staff and superannuation funds and such other contingencies as may reasonably be foreseen.

(2) After consulting the Minister, the Board is to resolve what part of the net profits is allocated to surplus and what part, if any, is distributed by way of dividend to the Government.

See Australian National Railways Commission Act 1983 [Aust] ss57, 58.

[19]

The Corporation's financial year is to end on 30 June in each year or on such other day as the Board may, with the approval of the Minister, determine.

[20]

The Commission shall not, without the approval of the Attorney General

(a) acquire any property, right or privilege for a consideration exceeding in amount or value $50,000 or, if a higher amount is prescribed, that higher amount;

(b) dispose of any property, right or privilege where the amount or value of the

consideration for the disposal, or the value of the property, right or privilege, exceeds $50,000 or, if a higher amount is prescribed, that higher amount;

(c) enter into a contract for the construction of a building for the Commission, being a contract under which the Commission is to pay an amount exceeding $50,000 or, if a higher amount is prescribed, that higher amount; or

(d) enter into a lease of land for a period exceeding ten years.

Law Reform Commission Act 1973 [Aust] s30.

[22]

The Institute is not subject to taxation under any law of the Commonwealth or of a State or Territory of the Commonwealth.

Australian Institute of Marine Science Act 1972 [Aust] s43.

[23, 24]

The Board must cause to be kept proper accounts and records of the transactions and affairs of the Board and must do all things necessary to ensure that

(a) all moneys received are properly brought to account; and

(b) all payments out of its moneys are correctly made and properly authorised; and

(c) adequate control is maintained over its property and over the incurring of liabilities by the Board.

(1) The Authority must cause to be prepared and submitted to the Minister, within 2 months after the end of the Authority's financial year, an annual report containing

(a) financial statements for the financial year; and

(b) performance indicators and such other information as may be directed by the Treasurer; and

(c) a report on the operations of the Authority during the preceding financial year; and

(d) such other information as the Minister may direct in writing.

(2) The financial statements referred to in subsection (1)(a) are to be prepared on an accrual accounting basis and are to consist of

(a) a statement of financial transactions of the Authority for the financial year; and

(b) a statement of the financial position of the Authority at the end of the financial year; and

(c) proper and adequate notes to the financial statements.

(3) The financial statements referred to in subsection (1) must

(a) present fairly the financial transactions of the Authority during the financial year to which they relate; and

(b) present fairly the financial position of the Authority at the end of the financial year; and

(c) be certified in the manner required by the Treasurer.

(4) The Authority must within 2 months after the end of the Authority's financial year cause to be submitted to the Auditor General the financial statements and the other information referred to in subsection (1)(b) and (d).

(5) The Minister must cause copies of each annual report together with a copy of the opinion of the Auditor General to be laid before Parliament within 10 sitting days of receiving the Auditor General's opinion.

(1) Food from Britain shall
(a) keep proper accounting records in such form as the Ministers may, with the consent of the Treasury, determine; and
(b) prepare a statement of accounts in respect of each financial year.

(2) The statement of accounts shall give a true and fair view of the state of Food from Britain's affairs at the end of the financial year and of its income and expenditure in the financial year, and shall comply with any directions given by the Ministers with the consent of the Treasury as to the information to be contained in the statement or the manner in which it is to be presented or as to the methods and principles according to which the statement is to be prepared.

(3) The statement of accounts shall be audited by persons to be appointed in respect of each financial year by the Ministers, and the auditors shall be furnished by Food from Britain with copies of the statement of accounts for any financial year not later than 30th June following the end of that year.

(4) The auditors shall complete their audit and send the Ministers copies of the statement of accounts and of their report on the statement as soon as possible after the end of the financial year to which they relate and in any event not later than 30th September following the end of that year.

(5) No person shall be qualified to be appointed auditor under this section unless he is a member of one or more of the following bodies—
The Institute of Chartered Accountants in England and Wales;
The Institute of Chartered Accountants of Scotland;
The Association of Certified Accountants;
The Institute of Chartered Accountants in Ireland;
but a Scottish firm may be appointed under this section if each of the partners is qualified to be so appointed.

(6) As soon as possible after the end of any financial year and in any event not later than 30th September following the end of that year Food from Britain shall prepare and submit to the Ministers a report of what has been done in the discharge of its functions in that year.

(7) The Ministers shall lay before Parliament copies of the report for any financial year made under subsection (6) above together with copies of the statement of accounts and of the auditor's report for that year.

(8) The Ministers and the Comptroller and Auditor General shall be entitled to inspect all books, papers and other records of Food from Britain relating to or to matters dealt with in any statement of accounts required to be prepared pursuant to this section.

(9) The first financial year of Food from Britain shall be the period beginning with the coming into force of this section and ending with 31st March 1984; and any subsequent period of twelve months ending with 31st March shall be a financial year of Food from Britain.

Agricultural Marketing Act 1983 [UK] s5.

See Oil and Pipelines Act 1985 [UK] Sched 3, paras 8–10.

Administrative powers and procedures

[25]

The Corporation may, for the purposes of this Act, purchase or otherwise obtain and sell or otherwise dispose of land, buildings, materials, supplies, plant, machinery, and intellectual property.

[27, 30]

The Board may appoint such employees, either full-time or part-time, and engage under contract for services such professional, technical and other assistance, as it considers necessary to carry out its functions.

[28]

The Board shall operate a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment including provisions requiring

(a) good and safe working conditions; and
(b) the impartial selection of suitably qualified people for appointment; and
(c) recognition of
  (i) the aims and aspirations of Maori; and
  (ii) the employment requirements of Maori; and
  (iii) the need for greater involvement of Maori as employees of the employer operating the employment policy; and
(d) opportunities for the enhancement of the abilities of individual employees; and
(e) recognition of the aims and aspirations, and the cultural differences, of ethnic and minority groups; and
(f) recognition of the employment requirements of women; and
(g) recognition of the employment requirements of people with disabilities.

New Zealand Tourism Board Act 1991 [NZ] Sched 1, para 13.

[29]

(1) In each financial year, the Board must
  (a) develop and publish an equal employment opportunities programme for the Board; and
  (b) ensure that the programme is complied with.

(2) For the purposes of this clause, an equal employment opportunities programme is a programme aimed at identifying and eliminating all aspects of policies, procedures, and other institutional barriers, that cause or perpetuate, or tend to cause or perpetuate, inequality in respect of the employment of any people or group of people.

[32]

(1) A person to whom this section applies must not, either directly or indirectly, except in the performance of a function or duty under or in connection with this or any other Act or as required by any other legal duty
  (a) make a record of, or divulge or communicate to any person, any information concerning the affairs of another person acquired by him or her by reason of their office or employment under or for the purposes of this Act; or
  (b) produce to any person any document relating to the affairs of another person furnished for the purposes of this Act.

Penalty: $4000 and imprisonment for 6 months.

(2) This section applies to every person who is or has been a director or alternate director, is or has been an employee of the Corporation, or is rendering or has rendered services to the Corporation as a consultant.

[33]

The Board shall afford to the Minister facilities for obtaining information with respect to the property and activities of the National Bank and shall furnish him with returns, accounts and other information with respect thereto and afford to him facilities for the verification of information furnished, in such manner and at such times as the Minister may require.

National Bank of Commerce Act 1967 [Tanz] s6(2).

It shall be the duty of the Corporation to provide the Secretary of State with such information as he may from time to time require with respect to the property, activities or proposed activities of the Corporation or any of its subsidiaries; but a requirement in pursuance of this section shall not impose upon the Corporation the duty of providing the Secretary of State with information which the Corporation does not possess and cannot reasonably be expected to obtain.

Petroleum and Submarine Pipe-lines Act 1975 [UK] s11.

Where information is recorded or stored by means of a mechanical electronic or other device any duty imposed by this Act to produce the document recording that information shall be construed as a duty to provide a document containing a clear reproduction in writing of the information.

Sex Discrimination Act 1984 [Aust] s113.

[35]

(1) The Corporation may enter into an agreement with another person or body to undertake a joint venture.

(2) A joint venture may be undertaken only for a purpose that is, or for purposes that are, consistent with the objectives of the Corporation set out in the research and development plan in force at the time when the agreement to undertake the joint venture is entered into.

(3) Without limiting the matters that may be dealt with in a joint venture agreement, such an agreement must specify
(a) the objectives of the joint venture; and
(b) the expected duration of the joint venture; and
(c) the nature and extent of the contribution to be made by the Corporation towards the joint venture; and
(d) the basis for the distribution of profits or other benefits derived from the joint venture.

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(1) The Corporation may enter into commercial operations with respect to
(a) any service developed in connection with the exercise of its functions;
(b) any product or by-product resulting from the exercise of its functions;
(c) any intellectual property resulting from the exercise of its functions;
(d) any land or building or other property of the Corporation.

(2) The Corporation may, for the purpose of exercising its powers under subsection (1)
(a) form or join in forming a company, partnership or trust;

(b) subscribe for, invest in, or otherwise acquire and dispose of shares, units, or other interests in or securities of a company, partnership or trust;
(c) enter into any joint venture or arrangement for sharing profits;
(d) manage, or participate in the management of, a company, partnership or trust.

[36]

(1) Each Corporation shall secure that, notwithstanding anything in the memorandum or articles of association of any of its wholly owned subsidiaries, none of those subsidiaries
(a) shall carry on any activity which the Corporation itself has no power to carry on or has power to carry on only with the consent of the Secretary of State, or
(b) shall acquire any interest in a body corporate or form or take part in forming a body corporate, or
(c) shall enter into a partnership with any other person, except with the consent of, or in accordance with the terms of any general authority given by, the Secretary of State.

(2) Paragraph (b) of subsection (1) above shall apply whether or not the body corporate is or will be incorporated in the United Kingdom, and paragraph (c) shall apply whether or not the partnership will be governed by the law of any part of the United Kingdom.

(3) Each Corporation shall secure that, except with the consent of, or in accordance with the terms of any general authority given by, the Secretary of State, none of its wholly owned subsidiaries shall dispose of an interest in any other of its wholly owned subsidiaries, unless the disposal is to the Corporation itself or to another of its wholly owned subsidiaries.

Aircraft and Shipbuilding Industries Act 1977 [UK] s9.

[41]

(1) The common seal of the Corporation shall
(a) be in a form determined by the Board; and
(b) be kept in custody as directed by the Board; and
(c) not be used except as authorised by the Board.

(2) Judicial notice must be taken of the imprint of the Corporation's seal appearing on a document and the document is presumed to have been properly sealed unless the contrary is proved.

[42]

Delegation is discussed at page 229. See also, as to special committees and delegation New Zealand Market Development Board Act 1986 [NZ] s20; as to delegation subject to restrictions, Hong Kong Trade Development Council Ordinance [HK] s7.

[43]

If requested by the Commission, the Government or any agent of the Government may, on such terms and conditions as are agreed,
(a) enter into arrangements for the execution of any work or the provision of any service for the Commission;
(b) execute any work or provide any service for the Commission;

(c) supply to the Commission any goods, stores, or equipment.

[45, 46]
As to the development of corporate plans and operational plans, see Australian Meat and Live-stock Corporation Act 1977 [Aust] ss30N–30U (inserted in 1984).

[47]
As to review clauses, see the form at p 216.

Procedural provisions concerning Board or other governing body

[49, 50]

(1) Every member of the Board is to be appointed for a term specified in the instrument of appointment and not exceeding 3 years.

(2) A member is eligible for re-appointment.

[51, 52]

(1) A member may resign by giving a signed notice of resignation to the Minister.

(2) The Minister may remove a member from office upon being satisfied that the member
  (a) is an undischarged bankrupt; or
  (b) is, for whatever reason, permanently incapable of performing the duties of a member; or
  (c) has neglected the duties of a member or has engaged in misconduct; or
  (d) has been absent, without leave of the Board, from 3 consecutive meetings of the Board; or
  (e) has been convicted of an indictable offence or an offence against this Act.

(3) A member unless he or she sooner resigns or is removed from office, continues in office until a successor comes into office, notwithstanding that his or her term may have expired.

In the case of a new body, a need may exist for the initial terms of appointment of members to be of different lengths so as to ensure continuity of experience. The form above is deliberately flexible to deal with this problem and to meet any other needs (such as the case of a member approaching the maximum age limit) that may arise from varying terms. The form above is preferable to forms that provide for vacation of office in certain specified circumstances of the kind listed in paragraphs (b) and (c). Where the vacation of office depends on the existence of specified circumstances, there may be doubt and a dispute as to the existence of those circumstances and in consequence uncertainty whether a person is or is no longer a member. The need for the Minister to take removal action in the form above ensures certainty.

> Each of the members of the Board shall be appointed to hold office during good behaviour but may be removed for cause at any time by the Governor in Council, and no member shall hold office beyond the age of seventy years.
>
> *Livestock Feed Assistance Act* [Can] s4(1).

> Where a person ceases to be a member of the Commission, and it appears to the Secretary of State that there are special circumstances which make it right for that person to receive

compensation, the Secretary of State may, with the Treasury's approval, direct the Commission to make to that person a payment of such amount as the Secretary of State may determine with the Treasury's approval.

National Heritage Act 1983 [UK] Sched 3, para 11(3).

[54]

(1) Where the Minister is satisfied that
   (a) a member is absent or temporarily incapable of performing the duties of a member; or
   (b) the office of a member is vacant,
   the Minister may appoint a person to act in the place of that member during the period of absence or incapacity or until the vacancy is filled.

(2) An acting member appointed under this section has the powers, duties and entitlements of a member.

(3) No appointment under this section and no act done while a person is acting as a member of the Council can, be questioned in any proceeding on the grounds that the occasion for the appointment had not arisen or had ceased.

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(1) The Minister may appoint a person to be the alternate of a specified member of the Board and may terminate the appointment at any time.

(2) The alternate of a member may resign the office of alternate member by notice in writing delivered to the Minister.

(3) The alternate of a member may, in the event of the absence of that member from a meeting of the Board, attend the meeting and when so attending is to be regarded as a member of the Board.

[58]

The Ministers may designate persons to attend on their behalf any meetings of Food from Britain or any of its committees, and it shall be the duty of Food from Britain to afford any person so designated reasonable facilities for taking part in the deliberations of Food from Britain or the committee, and recording the decisions of Food from Britain or the committee; but a person so designated shall not be qualified to vote or otherwise count as a member of Food from Britain or the committee.

Agricultural Marketing Act 1983 [UK] Sched 1, para 10.

The Board may permit any person to attend and participate (but not vote) at a meeting of the Board.

[55-57, 60-63]

(1) The first meeting of the Authority is to be convened by the chairperson and subsequently, subject to subsection (2), meetings are to be held at such times and places as the Authority determines.

(2) The chairperson may at any time convene a special meeting of the Authority and must do so if asked by at least 4 members.

(3) The chairperson is to preside at all meetings of the Authority at which he or she is present and the deputy chairperson is to preside in the absence of the chairperson.

(4) If both the chairperson and the deputy chairperson are absent from a meeting the members present must appoint one of their number to preside.

(5) A quorum for a meeting of the Authority is 4 members.

(6) At any meeting of the Authority the chairperson, deputy chairperson or other person presiding has a deliberative vote, and in the case of an equality of votes also has a casting vote.

(7) The Authority must cause accurate minutes of proceedings at each meeting of the Authority to be recorded and preserved.

[64]

A resolution is a valid resolution of the Board, even though it was not passed at a meeting of the Board, if

(a) it is signed or assented to by letter, telegram, telex, or facsimile transmission by a majority of members of the Board; and

(b) proper notice of the proposed resolution was given to all members of the Board.

See also Australian Meat and Live-stock Industry Selection Committee Act 1984 [Aust] s21.

[65]

(1) A member of the Commission who is in any way directly or indirectly interested in a contract made or proposed to be made by the Commission, or in any other matter which falls to be considered by the Commission, must disclose the nature of that member's interest at a meeting of the Commission.

(2) The disclosure must be recorded in the minutes of the meeting.

(3) A member must not take part in the deliberations on or decision about a contract in which the member is interested.

(4) A member must not take part in the deliberations on or decision about any matter in which the member is interested (other than a contract) if the Commission decide that the member's interest might prejudicially affect his or her consideration of the matter.

(5) For the purposes of this section, a notice given by a member at a meeting of the Commission to the effect that he or she is a member of a specified body corporate or firm and is to be regarded as interested in any contract which is made with the body corporate or firm after the date of the notice, and in any other matter concerning the body corporate or firm which falls to be considered after that date, is to be a sufficient disclosure of the member's interest.

(6) A member need not attend in person at a meeting of the Commission in order to make a disclosure which is required under this section if the member takes reasonable steps to secure that the disclosure is made by a notice which is taken into consideration and read at such a meeting.

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(1) A director who has a direct or indirect pecuniary interest in a proposal being considered or about to be considered by the Board must, as soon as possible

after the member becomes aware of the proposal, disclose the nature of his or her interest to the Board.

(2) A disclosure under subsection (1) must be recorded in the minutes of the meeting of the Board.

(3) The director must not, unless the Board otherwise determines
(a) be present during any deliberation of the Board with respect to that proposal; or
(b) take part in any decision of the Board with respect to that proposal.

(4) For the purpose of the making of a determination by the Board under subsection (3) about a director who has made a disclosure under subsection (1), a director who has a direct or indirect pecuniary interest in the proposal to which the disclosure relates must not
(a) be present during any deliberation of the Board for the purpose of making the determination; or
(b) take part in the making of the determination.

[66]

(1) The Chairman of the Council and each of the directors shall be paid such salaries and expenses as are fixed by the Governor in Council and shall devote the whole of their time to the performance of their duties under this Act.

(2) The other members of the Council shall serve without remuneration but are entitled to be paid reasonable travelling and living expenses while absent from their ordinary place of residence in the course of their duties under this Act.

(3) Notwithstanding subsection (2), a member of the Council other than the chairman or a director may, for any period during which he performs with the approval of the Council any duties on behalf of the Council in addition to his ordinary duties as a member thereof, be paid such remuneration therefor as may be authorised by the Governor in Council.

Economic Council of Canada Act [Can] s5.

[67]

The Board may determine the procedures for the conduct of its functions except as otherwise provided by this Act.

Provisions for replacement of existing corporation by new corporation

[69, 70]

(1) The Forestry Research Council established by section 4 of the repealed Act is dissolved.

(2) Compensation is not payable to any member of the Forestry Research Council for loss of office resulting from the dissolution of that Council.

[71]

(1) On the day when this Act comes into force (the commencement day) all property of the Forestry Research Council becomes the property of the Conservation Commission and is vested in the Conservation Commission without transfer, conveyance or assurance.

(2) Vesting of property under this section is without prejudice to any trust, including a resulting trust or other trust in favour of a donor, that immediately before the commencement day affected the property vested.

(3) In relation to property vested under this section, the Conservation Commission has and is subject to all the rights, powers, remedies, liabilities, and obligations and may exercise and discharge in relation to that property all or any of the rights, powers and remedies which the Forestry Research Council would have had and been subject to and might have exercised or discharged in relation to that property if the property had not been divested from the Forestry Research Council and vested in the Conservation Commission.

(4) On the commencement day, the Conservation Commission becomes liable to pay and discharge all the debts, liabilities, and obligations of the Forestry Research Council that existed immediately before that day to the same extent as the Forestry Research Council would have been liable if this Act had not come into force.

[73]
On the commencement day, the Commission becomes the owner of all documents, books, and other records of the Council (however compiled , recorded or stored) relating to the operations of the Council, and of any tape, disc or other device or medium relating to such records.

[74]
On the commencement day, all contracts, agreements and undertakings made by the Forestry Research Council and all securities lawfully given to or by that Council and in force immediately before that day have effect as contracts, agreements and undertakings by and with the Conservation Commission and may be enforced by and against that Commission accordingly.

[75]
(1) Every person who, immediately before the commencement day was employed by the Council becomes on the commencement day an employee of the Commission at the same remuneration as applied to that person immediately before the commencement day.

(2) There is no break or interruption in the employment of a person whose employment is affected by subsection (1).

(3) The employment of a person to whom this section applies may be terminated or the terms and conditions varied after the commencement day in the same manner and to the same extent as before that day.

[76]
Proceedings commenced by or against the Council before the commencement day may be continued or enforced on or after that day by or against the Commission as if the Commission were a party to those proceedings and all claims and defences that were available to the Council are available to the Commission.

[78]
(1) The Forestry Research Council as constituted immediately before the commencement day continues in existence for the purpose of preparing and

submitting to the Minister the accounts and report referred to in subsection (2) and so continues to exist until it has complied with that subsection.

(2) As soon as practicable after the commencement day, the Forestry Research Council must prepare and submit to the Minister a report of its activities and a statement of accounts in respect of the period from the end of the immediately preceding financial year in respect of which a report has been furnished under the repealed Act to the commencement day.

(3) The accounts and report required by this section must be prepared and audited in accordance with the provisions of the repealed Act as if it had not been repealed.

(4) The Minister must cause a copy of the reports and statement referred to in this section to be laid before Parliament as soon as practicable.

[79]
If there is no sufficient provision in this Act for any matter or thing necessary or convenient to give effect to the purpose of dissolving the Council and conferring its functions and its assets and liabilities on the Commission, the Governor-General may make regulations for the purpose and any such regulations may be made after the commencement day but so as to have effect from that day.

The breadth and imprecision of the above form are such that it may be desirable to require parliamentary approval or at least consideration of any regulations that might be made. As to parliamentary consideration of regulations, see page 337.

Dissolution of statutory corporations

The forms under items [69–79] above refer specifically to the succession of a new corporation to the functions of an existing corporation. Perhaps less frequently, dissolution is not consequential on the establishment of a new body but is intended for other reasons. The body may have served its purpose or possibly its continued existence may be incompatible with current government policy. Whether or not a new body is to take over, the tidying up process is much the same. As a minimum, the drafter needs to deal with these topics:

- the dissolution itself
- the assets and liabilities existing at the time of dissolution
- staff
- pending legal proceedings
- final accounts and reports.

Consideration also needs to be given to the necessity for consequential amendments to other legislation. For example, there may be references to the body being dissolved in official information legislation, ombudsmen legislation, superannuation legislation or prevention of corruption legislation. Another possible requirement is a prohibition against the further use of the title of the body to be dissolved.[5]

5 See New Zealand Export-Import Corporation Dissolution Act 1992 [NZ] s6.

In most cases, provision will be made to hand over responsibilities to a Minister on behalf of the Crown (or Republic). In a simple case without complications, the following might be sufficient:

(1) On the commencement of this Act
  (a) the Health and Safety Council is dissolved; and
  (b) all assets, rights, liabilities, and obligations of the Council vest in the Minister; and
  (c) any proceeding commenced by or against the Council may be continued by or against the Minister.

(2) Notwithstanding its dissolution under subsection (1), the Council is to continue in existence to prepare and submit to the Minister as soon as practicable a report of its activities and an audited statement of accounts in respect of the period from the end of the immediately preceding financial year in respect of which a report has been furnished to the day this Act commences.

(3) The Minister must cause a copy of the report and statement referred to in this section to be laid before Parliament as soon as practicable.

An example of a dissolution provision contained in the statute incorporating the body corporate is seen in the following section from the Expo '88 Act 1984 [Q]. Such a provision removes the necessity to go back to Parliament in the case of a body intended to have a limited existence.

(1) The Governor in Council may by Order in Council give directions to the Authority with respect to its doing such acts and things as, in his opinion, will assist in the winding up of the Authority's affairs following the presentation of Expo '88.

(2) The Authority shall promptly comply with every direction issued to it under subsection (1).

(3) When in the opinion of the Governor in Council the Authority has properly discharged the functions required of it to achieve the objects and purposes of this Act and all directions issued to it under subsection (1) and its affairs have been adequately wound up, the Governor in Council may, by Proclamation, specify a date for the expiry of this Act.

(4) Upon the date specified under subsection (3)
  (a) the Authority shall cease to exist as a body corporate; and
  (b) any money then held by or on account of the Authority shall vest absolutely in the Crown and shall be dealt with as directed by the Minister; and
  (c) the terms of office of members of the Authority then current shall expire; and
  (d) this Act and all bylaws and regulations made thereunder (if they have not already terminated) shall terminate.

(5) The termination of this Act shall not affect
  (a) the previous operation thereof or anything duly done or suffered thereunder;

(b) any right, privilege, obligation or liability acquired, accrued or incurred thereunder;

(c) any legal proceeding, arbitration or remedy in respect of such right, privilege, obligation or liability and any such legal proceeding, arbitration or remedy may be instituted, enforced or continued against the Crown in right of Queensland in place of the Authority.

A flexible provision enabling the dissolution of a body once it has achieved its purposes follows:

(1) If at any time it appears to the Secretary of State that the purposes for which the Commission exists under this Act have been substantially achieved he may, by order, on such day as he may appoint—

(a) terminate the exercise by the Commission of its functions except for the purpose of winding up its affairs;

(b) vest in himself, any other Minister of the Crown or any accountable public authority any property, rights, liabilities or obligations of the Commission;

(c) extinguish any liability of the Commission in respect of money lent or advanced at any time by the Secretary of State to any development corporation or to the Commission;

(d) dissolve the Commission.

(2) Different days may be appointed for different purposes of this paragraph.

(3) Any order under this paragraph may include such incidental, supplemental, consequential or transitional provisions as the Secretary of State thinks fit, including amendments of and repeals in this Act so far as it relates to the Commission.

(4) Any sums arising out of the vesting of property or out of property vested in a Minister of the Crown by an order under this paragraph shall be paid into the Consolidated Fund and any sums required to meet any liabilities assumed or incurred by a Minister of the Crown or to defray any expenditure of his in connection with the management of property so vested in him shall be paid out of money provided by Parliament.

New Towns Act 1981 [UK] Sched 9, para 7 (added in 1985).

See also s11 British Technology Group Act 1991 [UK]. A general dissolution form relevant to dissolution following handover to a successor company is the Crown Agents Act 1995 [UK].

Chapter 13

Substantive and administrative provisions: Part 2

LICENSING AND REGISTRATION[1]

The privileges and duties attaching to licences and registration vary widely because of the tremendous range of activities and objects which may be controlled by means of a statutory licensing or registration system. The characteristics of a scrap metal dealer's licence will obviously have little in common with those attached to a licence for a nuclear installation. However, despite the apparent differences, laws of this nature are likely to have much in common with one another, particularly with respect to administrative and procedural matters.

The following check list is intended for use at the design stage of drafting. Its purpose is to remind the drafter of topics which may or may not require to be dealt with in particular cases. The check list contains much detail which will not be justified in many circumstances. In every case, the drafter should consider whether power should be conferred enabling the prescription of procedural provisions in subordinate legislation.

The opening section and the check list refer only to licensing and registration but the list and forms are of equal application to forms of statutory regulation involving the issue of permissions or authorities under other names.

Check list for licensing or registration systems

Who may issue licence or grant registration?

1 Appointment of licensing or registration authority (establishment if necessary)
2 Qualifications or criteria for appointment of authority
3 Term of office of authority
4 Conditions of appointment of authority, including salary and expenses
5 Power for authority to delegate limited authority
6 Transitional provisions to deal fairly with circumstances that exist on commencement

1 See Glanville Williams, 'Control by Licensing', Current Legal Problems 1967, p81.

What is the activity to be licensed or registered?

7 Description of activity or operation to be licensed or registered
8 Sanctions Unlawfully engaging in activity or operation
9 Fraudulently purporting to be licensed or registered
10 Exempted activities and power to exempt

Who may apply for licence or registration and how?

11 Criteria for applications (qualifications and disqualification)
12 Persons with qualifications obtained outside jurisdiction
13 Manner of application (specified form, information to be supplied, fee to be paid)
14 Advertisement of application
15 Security to be given or offered by applicant
16 Further information to be provided by applicant if required
17 Offence to make fraudulent application or provide false information

How are applications to be dealt with?

18 Provisional or temporary registration or licensing
19 Right of third parties to make submissions or object (manner, time limits, service on applicant)
20 Pre-hearing meeting
21 Public hearing or administrative process
22 Application or non-application of rules of evidence to hearing
23 Right of applicant to be heard or make submissions if refusal in contemplation
24 Licensing or registration authority to have discretion in exercise of functions
25 Applications to be dealt with and decisions to be in writing
26 Issue and form of licence or other authority
27 Conditions, limitations or terms may be attached to licence
28 Applicant to be notified of decision
29 Reasons to be provided in writing by authority for refusal of application or attachment of adverse restrictions
30 Restriction on right to further apply following refusal of application
31 Subordinate legislation in respect of procedural matters

What are the privileges, duties and other attributes of licensing or registration?

32 Duration of licence or registration
33 Transferability of licence
34 Renewal (including procedure for renewal applications)
35 Restriction on name under which licence holder may operate
36 Power of authority to review registration or licence
37 Power of authority to amend or vary licence, variation or attachment of conditions
38 Procedure requiring licence holder to show cause why licence should not be varied, suspended or cancelled
39 Surrender of licence
40 Power of authority to suspend or cancel licence

41 Licence to be returned on suspension or cancellation or for endorsement of amendments
42 Procedure for immediate and provisional suspension or cancellation
43 Written reasons to be given for suspension or cancellation
44 Liability of licence holder for actions of manager and staff
45 Issue of temporary licences on death, bankruptcy or incapacity of licensee
46 Books to be kept, returns to be made, information to be supplied by licensee
47 Licence to be exhibited or produced on demand
48 Duty to notify change of place of business or other address of licensee
49 Duty to notify change of directors of corporate licensee
50 Lost licence may be replaced

What rights of appeal or review should be conferred on aggrieved persons and what disciplinary provisions should be included?

51 Right to appeal against refusal of licence, attachment of adverse conditions, variation of licence, suspension or cancellation of licence
52 Manner of exercising right of appeal
53 Procedure for processing and hearing of appeal or disciplinary proceeding
54 Provisions pending appeal (possibly interim power to engage in activity)
55 Powers of appeal authority

What requirements should be specified about the register?

56 Duty to prepare a register of licences or persons registered
57 Duty to maintain and correct register
58 Certificate of registrar as to register to be evidence
59 Offences as to register (fraudulent entries)
60 Publication and inspection of register
61 Removal of name from register on request
62 Restoration of name to register

What enforcement provisions should be included?

63 Appointment of inspectors
64 Powers of inspectors (right of entry, right to require answers to questions, provision of documents and information etc, power to inspect, take samples, seize goods)
65 Issue of identity cards to inspectors and duty to show identification on request
66 Offence to obstruct inspector
67 Offence to impersonate inspector
68 Protection of inspectors from personal liability
69 Provisions for service of notices and orders

The following supplementary list applies where a disciplinary process is to be included. This is likely to be appropriate where members of a trade or profession are licensed or registered by statute.

70 Appointment (establishment if necessary) of disciplinary authority
71 Procedure for third parties to complain about licensee
72 Information to be given to person complained against

73 Preliminary investigation of complaint (appointment of committee or investigator)
74 Power of interim suspension following preliminary investigation
75 Criteria applicable to discipline of registered persons
76 Processing or hearing of complaint
77 Attendance of witnesses
78 Right of audience and right of representation
79 Evidence (rules to apply or not apply)
80 Power to adjourn or postpone hearing
81 Disciplinary powers of authority (censure, suspension, fine, removal of name from register, cancellation of registration, disqualification for specified period, fixing of date after which further application for registration may be made)
82 Orders to be issued in writing
83 Publication of orders of authority
84 Enforcement of fines
85 Costs and expenses
86 Immunity of witnesses and counsel
87 Appeals.

Forms relating to licensing and registration

See the Food and Environment Protection Act 1985 [UK] ss5, 6; Chiropractors Act 1994 [UK]; Optometrists and Dispensing Opticians Act 1976 [NZ] Part IV; Farriers (Registration) Act 1975 [UK] ss15A, 16; National Lottery etc Act 1993 [UK] ss5–10.

[8, 9]

64(1) In any area in which this and the following sections of this Part are in force
(a) no person shall hawk food unless he is registered under those sections by the local authority for the area; and
(b) no premises shall be used as storage accommodation for any food intended for hawking unless the premises are so registered.
This subsection applies to a person who hawks food as an assistant to a person registered under those sections unless
(i) he is normally supervised when so doing; or
(ii) he assists only as a temporary replacement.

(2) For the purposes of those sections a person hawks food if for private gain
(a) he goes from place to place selling food or offering or exposing food for sale, or
(b) he sells food in the open air or offers or exposes food for sale in the open air,
unless he does so as part of, or as an activity ancillary to, a trade or business carried on by him or some other person on identifiable property.

65(1) A person who without reasonable excuse contravenes section 64 is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(2) It is a defence for a person charged with such an offence to prove that he

(a) took all reasonable precautions, and
(b) exercised all due diligence,
to avoid committing the offence.

Food Act 1984 [UK] ss64, 65.

As to the reference to 'the standard scale' in the above form see page 372.

A person who carries on business as a travel agent without being the holder of a licence under this Act commits an offence and is liable to a fine of $5000 or imprisonment for 12 months, or both.

Except as otherwise provided by section 12, a person who is not registered as a podiatrist under this Act and in any manner holds himself or herself out as or pretends to be or makes use of any words or description implying that he or she is a podiatrist or is entitled, either alone or with others, to practise or teach podiatry commits an offence and is liable to a fine of $2000.

[10]

(1) The Minister may, by notice published in the *Gazette*, specify operations
(a) that are not to need a licence; or
(b) that are not to need a licence so long as certain circumstances apply or any condition specified in the notice is complied with.

(2) A notice may specify a condition that would require a person to obtain the Board's approval to do something for which the person would require a licence except for the notice.

(3) An approval under subsection (2) may be given unconditionally or subject to conditions.

[11]

(1) A person who satisfies the Board that he or she
(a) is of good character and reputation; and
(b) is resident in the State; and
(c) holds an approved educational qualification,
is, subject to this Act and upon payment of the prescribed fee, entitled to be registered under this Act and the Board must cause the name of that person to be entered in the Register accordingly.

(2) For the purposes of subsection (1), a person who holds 'an approved educational qualification' means a person who has gained by examination a qualification approved by the Board granted by a tertiary educational institution recognised by the Board.

[13, 16]

(1) An application for registration under this Act must be made in writing and in a manner and form determined by the Board.

(2) An applicant must provide the Board with any further information that the Board requires in the particular case.

(3) The Board may require an applicant to attend personally before the Board and, if the applicant fails to attend, the Board may refuse the application.

[18]

(1) On receiving an application for a dairy licence, the licensing authority must immediately issue a provisional licence for the premises concerned, but a provisional licence cannot be issued for any premises
   (a) during the currency of another provisional licence or of a dairy licence issued for the same premises;
   (b) during any period when any licence issued under this Act for the same premises is suspended;
   (c) except with the written consent of the Minister, within 3 months after the licensing authority has refused to issue a dairy licence or revoked a provisional licence for the same premises;
   (d) except with the written consent of the Minister, within 3 months after the revocation of a dairy licence for the premises.

(2) Within 12 months after the issue of a provisional licence, the licensing authority must
   (a) cause the premises concerned to be inspected and reported on by an inspector appointed under section 22; and
   (b) consider the report and any representations made concerning the report by the owner or occupier of the premises, and either issue or refuse to issue a dairy licence in respect of the premises.

(3) A provisional licence expires when the licensing authority makes a decision under subsection (2).

As to provisional registration, see Chiropractors Act 1994 [UK] s5.

[23]

(1) Where the Authority is considering the refusal of an application for a licence or the grant of a licence subject to the attachment of a term, limitation or condition that is adverse to the applicant or is inconsistent with the terms of the application, the Authority must inform the applicant accordingly and must also inform the applicant that the applicant has a right to be heard by or to make written representations to the Authority before the Authority makes a decision on the application.

(2) Oral or written representations under this section must be made by the applicant within 30 days after being informed under subsection (1).

(3) The Authority must have regard to any representations made by the applicant before making its decision.

A Commissioner shall not make a decision under this Act that would be adverse to a person without giving to the person an opportunity of being heard and of presenting evidence.

Insurance (Agents and Brokers) Act 1984 [Aust] s41.

See also Real Estate Agents Act 1976 [NZ] ss21–24; Insurance Brokers (Registration) Act 1977 [UK] s3; Riding Establishments Acts 1964 and 1970 [UK]; Hairdressers (Registration) Act 1964 [UK] ss3, 4, 5.

[27]

(1) The regulations may provide for terms, conditions and limitations attached to licences.

(2) The Authority may attach terms, conditions and limitations to licences additional to those provided for in the regulations, but not in a manner inconsistent with the Act or the regulations.

(3) Any terms, conditions and limitations attached to a licence by the Authority under subsection (2) must be set out in the licence.

[30]

(1) Where an application for the registration of a home is refused, no further application may be made within the period of six months beginning with the date when the applicant is notified of the refusal.

(2) Paragraph (1) shall have effect, where an appeal against the refusal of an application is determined or abandoned, as if the reference to the date when the applicant is notified of the refusal were a reference to the date on which the appeal is determined or abandoned.

(3) Where the registration of a home is cancelled, no application for the registration of the home shall be made within the period of six months beginning with the date of cancellation.

(4) Paragraph (3) shall have effect, where an appeal against the cancellation of the registration of a home is determined or abandoned, as if the reference to the date of cancellation were a reference to the date on which the appeal is determined or abandoned.

Children Act 1989 [UK] Sched 6, para 9.

[32]

(1) The duration of a licence must be stated in the licence.

(2) A licence may be for a fixed period not exceeding 5 years or for an indefinite duration.

(3) A licence expires if the holder of the licence ceases to be a person eligible under this Act to apply for the licence.

[34]

(1) A licence issued for a fixed period may be renewed from time to time in accordance with this section.

(2) An application for a renewal must be made in writing to the Board and must be accompanied by the prescribed fee.

(3) If the Board is satisfied that the applicant continues to meet the requirements for the issue of a licence, the Board must renew the licence.

(4) If an application for the renewal of a licence has been made before the expiry of the licence but has not been dealt with by the Board when the licence is due to expire, the licence continues in force until the application for renewal is dealt with and any renewal in such a case shall be taken to have commenced from the day when the licence would have expired but for the renewal.

[37]
After informing the holder of a licence of the course of action the Authority has under consideration and giving that person a reasonable opportunity to be heard or to make written representations, the Authority may at any time

(a) vary the duration of the licence;
(b) vary, add to or remove terms, conditions or limitations of the licence;
(c) attach conditions to the licence.

[38, 40]

(1) The Authority may cancel the registration of a person in respect of a nursing home
  (a) on any ground that would entitle the Authority to refuse an application for registration of that person in respect of that nursing home; or
  (b) on the ground that the prescribed registration fee is due and unpaid; or
  (c) on the ground
    (i) that the person has been convicted of an offence under this Act or the regulations made under this Act or an offence in respect of dishonest conduct; or
    (ii) that any other person has been convicted of an offence under this Act or the regulations made under this Act in respect of that nursing home, or
    (iii) that any condition attached to the person's registration in respect of that nursing home has not been complied with.

(2) If the Authority proposes to cancel a person's registration in respect of a nursing home, the Authority must give to the person notice in writing of the proposal and the Authority's reasons for the proposal and must invite the person to show cause why the Authority should not proceed as proposed.

(3) A notice to show cause must state that within 21 days of service, the person on whom it is served may make representations in writing or otherwise show cause to the Authority concerning the matter and the Authority must not determine the matter without considering any submissions or representations received within that period of 21 days.

(4) If the Authority cancels the registration of a person under this section, the Authority must give to the person notice in writing of the cancellation and a note giving information concerning the right of appeal conferred by section 74.

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(1) If the Authority considers the licence should be amended, the Authority must give the holder of the licence a written notice (called a show cause notice) that
  (a) sets out the proposed amendment; and
  (b) states the reasons for the proposed amendment; and
  (c) invites the holder to show within 21 days why the licence should not be amended.

(2) The Authority may amend the licence if, after considering and having regard to all representations made within 21 days, the Authority considers the licence should be amended
  (a) in the manner set out in the show cause notice; or
  (b) in some other manner.

(3) If the Authority decides to amend the licence, the Authority must give the holder of the licence a written notice stating
(a) how the licence has been amended; and
(b) that the holder of the licence may appeal to a District Court within 28 days.

(4) Despite subsections (1) to (3), the Authority may amend a licence by written notice to the holder of the licence without proceeding under those subsections if the licence is amended only
(a) for a formal or clerical reason; or
(b) in a manner that does not adversely affect the interests of the holder; or
(c) at the holder's request.

See also Children Act 1989 [UK] Sched 6; National Lottery etc Act 1993 [UK] Sched 3.

On revocation of licences generally see *Congreve v Home Office* [1976] QB 629, [1976] 1 All ER 697.

[41]

(1) The Authority may, by written notice, require the holder of a licence to return the licence to the Authority within 14 days to enable the Authority to alter the licence to show an amendment to it.

(2) The holder of a licence must comply with a notice under this section unless he or she has a reasonable excuse.
Penalty: $500.

(3) The amendment of a licence under section xx does not depend on the alteration of the licence under this section.

[45]

On the death of the holder of a licence, the personal representatives of the deceased are deemed to be the holders of the licence during the period of three months after the death or such longer period as the local authority may approve.

Zoo Licensing Act 1981 [UK] s7(2).

See also Real Estate Agents Act 1976 [NZ] ss32, 33.

[49]

(1) Where the holder of a licence under this Act is a body corporate, then if at any time a change occurs
(a) in the persons who are directors of that body corporate, or
(b) in the persons in accordance with whose directions or instructions the directors of that body corporate are accustomed to act,
the body corporate shall as soon as reasonably practicable after that time serve on the clerk to the licensing authority, the appropriate officer of police and the Board, a notice giving particulars of the change.

(2) A body corporate which fails to comply with the preceding sub-paragraph shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Gaming Act 1968 [UK] Sched 2, para 64.

[51–55]

(1) Before refusing an application for registration under section 3 of this Act or an application for enrolment under section 4 of this Act, the Council shall give the person by whom or the body corporate by which the application was made an opportunity of appearing before and being heard by a committee of the Council.

(2) Where the Council refuse any such application, the Council shall, if so required by the person by whom or the body corporate by which the application was made within seven days from notification of the decision, serve on that person or body a statement of the reasons therefor.

(3) A person or body corporate whose application is so refused may within twenty-eight days from
(a) notification of the decision, or
(b) if a statement of reasons has been required under subsection (2) above, service of the statement,
appeal against the refusal to the Court.

(4) The Council may appear as respondent on any such appeal and for the purpose of enabling directions to be given as to the costs of any such appeal the Council shall be deemed to be a party thereto, whether they appear on the hearing of the appeal or not.

(5) On the hearing of any such appeal the Court may make such order as it thinks fit and its order shall be final.

Insurance Brokers (Registration) Act 1977 [UK] s5.

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(1) The owner or occupier of premises may appeal to the Minister against
(a) the refusal of the licensing authority to grant a dairy licence for those premises; or
(b) the revocation of a dairy licence or a provisional licence, or the suspension of a dairy licence, issued in respect of those premises.

(2) Every appeal must be made in writing within 30 days after the communication to the person by whom the application for a dairy licence was made, or to whom a dairy licence was granted of such refusal, revocation or suspension.

(3) Upon receiving an appeal, the Minister must appoint one or more delegates to hear any representations made by the appellant and the licensing authority and, if such delegate or delegates think fit, to inspect the premises, and to report to the Minister, who must then determine the appeal.

(4) In determining an appeal, the Minister may
(a) dismiss the appeal;
(b) require the licensing authority to issue a dairy licence;
(c) quash any revocation or suspension of a licence or substitute suspension for revocation or substitute suspension for a different period;
(d) permit an owner or occupier to make a fresh application for a licence notwithstanding that the period prescribed by this Ordinance has not expired,
and the licensing authority must give effect to the Minister's determination.

(5) The decision of the Minister under this section is final.

Cf *Dairy Industry Ordinance* [Tanz] s17.

See also Slaughterhouses Act 1974 [UK] ss6, 7. Appeal provisions in many cases confer a right of appeal on 'any person aggrieved'. This imprecise phrase may lead to argument (eg *R v Ipswich Justices, ex p Robson* [1971] 2 QB 340) and it is better practice to specify who may appeal and in what circumstances.

[56, 60]

(1) The Board must cause to be compiled and maintained a register showing in respect of each licence such particulars as are prescribed.

(2) The register is to be kept in the office of the Registrar and must at all reasonable times be available for inspection by any person upon payment of the prescribed fee (if any).

(3) The register may be compiled and maintained

(a) in a bound or loose leaf book; or

(b) by recording or otherwise storing the prescribed particulars in the register by mechanical, electronic or other means, but so that the particulars will remain accurately stored and will be capable of being reproduced in written form in the English language.

[68]

No inspector is personally liable for any act done or omitted by the inspector in good faith and in the intended pursuance of the objects of this Act.

Disciplinary provisions

[71]

(1) An inspector or other interested person may lodge a written complaint with the Authority if the inspector or person has reason to believe that a registered electrician

(a) has acted in an incompetent, negligent, or improper manner in performing any duty under this Act or in carrying out electrical work; or

(b) has been convicted of an offence under this Act or an offence that renders the electrician unfit to act as an electrician; or

(c) is incompetent or unfit to perform his or her trade; or

(d) obtained registration by fraud or misrepresentation.

(2) A complaint must specify the reasons for the belief on which the complaint is based.

(3) On receiving a complaint the Authority must meet promptly and decide whether to hold an inquiry.

[72, 76–79, 85]

(1) After considering a complaint under section xx, the Authority may hold an inquiry into that complaint if it considers an inquiry is desirable and justified.

(2) The Authority must

(a) give the registered electrician (the respondent) at least 21 days written notice of the time and place of the inquiry; and
(b) give the respondent at least 10 days before the inquiry a written summary of what is alleged against the respondent; and
(c) give the respondent a reasonable opportunity to be heard or make written representations.

(3) The respondent
(a) may attend the inquiry; and
(b) may be represented by a barrister or solicitor; and
(c) may examine and cross-examine witnesses and otherwise offer evidence.

(4) The Authority may conduct an inquiry in whatever manner that it considers appropriate and equitable and is not bound by the rules of evidence.

(5) A person who attends an inquiry to give evidence or produce a document or other exhibit is entitled to the expenses allowable correspondingly in criminal trials in the Supreme Court.

(6) The Authority may make an order of costs in favour of the respondent or the complainant and such an order may be registered in a court of competent jurisdiction as a judgment debt.

[77]

(1) The Authority may, by written notice signed by the chairperson or the registrar, require a person to attend and give evidence at an inquiry and to produce all documents or other things that are in that person's custody or within that person's control and relate to the matter of the inquiry.

(2) The Authority may require evidence to be given on oath, and either orally or in writing, and for that purpose the person presiding at any meeting of the Authority may administer an oath to a person.

(3) A person who, without lawful justification, refuses or fails to give evidence when required to do so by the Authority, or to answer truly and fully any question put to the person by the Authority, or to produce any document or other thing required of that person, commits an offence and is liable to a fine not exceeding $2000.

[85, 86]

(1) Witnesses and counsel have the same privileges and immunities in relation to matters before a disciplinary tribunal as they would have if the matters were proceedings in the Supreme Court.

(2) A witness giving evidence or intending to give evidence at any inquiry before a disciplinary tribunal is entitled to such sum for expenses and loss of time as the tribunal may determine.

GOVERNMENT FINANCE

Introduction

The British 'exchequer' or 'consolidated fund' system of government finance has, subject to procedural changes, been widely adopted in Commonwealth countries.

A large proportion of legislation has some financial implications and drafters must have a working knowledge of how the system operates. This section is intended to give a general, though of necessity abbreviated, picture of the workings and the essential characteristics of the system.[2]

At the heart of the system stands the consolidated fund which, in the case of the United Kingdom, was set up in 1787 following the recommendation of a Commission that there be 'one fund into which shall flow every stream of public revenue and from which shall issue the supply for every service'.[3]

The general rule is that all public revenue, including the proceeds of loans raised and taxes imposed, must be paid into an account known as the exchequer account. The consolidated fund consists of the total amount standing at one time to the credit of the exchequer account and the terms 'exchequer', 'exchequer account' and 'consolidated fund' are commonly used synonyms.

There are four exceptions to the general rule that all public revenue is to be paid into the exchequer.

First, receivers of revenue may deduct from revenues they have collected such sums as may be required for drawbacks, repayments and discounts before paying the balance of the revenues into the exchequer.

Secondly, the Treasury may authorise receivers of revenue who are accounting officers to defray expenditure for which they are accountable in the first instance from revenue they have collected.

Thirdly, the Treasury may direct that revenue received by way of fee, penalty or proceeds of sale, or by way of extra or unusual receipt shall be applied as an appropriation-in-aid of money provided by the legislature for the expenditure of the department concerned.

Appropriations-in-aid are not subject to debate in the committee responsible for considering the supply estimates because they are not moneys which the government is demanding from the legislature; the moneys are expected from other sources. However, they are within the control of the legislature in that they are contained within the Appropriation Act. Moneys received as appropriations-in-aid may be spent directly and do not go through the consolidated fund.

The final exception relates to funds established by the Treasury upon the appropriation of moneys by the legislature for that purpose. The receipts, earnings and accruals of such funds are not payable into the exchequer.

So much for payments into the exchequer. No payment out of that account (ie the consolidated fund) may be made except by the authority of a statute. It is one of the duties of the Comptroller and Auditor-General, where he is satisfied that the necessary statutory authority exists to authorise the grant of credits from the consolidated fund to the Treasury. An officer known as the Paymaster-General then takes charge of such funds. He is the principal paying agent of government and acts as a banker for all government departments, making expenditure on their behalf up to the limit authorised in their votes.

2 Further reading is recommended, and a knowledge of all existing local exchequer and audit, loan and guarantee legislation together with the standing orders of the legislature is essential. As a result of the National Loans Act 1968, the consolidated fund in the United Kingdom no longer occupies its former central and predominant position. This Act established the National Loans Fund from which most loans and repayments are made.

3 For a short but valuable article, see Sir Frank Tribe, 'Parliamentary Control of Public Expenditure', XXXII Public Administration 363. English practice may be studied in Chapters 27 to 31 of Erskine May's *Parliamentary Practice* (20th edn), and in shorter form in 34 Halsbury's Laws of England (4th edn) 578 et seq. For further reading see Sir Herbert Brittain, *The British Budgetary System*; Basil Chubb, *The Control of Public Expenditure*; V. M. Levy, *Public Financial Administration* (2nd edn) (for an account of Australian practice).

Public expenditure is of two distinct kinds—supply expenditure and statutory expenditure. The distinction is one of great importance to the drafter.

Supply expenditure

Supply expenditure is the term used to describe expenditure which is authorised annually and provided for by appropriation legislation in response to demands presented to the legislature by the government in the form of estimates for the service of the financial year. Parliamentary supply procedure involves the following four stages:

1. the government makes its needs known to the legislature by the presentation of annual estimates;
2. the legislature, after consideration in committee, grants the sums demanded, or reduced sums, for the purposes specified in the estimates;
3. the legislature sanctions the issue from the consolidated fund of the necessary sums to meet the approved expenditure;
4. statutory authority is given to the grants which are legally appropriated to the purposes for which they were made.

The authority for supply expenditure endures only until the end of the financial year and then lapses, with the result that unspent balances withdrawn from the consolidated fund must be repaid.

Statutory expenditure

Statutory expenditure is authorised once and for all by charging it upon the consolidated fund. When this is done by statute, no further appropriation or authority is necessary, and, in contrast to the temporary nature of authority for supply expenditure, the authority for statutory expenditure is unrestricted in duration. It endures for ever, subject to the competence of the legislature to revoke it and to the terms of the statute.

Statutory expenditure is exceptional and is only authorised in a limited range of circumstances where the legislature is satisfied that the obligation for which it is required is of such an exceptional and determinate nature that the immediate and recurring scrutiny of the legislature is not necessary. Examples of statutory expenditure are payments in respect of the national debt, salaries of judicial officers, the Comptroller and Auditor-General and other constitutional officers whose offices are such that they should not be at the annual whim of the legislature, certain civil pensions and contingent liabilities under guarantees given by government in respect of the activities of statutory corporations or other activities.

Legislative provision for expenditure

If legislation being drafted is not itself intended to constitute the authority for payment from the consolidated fund and it is anticipated that funds will or may be provided by annual appropriation, it is usual to refer in the statute to 'such sums as may be provided by Parliament for the purpose' or to provide for expenditure 'out of money provided by Parliament'.[4]

4 See also the form at the top of p258.

United Kingdom statutes frequently make provisions of the following kind:

> (5) Any expenses of the Secretary of State incurred under subsection (4) above shall be defrayed out of money provided by Parliament.
>
> *Mineral Workings Act 1985* [UK] s6(5).

> (4) Any sums required by the Secretary of State for making payments under subsection (1), or for meeting any expenses of any person appointed under subsection (3), shall be paid out of money provided by Parliament; and any sums received by the Secretary of State by virtue of this section shall be paid into the Consolidated Fund.
>
> *Films Act 1985* [UK] s5(4).

The following is a Canadian form:

> All expenditures for the purposes of this Act shall, unless otherwise specifically provided for, be paid out of money appropriated by Parliament therefor.
>
> *Public Service Staff Relations Act* [Can] s114.

New Zealand practice is illustrated by the following example:

> All fees, salaries, allowances, and other expenditure payable or incurred under or in the administration of this Act shall be payable out of public money to be appropriated by Parliament for the purpose.
>
> *Health Research Council Act 1990* [NZ] First Sched, cl 9.

Statutory expenditure is authorised by the formula—

> shall be charged on and paid out of the Consolidated Fund.

The phrases 'without further appropriation' or 'without further appropriation than this section' are sometimes added but this is unnecessary.

Statutory expenditure in Australia is authorised as follows—

> Grants are payable out of the Consolidated Revenue Fund, which is appropriated accordingly.
>
> *Home Deposit Assistance Act 1982* [Aust] s57.

Parliamentary control

The principal characteristic of the exchequer system is the complete supremacy of the legislature; it exercises an effective control over what goes into and what issues from the consolidated fund. In part, this control is exercised directly by the legislature itself and its committees and in part control is exercised through the Treasury, accounting officers and the Comptroller and Auditor-General who are responsible to the legislature. It is intended to discuss very briefly the role of Parliament in relation to the control of public finance and the role of the instruments it employs for the purpose. We shall look in turn at Parliament, the Treasury, accounting officers, the Comptroller and Auditor-General, and the Public Accounts Committee.

PARLIAMENT

Parliament

(a) approves public expenditure in advance by scrutinising the supply estimates submitted by the government and sanctioning the necessary issues from the consolidated fund to meet the approved expenditure;
(b) appropriates the sums it grants by way of supply to the purposes for which supply is demanded, thus preventing diversion to other purposes;
(c) considers ways and means of providing sufficient funds to meet the approved expenditure and enacts such legislation imposing taxes and authorising borrowing as may be necessary;
(d) with the assistance of the Treasury, the Public Accounts Committee and the Comptroller and Auditor-General scrutinises at the end of the financial year the actual expenditure which it approved in estimate form.

TREASURY

The Treasury

(a) supervises and controls public finances, manages the consolidated fund and issues directions as to the management of public finances;
(b) approves the supply estimates before they are presented to the legislature;
(c) exercises miscellaneous functions with either statutory or customary approval of the legislature including the writing-off of losses, opening new subheads in the estimates and approving virement between sub-heads of a vote.

Treasury control is exercised on two levels.

At the higher policy level, the Treasury is deeply concerned with the formation of government policy because of the Finance Minister's responsibility for the presentation of the budget and the obligation to find the funds to meet the expenditure approved by the legislature. The Minister's obligation to provide the actual money ensures a powerful voice in determining the limits of expenditure and striking a fair balance between competing demands.

At the lower technical level, the Treasury is concerned to ensure that public moneys are expended only with prudence and in accordance with proper statutory authority.

ACCOUNTING OFFICERS

Accounting officers occupy a key position in relation to the parliamentary control of public expenditure in so far as they are directly and personally accountable to the legislature for the moneys spent under the votes they control. An accounting officer must ensure that the funds entrusted to him or her are spent only on the purposes for which they were voted and within the limits approved.

The Treasury appoints an accounting officer for each department and the general practice is for the head of the department to be appointed. He or she will not normally be an accountant or finance officer but the appointment recognises that finance cannot properly be separated from policy and administration.

The position is an onerous one of personal responsibility and this responsibility is established beyond doubt by the requirement that the accounting officer sign personally the annual appropriation account and appear personally before the Public Accounts Committee if called upon to do so. The appropriation account prepared at the end of each financial year follows closely the form of the estimates and relates actual expenditure to estimated and authorised expenditure and explains variations. After audit, appropriation accounts are submitted to Parliament and scrutinised by the Public Accounts Committee.

COMPTROLLER AND AUDITOR-GENERAL

As the title of the office implies, the Comptroller and Auditor-General has a dual role. As controller of the exchequer, he or she is responsible for ensuring that all public moneys are duly paid into the exchequer and also for granting credits to the Treasury on the exchequer account only in respect of supply and statutory expenditure which has been authorised by Parliament.

As Auditor-General, he or she is responsible for auditing and reporting on the public accounts (and certain other quasi-public accounts). The responsibility is to the legislature not to the government. The independence of the office stems from the legislature not the government and is generally established by making the holder of the office secure in the office with the salary charged on the consolidated fund.

There are four aspects to the audit.

1. The accounts audit is intended to ensure that the accounts are a true record of receipts and payments.
2. The finance audit deals with such matters as internal financial control, financial systems, storekeeping and accounting.
3. The appropriation audit is designed to check that expenditure has been made only for the purposes approved in the estimates and within the limits imposed.
4. The Auditor-General is also encouraged by the legislature to report on any apparently wasteful or uneconomical expenditure and on losses due to extravagance or lack of reasonable foresight.

PUBLIC ACCOUNTS COMMITTEE

It is the practice of the legislature to appoint a Public Accounts Committee under its standing orders for the purpose of examining the public accounts after they have been audited and reported on by the Comptroller and Auditor-General. A Public Accounts Committee probes particularly into matters on which the Comptroller and Auditor-General has commented adversely and into matters where there may have been unauthorised or wasteful expenditure.

An accounting officer called before the Public Accounts Committee is in the dock and required to defend his or her stewardship if it is called in question. If the accounts for which the accounting officer is responsible are irregular and unauthorised expenditure has been made, he or she may have to bear some personal liability. If the department's administration has been imprudent or wasteful, the report of the Committee is likely to be highly critical and the subject of much uncomfortable publicity.

It has been said that the prime duty of the Public Accounts Committee is to criticise. The Committee is without doubt a powerful instrument for the exposure of waste, inefficiency and maladministration. Its deterrent effect is probably even more powerful.

Appropriation legislation

It is not proposed to include forms or give references to appropriation legislation. Local practice must be studied and the general information above must be supplemented by a study of relevant local legislation and the standing orders of the legislature. Particular attention must be paid to ascertaining how expenditure is authorised for the early part of the financial year before the estimates in their entirety are approved.

If local forms are encrusted with antique verbal adornments gathered over many years, it is undoubtedly time for a review of local practice.

Loan and guarantee legislation

Statutory authority is necessary to authorise borrowing by the government or the giving of a guarantee. The authority may be either specific or general.

Statutory authority is generally necessary on two counts. It authorises the government to issue the security and, secondly, it makes the security of much greater value from the point of view of the holder by charging on the consolidated fund the payments necessary to meet the liabilities under the security or otherwise providing the authority for repayment. The creditor is no longer dependent on the voting and appropriation of funds as and when payment becomes due.

With respect to government borrowing generally see National Loans Act 1968 [UK] and the Public Finance Act 1989 [NZ].

An example of a provision authorising a specific borrowing follows. It includes the two points mentioned above. It authorises the borrowing—

> (1) The Treasurer may, from time to time during the current financial year, borrow moneys not exceeding in the whole 25 million dollars in the currency of the United States of America and may make and carry out an agreement or agreements for that purpose.

It appropriates repayments—

> (2) Any moneys payable under an agreement made in pursuance of this Act or under a promissory note or other security under such an agreement, including the expenses of borrowing, commitment fees, interest and other charges, are payable out of the Consolidated Revenue Fund, which is appropriated accordingly.

As to loans by the government to a statutory corporation from moneys borrowed for the purpose, see Loans (Qantas Airways Limited) Act 1972 [Aust] s7.

Government loans to a public enterprise may be provided for along the following lines:

> (1) As from the appointed day the Secretary of State may, with the consent of the Treasury, make loans to the successor company; but no loan shall be made by

him under this section at a time when that company has ceased to be wholly owned by the Crown.

(2) The Treasury may issue to the Secretary of State out of the National Loans Fund any sums necessary to enable him to make loans under this section.

(3) Any loan made by the Secretary of State under this section shall be repaid to him at such times and by such methods, and interest thereon shall be paid to him at such rates and at such times, as he may, with the consent of the Treasury from time to time direct.

(4) Any sums received by the Secretary of State under subsection (3) shall be paid into the National Loan Fund.

(5) The Secretary of State shall in respect of each financial year prepare, in such form and manner as the Treasury may direct, an account of
(a) sums issued to him under subsection (2);
(b) sums received by him under subsection (3); and
(c) the disposal by him of sums so issued or received,
and shall send the account to the Comptroller and Auditor General not later than the end of November in the following financial year; and the Comptroller and Auditor General shall examine, certify and report on the account and lay copies of it, together with his report, before each House of Parliament.

British Steel Act 1988 [UK] s8.

A government guarantee of the debt of a statutory corporation may be authorised in this way

(1) The Treasury may guarantee, in such manner and on such conditions as they think fit, the repayment of the principal of and the payment of interest on any sums which either Corporation borrows from a person other than the Secretary of State.

(2) Immediately after a guarantee is given under this section, the Treasury shall lay a statement of the guarantee before each House of Parliament; and where any sum is issued for fulfilling the guarantee so given the Treasury shall, as soon as possible after the end of each financial year (beginning with that in which the sum is issued and ending with that in which all liability in respect of the principal of the sum and in respect of interest thereon is finally discharged), lay before each House of Parliament a statement relating to that sum.

(3) Any sums required by the Treasury for fulfilling a guarantee under this section shall be charged on and issued out of the Consolidated Fund.

(4) If any sums are issued in fulfilment of a guarantee given under this section, the Corporation to whose loan the guarantee relates shall make to the Treasury, at such times and in such manner as the Treasury may from time to time direct, payments of such amounts as the Treasury so direct in or towards repayment of the sums so issued and payments of interest, at such rate as the Treasury so direct, on what is outstanding for the time being in respect of sums so issued.

(5) Any sums received by the Treasury in pursuance of subsection (4) above shall be paid into the Consolidated Fund.

Aircraft and Shipbuilding Industries Act 1977 [UK] s13.

See also Mass Transit Railways Corporation Ordinance [HK] s12; Qantas Airways Limited (Loan Guarantee) Act 1989 [Aust] ss4, 5.

TAXATION

Introduction

> The Finance Act is a taxing Statute and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words.[5]

The need for clear and unambiguous language in all taxing legislation has been emphasised by the courts again and again. The best known words are probably those of Rowlatt J:

> in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used.[6]

These hallowed dicta are no longer accepted as authority for the proposition that taxing statutes are to be interpreted literally without regard to the purpose of the legislature. Nevertheless, drafters must strive mightily to avoid giving life to the demon doubt and make every endeavour to see that the intention of the legislature is clear.

> What are 'clear words' is to be ascertained on normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded ...[7]

Little can be said here about the drafting of legislation in respect of the familiar major taxes such as income tax, stamp duty, inheritance tax, customs duty and excise duty. Chapter XVII of the Renton Report contains useful discussion on the drafting of fiscal legislation. One of the recommendations is of particular value: 'The scope of a charge or relief should be stated clearly in general terms at the beginning of the section or group of sections dealing with it.'[8]

Regular consolidation of taxing legislation is of great importance. The result of a failure to consolidate is that the law in force at any particular time is very difficult to find.

This section is particularly concerned with the drafting of legislation for the minor taxes which are constantly being invented. The owning of a hen, the growing

5 Lord Parker of Waddington in *A-G v Milne* [1914] AC 765 at 781. See David W. Williams, (1978) 41 Mod LR 404.

6 *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 at 71.

7 Lord Wilberforce in *W T Ramsay Ltd v IRC* [1981] 1 All ER 865 at 871. See also Vinelott J, 'The Interpretation of Fiscal Statutes' [1982] Stat LR 78.

8 See 'The Preparation of Legislation' (The Renton Report) (Cmnd 6053) para 17.11.

of strawberries, the delivery for sale of grain, the occupation of a hotel bed, the departure from an airport, the slaughter of an animal, a debit or credit transaction of a bank account and the admission to an entertainment are typical if diverse examples of activities or circumstances liable to be taxed.

This section applies also to legislation relating to the imposition of levies under which a statutory or other body is empowered to raise a levy for its purposes. The power of the Pork Industry Board in New Zealand to impose a levy on the slaughter of pigs to provide funds to enable the Board to perform its functions provides a typical example.[9] An example of legislation generally regulating the imposition of levies is found in the Commodity Levies Act 1990 [NZ].

Check list for legislation imposing or empowering a tax or levy

1 Description of subject of tax or levy (person, object, transaction, activity, process) and imposition of tax or levy.
2 Restrictions on imposition.
3 Matters to be specified in imposition order.
4 Expiration of levy orders.
5 Identification of person obliged to pay (owner, possessor, occupier, vendor, user, person performing an action).
6 Fixing point in time when liability is to attach.
7 Rate and variation of rate (including procedure for fixing rate).
8 Default rate if rate for period not fixed.
9 Disposal, allocation, use of tax by recipient (where it is not to be paid into consolidated fund).
10 Time for payment.
11 Extension of time for payment, payment by instalments.
12 Appointment of collection agent.
13 Issue of receipts.
14 Recovery.
15 Recovery by distress.
16 Evidence in recovery suits.
17 Recovery from third parties (eg creditors of payer).
18 Recovery of amount paid on behalf of another person.
19 Reimbursement of Crown for collection of levy.
20 Effect of non-payment of tax (eg liability to additional or penal amounts).
21 Relief in cases of hardship.
22 Exemptions from liability and provision for further exemptions.
23 Refunds, rebates.
24 Assessment and notice of assessment.
25 Default or estimated assessment.
26 Additional or amended assessment.
27 Withdrawal or cancellation of assessment.
28 Objections to assessment and procedure for resolution of disputes.
29 Review of assessment.
30 Appeal against assessment.
31 Settling appeals.
32 Taxing authority may state case for opinion of court.
33 Obligation to pay not affected by appeal.

9 See s30(1), Pork Industry Act 1982 [NZ] which is set out on p295. See also ss13, 14,

34 Institution of proceedings.
35 Appointment of officer responsible for administration of tax or levy.
36 Delegation of functions of person appointed under 35.
37 Appointment of inspectors or other enforcement officers.
38 Provision and production of inspector's certificates of appointment.
39 Registration system for liable persons.
40 Returns, prescription of forms.
41 Further returns, information and attendance to answer questions.
42 Presumption of authority to make returns.
43 Duty to keep, preserve and produce books of account and records.
44 Power of entry and search (provision for warrant, production of warrant, duties of person executing warrant).
45 Power to take samples.
46 Time for commencing prosecutions.
47 Penalties not to give relief from tax.
48 Compliance audits.
49 Purpose of compliance audits.
50 Powers of auditors.
51 Prohibition of obstruction.
52 Offences.
53 Secrecy and non-disclosure of information.
54 Service of documents and substituted service.
55 Priority of tax in bankruptcy.
56 Provision where taxpayer dies or leaves country.
57 Offences by bodies corporate or partnerships.
58 Protection of officers.
59 Regulations (forms relating to taxation).

Forms

[1]

Subject to this Part, a levy is imposed on whole milk produced in Australia and sold by the producer.

Dairying Industry Research and Promotion Levy Act 1972 [Aust] s6.

There is hereby imposed a levy (to be called the Pork Industry Levy) on each pig slaughtered on licensed premises (except on pigs slaughtered on licensed premises in the Chatham Islands), whether the pig is subject to the control of the Board or not.

Pork Industry Board Act 1982 [NZ] s30(1).

(1) A financial institution to which this section applies that receives money in the State during a month is liable to pay financial institutions tax in respect of each such receipt.

(2) This section applies to a financial institution that is registered under this Act as a financial institution or is required to be so registered under this Act.

See also Car Tax Act 1983 [UK].

[2]

See Commodity Levies Act 1990 [NZ] s5.

[5]

Levy on the slaughter of a pig is payable by the person who owns the pig at the time when the slaughter takes place.

Pig Slaughter Levy Collection Act 1971 [Aust] s7.

(1) Tax imposed by the Diesel Fuel Tax Act (No 1) 1957 is payable by the person who sells or otherwise disposes of the diesel fuel.

(2) Tax imposed by the Diesel Fuel Tax Act (No 2) 1957 is payable by the person who owns the diesel fuel immediately before it is used in propelling a road vehicle on a public road.

Diesel Fuel Taxation (Administration) Act 1957 [Aust] s10.

The producer of any whole milk is liable to pay the levy on that whole milk.

Dairying Industry Research and Promotion Levy Act 1972 [Aust] s8.

[7]

(3) On or before the 1st day of October in any year the Board may fix, by notice in the Gazette, the rates of levy which are to be paid in the next succeeding year.

(4) If in any year the rates of levy are not fixed pursuant to subsection (3) of this section by the 1st day of October, the rates for the next succeeding year shall be the same as those last fixed under this section.

(5) Except where the Minister has given his express consent in writing, the Board shall not fix any particular rate of levy which exceeds by more than 20% the rate last fixed for that levy.

Pork Industry Board Act 1982 [NZ] s30(3), (4), (5).

[9]

(1) The money received by the Board in respect of the levy imposed by this Act is to form part of the funds of the Board and is to be used by the Board for the promotion, development and improvement of the cherry industry.

(2) Without limiting the Board's general power, the Board may use any such money for

(a) entering into insurance contracts to protect cherry growers from hail damage; and

(b) promoting and conducting research in connection with the cherry growing industry.

[10]

Every person who is obliged to pay a levy under this Act must in each year pay to the Board within 3 months after the expiration of that person's financial year the levy payable by that person in respect of that financial year.

[11]

(1) The Commissioner may

(a) extend the time for payment of tax for such period or periods as the Commissioner considers appropriate in the circumstances; or

(b) permit payment of tax to be made by instalments within such time as the Commissioner considers appropriate in the circumstances.

(2) If the Commissioner extends the time for payment of tax for a period, the tax is due and payable at the expiration of that period.

(3) If the Commissioner permits payment of tax to be made by instalments, each instalment is due and payable on the date determined in accordance with the Commissioner's permission, but, if an instalment is not paid on or before the date so determined, all of the unpaid tax is due and payable on that date.

(4) An extension or permission may be made or given subject to such conditions as the Commissioner thinks appropriate and a condition may provide for the payment from time to time of interest on any unpaid balance of tax at a rate not exceeding 10%.

(5) In this section 'tax' includes additional tax and penal tax.

See Building Research Levy Act 1969 [NZ]; Energy Resources Levy Act 1976 [NZ], Part VI.

[14]

Every levy imposed under this Act constitutes a debt due to the Board at the time it becomes payable and is recoverable accordingly in a court of competent jurisdiction.

[15]

See Betting and Gaming Duties Act 1981 [UK] s28.

[16]

(1) The production of a notice of assessment, or of a document under the hand of the Commissioner or a Deputy Commissioner purporting to be a copy of a notice of assessment, is conclusive evidence of the due making of the assessment and (except in proceedings on a review of, or appeal against, the assessment) that the amount and all the particulars of the assessment are correct.

(2) The production of a document under the hand of the Commissioner or a Deputy Commissioner purporting to be a copy of a document issued or given by the Commissioner or a Deputy Commissioner is conclusive evidence that the document was so issued or given.

As to evidence by certificate, see page 365.

[17]

(1) The Commissioner may, by notice in writing require
   (a) any person by whom any money is due or accruing, or may become due, to a person liable to tax; or
   (b) any person who holds or may subsequently hold money for or on account of a person liable to tax; or
   (c) any person who holds or may subsequently hold money on account of some other person for payment to a person liable to tax; or
   (d) any person having authority from some other person to pay money to a person liable to pay tax,

   to pay to the Commissioner forthwith upon the money becoming due or being held, or within such further time as the Commissioner may allow and specify in the notice, the money or so much of it as is sufficient to pay the tax due by the person liable to tax.

(2) A copy of a notice must be served on the person liable to tax at that person's last known place of business or residence.

(3) The Commissioner may, by further notice in writing, amend or revoke a notice given under subsection (1).

(4) A person who fails to comply with a notice under subsection (1) commits an offence and is liable to a fine of $2000.

[18]

A person who, under this Act, pays any duty for or on behalf of any other person is entitled to recover the amount so paid from that other person as a debt, together with the costs of recovery, or to retain or deduct that amount from any money in his or her possession belonging or payable to that other person.

[21]

In any case where it is shown to the satisfaction of the Minister of Finance that any person who has become liable to pay a levy has suffered such loss or is in such circumstances that the exaction of the full amount of the levy would entail or has entailed serious hardship, the Minister of Finance may release the person wholly or in part from his liability to pay the levy and may take such steps as are necessary for that purpose; and the Minister of Finance may, if the levy or any part thereof has already been paid, refund the whole or any part of the amount paid.

Energy Resources Levy Act 1976 [NZ] s19.

[23]

If the Board is satisfied that an amount of levy has been wrongfully paid or has been overpaid, the Board must refund that amount.

[25]

(1) Where an amount is due on account of gaming licence duty, chargeable by reference to gross gaming yield but the Commissioners are unable to ascertain the amount of the duty properly due because

(a) returns, accounts, records or other documents have not been made, kept, preserved or produced as required by regulations made under this Schedule; or

(b) it appears to the Commissioners that any returns, accounts, records or other documents are incomplete or incorrect,

they may estimate the amount due.

(2) Without prejudice to the recovery of the full amount due or to the making of a further estimate, the amount estimated shall be recoverable as duty properly due unless in any action relating thereto the person liable proves the amount properly due and that amount is less than the amount estimated.

Betting and Gaming Duties Act 1981 [UK] Sched 2, para 5.

[28]

(1) A person who is dissatisfied with a decision made by the Commissioner under this Act by which that person's liability to pay levy is affected or is dissatisfied with an assessment made by the Commissioner under this Act may post to or lodge with the Commissioner a written objection stating fully and in detail the grounds on which the person relies.

(2) An objection must be posted to or lodged with the Commissioner within 60 days, or such longer period as the Commissioner may in writing allow, after service of notice of the decision or assessment.

(3) Notwithstanding subsection (1), the person objecting has no further right of objection in the case of an objection to an amended assessment than that person would have had if the amended assessment had not been made except to the extent to which, by reason of the amended assessment, a fresh liability in respect of any particular is imposed or an existing liability in respect of any particular is increased.

(4) The Commissioner must consider the objection, and may either disallow it or allow it, either wholly or in part.

(5) If the person's liability or assessment is reduced by the Commissioner after considering the objection, the Commissioner must refund to the person any amounts paid in excess.

(6) The Commissioner must serve on the objector written notice of the decision on the objection.

Every levy order shall provide for
(a) the appointment of mediators to resolve disputes as to
  (i) whether or not any person is required to pay the levy concerned,
  (ii) the amount of levy any person is required to pay, and
(b) the procedures to be followed by mediators; and
(c) remuneration of mediators; and
(d) the payment of costs in relation to mediation; and
(e) a right of appeal to a District Court Judge against decisions of mediators, and
(f) any other matters relating to the resolution of such disputes.

Commodity Levies Act 1990 [NZ] s11

[30]

(1) A person who has been assessed to levy may appeal to the Minister.

(2) Every appellant must give to the Commissioner a written notice of appeal stating briefly the grounds of appeal within 28 days after the assessment is served on the appellant or within such further time as the Minister may allow.

(3) The Minister must, personally or by the Minister's lawful delegate, after giving a reasonable opportunity to the appellant to be heard, determine the amount of levy (if any) payable, and on all questions of fact the decision of the Minister or delegate is final, except in the case of fraud.

(4) The Minister may delegate the power of hearing and determining any appeal to any specified person or to the holder for the time being of any specified office or appointment, but no delegation is to be made to a person employed in the Ministry of Agriculture.

(5) Every delegation is revocable at will by the Minister, but until revoked continues in force, notwithstanding that the Minister by whom it was made has ceased to

hold office, and continues to have effect as if made by the successor in office of the Minister.

(6) On the hearing of any such appeal, the appellant is limited to the grounds stated in the notice of appeal, and the burden of proving that the assessment is incorrect is on the appellant.

[33]

(1) The fact that an objection, appeal or case stated is pending with respect to any liability or assessment does not in the meantime interfere with or affect the liability or assessment that is the subject of that objection, appeal or case stated and the tax may be recovered as if no objection, appeal or case stated were pending.

(2) If the liability or assessment is altered on appeal or in consequence of a case stated, an adjustment must be made and amounts paid in excess must be refunded together with interest paid at the rate prescribed for the purposes of this subsection and amounts short paid are recoverable.

[39]

See Wool Tax (Administration) Act 1964 [Aust] ss13–16.

[41]

33. In addition to any return that is required by this Part, the Commissioner may, by notice in writing, call upon any person to furnish to him, within a time specified in the notice, such return, or such further or fuller return, as the Commissioner requires.

34. (1) For the purpose of inquiring into, or ascertaining, the liability of a person under any of the provisions of this Act, the Commissioner may, by notice in writing, require any person

(a) to furnish the Commission with such information as the Commissioner requires;

(b) to attend and give evidence before the Commissioner or before an officer authorised by the Commissioner for the purpose; and

(c) to produce any books, documents and other papers in the custody or under the control of the person.

(2) The Commissioner may require the person to give the information or evidence on oath, and either orally or in writing, and for that purpose the Commissioner or a person authorised by him may administer an oath.

(3) Where the person conscientiously objects to take an oath, he may make an affirmation that he so objects and that the information or evidence he will give will be the truth, the whole truth and nothing but the truth, and an affirmation so made is of the same force and effect, and entails the same liabilities, as an oath.

(4) A person who is required in pursuance of this section to attend and give evidence before the Commissioner or an officer authorised by the Commissioner for the purposes of an inquiry into, or the ascertaining of, the liability of another person under this Act is entitled to payment of an allowance in respect of his expenses

of attending and giving evidence of an amount determined by the Commissioner in accordance with the regulations.

Wool Tax (Administration) Act 1964 [Aust] ss33, 34.

[43]

A person who carries on business as a travel agent must

(a) keep such accounting records and other records as correctly record and explain the transactions and financial position of that business; and

(b) keep accurate records of all levies paid under this Act and the transactions to which those levies relate; and

(c) keep those records in a manner that will enable true and fair profit and loss accounts and balance sheets for that business to be prepared from time to time; and

(d) keep those records at the person's principal place of business in the State; and

(e) preserve those records for a period of not less than 7 years after the date they are made.

Penalty: $5000 or 6 months' imprisonment, or both.

See also Betting and Gaming Duties Act 1981 [UK] Sched 1, para 6.

[44]

(1) For the purposes of this Act, a person authorised in writing by the Minister to exercise powers under this section may, at all reasonable times and on production of that authority

(a) enter any building or place in which that person has reason to believe there are

(i) any hens kept for commercial purposes; or

(ii) any books, documents or other papers relating to the keeping of chickens or hens for commercial purposes or the hatching of chickens;

(b) search for any hens or other domesticated fowls, and any such books, documents or other papers, in any such building or place; and

(c) examine and count any such hens or other domesticated fowls and take extracts from, or make copies of, any such books, documents or other papers.

(2) A person shall not, without reasonable excuse, obstruct or hinder a person acting in pursuance of an authority under this section.

Penalty: One hundred dollars.

Poultry Industry Levy Collection Act 1965 [Aust] s11.

See also Pig Slaughter Levy Collection Act 1971 [Aust] s15; Betting and Gaming Duties Act 1981 [UK] Sched 1, para 10. For a form in which a judicial warrant to enter and search is required, including a statement of the powers and duties of the warrant holder, see ss19–23 Commodity Levies Act 1990 [NZ].

[54]

(1) Any certificate, notice, assessment form or other document required or authorised by this Act to be served or given by the Board is to be taken to have been duly served or given

(a) if delivered personally to the person; or

(b) if left at his or her address as shown on the last return furnished by that person with some person apparently of or over the age of 16 years; or

(c) if sent by prepaid letter post to the person at his or her address as shown on the last return furnished by that person.

(2) Service of a certificate, notice, assessment, form or other document in accordance with subsection (1)(c) is, unless the contrary is proved, to be presumed to have been effected at the time when it would be delivered in the ordinary course of post.

[56]

See Wool Tax (Administration) Act 1964 [Aust] Part VIII.

[57]

Where this Act provides that a person commits an offence

(a) in the case of a person that is a partnership, the reference is to be read as a reference to every member of the partnership; and

(b) in the case of a person that is an unincorporated body or association, the reference is to be read as a reference to every member of the committee of management of the body or association.

Chapter 14

Substantive and administrative provisions: Part 3

VALIDATION

Drafters must take three preliminary steps before proceeding to draft validating legislation. They must

1. identify the nature and extent of the actions and omissions which have produced the illegality that is to be cured;
2. identify the extent of the illegality caused by those actions and omissions;
3. identify what acts and omissions have taken place after and in consequence of the invalidity.

Validating legislation should remedy the defect or irregularity which is sought to be remedied and cure the consequences of that defect or irregularity. It is important that validating legislation should not go too far. To take an example, suppose it is discovered that a church, believed for many years to be a place licensed for the celebration of marriages, is not so licensed and it is necessary to validate the marriages celebrated in that church. In such a case, it would be going too far to validate all marriages celebrated there because this would have the effect of validating marriages void for other reasons, such as consanguinity or because a party was under the minimum age. The proper practice would be to validate all marriages which, but for the defect in the licensing of the church, would have been valid. In other words, validation should not be effected absolutely without due thought as to the consequences, but should be restricted to remedying the acts or omissions which have caused the illegality and the consequences of those acts and omissions.

Words similar to the following are useful to keep the extent of validation within proper bounds:

are not to be regarded as invalid because of ...
shall not be invalid by reason only of ...
declared to be as valid as it would have been if this Act had been in force.
to the extent that they would have been valid if ...
deemed to have been as valid and effectual as if ...

For example

No draft plan or approved plan purporting to have been prepared or approved under the Town Planning Act before the commencement of this Act is to be regarded as invalid or as ever having been invalid only because the plan contained illustrations, notes or descriptive matter.

The establishment of the Kigoma-Ujiji Town Council by the Local Government (Kigoma-Ujiji Town Council) Instrument 1962, shall not be invalid by reason only of the publication of the said Instrument in the Gazette otherwise than in accordance with the provisions of subsection (1) of section 5 of the Local Government Ordinance.

Kigoma-Ujiji Town Council (Validation) Act 1963 [Tanz] s2(b).

A decision taken under Part 3 of the Conservation Act 1994 within the period commencing on 1 June 1994 and ending on the commencement of this Act is declared to be as valid as it would have been if this Act had been in force when that decision was made.

The levy imposed by resolution passed by the Board at a meeting on 2 August 1993 is deemed to be valid to the extent that it would have been valid if notice of intention to impose a levy had been published in the Gazette not less than 14 days before the resolution was passed.[1]

The borrowing by the Board of $50,000 from the National Resources Bank on 8 January 1993 and the execution of the loan agreement setting out the terms and conditions of the borrowing by the Board on that date are deemed to have been as valid and effectual as if the Minister had approved the borrowing before that date in the manner required by section 17 of the Bee Board Act 1986.

Validation should be achieved only in a straightforward and apparent manner. Validation by implication is undesirable. Retrospective legislation should not be used to deem a provision to have come into force at some time in the past in order to validate only by implication the illegal consequences of the absence of the legislation at a past point of time. For example, let us suppose that a person is not qualified under a written law for a particular appointment unless that person has held a stipulated qualification for seven years but contrary to that law an appointment is purported to be made of a person who has been qualified for five years. If it is desired to validate the appointment and at the same time reduce the qualifying period to five years, it would not be good practice to seek to achieve the validation merely by deeming the amending provision reducing the qualifying period to have come into force before the date of the defective appointment. Of course, validating legislation must necessarily by its nature have retrospective effect. However retrospective operation alone is inadequate; validation should be explicit.[2]

Validating legislation is similar to all legislation having retrospective effect in that regard must be had to actions and omissions which have taken place before and to circumstances existing at the time when the legislation comes into force. In particular, care must be taken regarding past or pending legal proceedings. It may be desirable to include provision providing that the validation is not to affect legal proceedings that have been concluded or are pending at the time of the validation. For example

1 The word 'deem' is discussed at p99. It can usually be replaced by words such as 'is to be regarded as', but the usage in the example above is technically acceptable.

2 As to retrospective legislation generally, see p135.

(1) This Act does not affect any order or determination made by a court before the coming into force of this Act.

(2) If any proceeding for an offence committed before the coming into force of this Act was commenced but not finally determined before that time or is commenced on or after that time, the proceeding is to be dealt with and determined as if this Act had not been enacted.[3]

Also, consideration must be given to the need for indemnity provisions. They should be included only in circumstances in which it is considered necessary to explicitly free from liability any person who has exposed himself to civil or criminal proceedings.[4] For example

(1) The rates specified in the resolution of the Council passed at its meeting on 5 March 1995 are validated and declared to have been lawfully made in respect of the year that ended 31 March 1996 to the extent that they would have been valid if

(a) at the meeting on 5 March 1995 the Council had passed a resolution of its intention to make and levy those rates; and

(b) public notice of that intention had been given in accordance with section 77 of the Rating Act 1977.

(2) All actions of the Council and members of the staff of the Council in levying and collecting the rates validated by subsection (1) are validated and declared to have been lawful.

(3) All money received by the Council in payment of the rates so validated is declared to have been lawfully paid to and received by it.

(4) Any unpaid part of the rates validated by this section is lawfully payable to the Council.

If validating legislation is likely to be difficult to comprehend without background information or explanation, the inclusion of a purpose section or a preamble should be considered.[5] Here is an example of the embarrassing kind of situation encountered in a validation exercise. The preamble explains the purpose of a very technical provision.

WHEREAS due to administrative mishap the regulations referred to in Schedule 1 were not laid before the Legislative Assembly in accordance with the requirements of section 42(1) of the Interpretation Act 1984;

AND WHEREAS it is desirable to remedy the consequences of the failure to comply with that section so that

(a) the regulations referred to in Schedule 1 are deemed not to have ceased to have effect by reason of section 42(2) of the Interpretation Act 1984; and

(b) the Legislative Assembly should be enabled to invoke the provisions of section 42(2) of that Act (for disallowance) upon the laying of those regulations before that Assembly:

3 See the Transport Amendment Act 1990 [NZ].
4 For indemnity provisions, see Validation of Elections (No 2) Act 1955 [UK].
5 As to purpose provisions and preambles, see p198.

Where it is anticipated that minor and excusable irregularities are likely to recur, preventive action may remove the burden of unnecessary validating legislation. Defects in appointments to or vacancies in the membership of statutory bodies provide a good example. The following form is much used as a preventive measure:

> An act, decision or proceeding of the Commission shall not be invalid or called in question by reason of
> (a) a vacancy amongst the members of the Commission; or
> (b) a defect or irregularity in the appointment of a member of the Commission.

In the United Kingdom, the recurring necessity to enact laws validating elections to Parliament led to the enactment of the House of Commons Disqualification Act 1957 under which the House of Commons could order the disregard of disqualification in a particular case. See now the House of Commons Disqualification Act 1975 [UK] s6.

In New Zealand, irregularities in connection with area health boards could be validated by subsidiary legislation under s97 of the Area Health Boards Act 1983 (since repealed):

> Where anything is omitted to be done or cannot be done at the time required by or under this Act, or is done after that time, or is otherwise irregularly done in matter of form, or sufficient provision is not made by or under this Act, the Governor-General may, by Order in Council, at any time before or after the time within which that thing is required to be done, extend the time, or validate anything so done after the time required or so irregularly done in matter of form or make other provision for the case as he thinks fit.

On occasion a broad validation of executive acts may be necessary, perhaps acts which have anticipated the enactment of legislation. For example

> Every act or thing done by the Minister before the commencement of this Act that would have been lawful if section 37 of the principal Act (as substituted by section 3 of this Act) had been in force at the time when it was done is hereby validated and declared to have been lawfully done by him.
>
> *Petroleum Amendment Act 1975* [NZ] s6.

The capacity for human error is such that the categories of validation are never closed. Just a few of the more common areas are illustrated in the following examples.

Validation of fees, taxes or charges

> The imposition, recovery, and application of fees under regulation 22 of the Dog Food Regulations 1991 in respect of dog food preparation licences is validated and is to be taken to have been lawfully imposed, recovered and applied.

> The money collected by the Commissioner of Agriculture as a levy of $.25 per kilo of truffles under the purported authority of the Truffle Levy Regulations 1994 is deemed to have been lawfully collected.

Validation of unauthorised public expenditure

> (1) In the financial year that ended on 31 March 1994 the Minister for Home Affairs expended $3 750 200 in respect of the project to establish a National Art and

Culture Gallery and the sum expended exceeded by $750 200 the amount of money appropriated for that purpose by the Legislative Assembly for expenditure in that financial year .

(2) The expenditure by the Minister of Home Affairs of $750 200 being the sum referred to in subsection (1) is validated.

Validation of judicial acts

Nothing done in a Family Court in the Western Region at any time after 28 June 1992 and before the commencement of this Act shall be regarded as invalid only because at the time it was done the Western Region had not been designated by the President as a Region in which the Family Court may exercise jurisdiction.

(1) Every warrant issued or endorsed or executed under the principal Act before the commencement of this Act and every order made under the principal Act before the commencement of this Act which would have been validly issued or endorsed or executed or made if this Act had been in force when it was issued or endorsed or executed or made is declared to be and always to have been validly issued or endorsed or executed or made, and any proceeding instituted under the principal Act before the commencement of this Act may be continued and dealt with under the principal Act as amended by this Act:

(2) This section does not affect the rights of the parties under any order made in any Court or by any Judge before the commencement of this Act in proceedings on an application for habeas corpus.

Cf *Fugitive Offenders Amendment Act 1976* [NZ] s9.

Validation of administrative acts

Approvals given by the Minister of Customs and Excise between 1 April 1994 and the date of commencement of this section in respect of goods referred to in Tariff Classification No 456 are validated notwithstanding that those approvals were not recommended by the Minister for Technology (as required by section 77 of the Customs Act 1991).

(1) Every licence to which this section applies is declared to be and always to have been as valid as if the power of the Minister to grant the licence had been lawfully delegated (under section 69 of the Irrigation Act 1992) to the officer of the Ministry of Water Resources who purported to grant it.

(2) This section applies to an irrigation licence purportedly granted by an officer of the Ministry of Water Resources during the period after 31 March 1993 and ending on the day before the day of commencement of this section.

If any officer of the Department has, at any time before the commencement of this section, purported to exercise any power, function, or discretion of the Director-General under the Social Security Act 1964, and the exercise of that power, function, or discretion would have been valid if it had been carried out pursuant to a valid delegation by the Director-General (with the written consent of the Minister of Social Welfare) pursuant to section 10 of the Social Security Act 1964, the exercise of that power, function, or discretion shall be deemed to have been valid.

Social Welfare (Transitional Provisions) Act 1990 [NZ] s41.

Validation of appointment and irregular consequences

(1) Where before the commencement of this Act a person was appointed under section 65 of the Inland Revenue Act 1990 to be a member of the panel for a Board of Review and the appointment purported to have been made with retrospective effect, the appointment is not to be regarded as invalid by reason only that it purported to be so made.

(2) No act performed by a Board of Review which included such a person is to be regarded as invalid by reason only of that person's retrospective appointment.

Validation of subordinate legislation

(1) The purpose of this section is to remedy a defect that occurred in the making of the Hamburgers Regulations 1995 (in this section called 'the regulations') which purported to be made by the Minister for Meat under section 21 of the Meat Act 1992.

(2) Doubt has arisen whether the regulations were made after consultation with the Minister for Health as required by section 21 of the Meat Act 1992.

(3) The regulations are validated.[6]

IMPLEMENTATION OF INTERNATIONAL CONVENTIONS[7]

The importance of this topic is easily underestimated. In 1991 it was estimated that about one quarter of the 600 or so public Acts which make up New Zealand statute law give effect to international obligations.[8] It is very probable that a significant proportion of legislation in other jurisdictions has a similar effect. Yet even a cursory look at legislation of this kind reveals a surprising diversity of approach. It is appropriate to question whether this diversity is justified.

After a careful study of legislation and cases, Professor Francis Reynolds QC concluded[9]

> we may often be too preoccupied by our own law when implementing and interpreting international conventions such as the Hague Rules.

He suggests a greater consistency of drafting:

> What we need, I suggest, is as regards statutory drafting and interpretation equally, a greater awareness of the problem and, even if only by gradual development, a greater sophistication and uniformity of policy with respect to international conventions.

6 Validation alone may not be enough. The existence of past or pending prosecutions would call for further provisions such as those on p305.

7 'Conventions' is used in a generic sense to refer to all international agreements between two or more states or other international persons, governed by international law. See F. A. R. Bennion, *Statutory Interpretation* (2nd edn, 1992) 459–466; D. L. Mendis, 'The Legislative Transformation of Treaties' [1992] St L Rev 217; James Crawford, 'International Law Standard in the Statutes of Australia and the United Kingdom' (1979) 73 AJIL 642: K. J. Keith, 'New Zealand Treaty Practice: The Executive and the Legislature' 1 NZULR 272.

8 See Legislative Change (Report No 6 of Legislation Advisory Committee) p81.

9 F. Reynolds, 'The Implementation of Private Law Conventions in English Law', *Butterworths Lectures 1990–91* (1992) 1–53.

Where the purpose of domestic legislation is to implement an obligation under an international agreement, the role of the legislature is restricted, in a practical if not in a legal sense, to that of a law-transformer rather than a law-giver. The role is a difficult one. The drafter must pursue the objective of uniformity in the law as it operates in countries that are parties to the Convention yet at the same time must see that the new law fits without problems into the whole body of the law of the drafter's own country. The test of whether the domestic law accords with the Convention comes when the domestic law is interpreted in the domestic courts.

Of course, not all international Conventions require domestic legislation. Those which operate at the international level creating rights and obligations for states rather than for persons under domestic law are unlikely to need legislation.

Where domestic legislation is required, the initial decision is which of two alternative approaches is to be adopted. These may be broadly characterised as 'direct' and 'indirect' although there are overlaps and variations. The two approaches are not strictly alternatives; it is possible for a Convention to be implemented in part by the direct approach and in part by the indirect approach. These questions must be answered

1. Is the Convention to be implemented by means of a formula giving direct effect to the text of the Convention? This approach involves a declaration that the Convention text 'has the force of law' (or similar words) in the jurisdiction. This approach may be termed the '**direct approach**'.
2. Is the Convention to be implemented by incorporating its substance (rather than its wording) into the existing statute law? This approach may be termed the '**indirect approach**'.

Each approach has advantages and disadvantages and the decision as to which should be followed in a particular case must be taken pragmatically although in a principled way. The decision should take into account the variety of ways in which each approach may be followed. These are discussed later.

The direct approach is more conducive to the achievement of the important objective of achieving uniformity within the countries adhering to the Convention. On the debit side, this method may introduce to the domestic law language that is unsatisfactory and uncertain. The modern trend is to follow the direct approach in the absence of good reasons not to.[10]

Lord Wilberforce stated that the approach to the interpretation of an international Convention given the force of law (the direct approach) should be 'unconstrained by technical rules of English law, or by English legal precedent, and on broad principles of general acceptation': *James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141 at 152. See also *Fothergill v Monarch Airlines Ltd* [1981] AC 251, [1980] 2 All ER 696, a case of very considerable interest where a purposive construction was adopted.[11]

The indirect approach has the advantage that the law will be constructed and drafted in accordance with the current practices for domestic legislation. It will settle more harmoniously in the context of other domestic law. The effects of loose language and construction in the Convention can be ameliorated. Existing laws and practices can be accommodated more smoothly.

10 F. A. Mann has described it as 'the most usual method'. See F. A. Mann, 'Uniform Statutes in English Law', 99 LQR 376.

11 For criticism of this case, see the article referred to in note 10.

If the indirect approach is adopted and substantive provisions are drafted, the law, however, remains domestic law despite its wider purposes and the United Kingdom approach to construction of legislation of this kind has been stated by Diplock LJ in *Salomon v Customs and Excise Comrs* [1966] 3 All ER 871 at 875 as follows:

> If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (see *Ellerman Lines Ltd v Murray* [1931] AC 126), and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that parliament does not intend to act in breach of international law including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.

Let us look at the variations of each approach in turn.

Direct approach

The essence of this approach is to provide that the Convention 'has the force of law' in the jurisdiction concerned. The Convention in effect relies on its own language and must stand on its own feet, although it may need to be supplemented by procedural provisions such as provisions identifying who is to administer its provisions, by what means and which courts are to be available for its enforcement. Consequential modifications of conflicting and otherwise affected domestic law must be made where necessary.

When the direct approach is adopted, it is usual to set out the Convention in a schedule to the law. This action is desirable to facilitate communication and ready availability.

If the contents of the Convention are capable of effective application in this way, the direct approach should be favoured. Various private law Conventions are written so as to be capable of being given direct effect. On the other hand some Conventions which are non self-executing are unsuitable for this approach. For instance, a Convention that empowers or requires a state to take action of a kind that requires legislation cannot be directly implemented.

Examples where the direct approach has been followed include Uniform Laws on International Sales Act 1967 [UK]; Carriage of Goods by Road Act 1965 [UK]; Consular Relations Act 1968 [UK]; Child Abduction and Custody Act 1985 [UK]; Merchant Shipping (Salvage and Pollution) Act 1994 [UK].

An overlap with the indirect approach occurs when part only of the text of the Convention is given the force of law. This may cause problems.[12]

In a sub-branch of this category are cases in which the Convention is given the force of law but the legislation does not contain the text of the Convention. However failure to present the text is undesirable except for exceptional reasons.

See the International Transport Conventions Act 1983 [UK].

12 See *In re H (minors) (Abduction: Custody Rights)* [1991] 2 AC 476 for an instance where the scheduled text was to 'have the force of law in the United Kingdom' but certain provisions such as the preamble and the statement of objects were omitted from the scheduled text. The House of Lords nevertheless had regard to the omitted provisions.

Indirect approach

Some years ago, F. A. Mann identified three legislative methods of giving effect to an international Convention by means of the indirect approach.[13] All these rely on substantive provisions to give effect to the Convention. They differ in the manner in which they deal with the text of the Convention.

1 The legislation may contain no reference of any kind to the Convention but give effect to it by substantive provisions

This situation usually arises when it is considered that existing law already implements the Convention and no further legislation is required. It is clear from *Salomon*'s case that in case of ambiguity a court will refer to a Convention although the Convention is not mentioned in the legislation implementing it. The danger is that if there is no mention of the Convention its relevance may be overlooked when the statute is being interpreted or amended. It is certainly helpful to introduce specific mention of the Convention if it is practical to do so. It may not be practical to do this in treaties such as human rights treaties that are relevant to broad areas of the law.

2 The legislation may refer to the Convention but not set it out and may give effect to it by substantive provisions that may or may not adopt some of the wording of the Convention

Examples of this method are the Tokyo Convention Act 1967 [UK]; the International Carriage of Perishable Foodstuffs Act 1976 [UK]; the Merchant Shipping (Load Lines) Act 1967 [UK]; the Data Protection Act 1984 [UK]; the Guardianship Amendment Act 1991 [NZ]; and the Driftnet Prohibition Act 1991 [NZ].

It is desirable that the reference to the Convention should be presented prominently and not, for instance, contained in an obscure definition. A specific purpose provision making it clear that the intention of the law is to give effect to the Convention is recommended.

3 The legislation may set out the Convention in a schedule but for information or reference purposes only

As with methods (1) and (2), effect is given to the Convention by separate substantive provisions not by endowing the Convention with the force of law. On the grounds of its fuller communication, method (3) is to be preferred to methods (1) and (2).

Examples of this method are the Antarctic Treaty Act 1967 [UK], the Crimes (Protection of Aircraft) Act 1973 [Aust], the Antarctic Marine Living Resources Act 1981 [NZ] and the Arbitration (Foreign Agreements and Awards) Act 1982 [NZ]. The United Kingdom equivalent of the last-mentioned Act may be seen in the Arbitration Act 1975 [UK].

13 See F. A. Mann in 'The Interpretation of Uniform Statutes', 62 LQR 278. See also 44 Halsbury's Laws of England (4th edn) 553, 559; Chapter VII of the Law Commission's Report on the Interpretation of Statutes (Law Comm No 21).

Practical points

PURPOSE PROVISIONS

The purpose of legislation to implement a Convention may be indicated in the title of the statute, in a preamble, or by means of a purpose provision.[14] Preambles are tainted with an archaic flavour and are generally regarded as less desirable than purpose provisions.

> An Act to prohibit driftnet fishing activities and to implement the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific.
>
> *Driftnet Prohibition Act 1991* [NZ].

> The purpose of this Act is to help protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer
>
> (a) by providing for the phasing out by the year 2000 of all but essential use of controlled substances and for the restriction of the use of other ozone depleting substances; and
>
> (b) by giving further effect to New Zealand's obligations under the Vienna Convention for the protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer (copies of the English texts of which are set out in the Fifth and Sixth Schedules to the Act).
>
> *Ozone Layer Protection Act 1990* [NZ] s4(1).

IDENTIFICATION OF PARTIES

If the circumstances are such that identification of the parties to a Convention is desirable, a provision for certification or declaration of the Convention countries may be included.

> (1) Her Majesty may by Order in Council from time to time certify who are the High Contracting Parties to the Convention and in respect of what territories they are respectively parties.
>
> (2) An Order in Council under this section shall, except so far as it has been superseded by a subsequent Order, be conclusive evidence of the matters so certified.
>
> *Carriage of Goods by Road Act 1965* [UK] s2.

See also Merchant Shipping (Load Lines) Act 1967 [UK] s31. A substantive provision is preferable to the misuse of a definition for the purpose.[15]

EXPLANATORY PREAMBLES

Although preambles are retreating in the face of onslaughts from the standard bearers of the plain English cause, a preamble may be a convenient means of

14 As to purpose provisions and preambles, see pp154, 196.
15 As to definition usage, see p150.

including purely explanatory or background matter. Alternatively, if the matter has no legislative purpose or effect, it may be better provided by way of a note that does not form part of the statute.[16]

For the use of a preamble to explain that a new Convention is to take the place of an old one, see the Merchant Shipping (Load Lines) Act 1967 [UK].

LEVEL OF LEGISLATION

The policy and principles of a Convention should always be adopted by the legislature in primary legislation (if legislation is needed) but the delegation of legislative power may be an appropriate means to enable the implementation of technical or procedural detail or to enable additions or amendments to the Convention to be implemented. Whether delegation of legislative power is justifiable and appropriate should be decided in accordance with the principles discussed elsewhere.[17] In technical areas such as merchant shipping and civil aviation, a tertiary level of subordinate legislation may be justified. The case for delegation of legislative power may be strengthened if frequent or urgent changes are anticipated. The United Kingdom European Communities Act 1972 provides an example which has led to much delegated legislation, recently estimated at between 650 and 800 Community legislative instruments a year.[18]

DELEGATION OF LEGISLATIVE POWER TO IMPLEMENT AMENDMENTS

A recurrent need for amending legislation may, in suitable cases, be avoided by means of a provision permitting the amendment by subordinate legislation of the schedule containing the Convention.

> (1) If by any International Convention the Uniform Law on Sales or the Uniform Law on Formation is amended Her Majesty may by Order in Council modify the Schedules to this Act in such manner as appears to Her necessary for the purpose of giving effect to the Convention.
>
> (2) No recommendation shall be made to Her Majesty in Council to make an Order under this section unless a draft thereof has been laid before and approved by each House of Parliament.
>
> *Uniform Laws on International Sales Act 1967* [UK] s3.

See also Antarctic Treaty Act 1967 [UK] s10.

DELEGATION OF LEGISLATIVE POWER TO ELABORATE PRIMARY PROVISIONS

> (1) If it appears to Her Majesty that further provision, in addition to that made by sections 1 to 5 of this Act, is necessary or expedient for giving effect to any of the Agreed Measures, Her Majesty may by Order in Council make such provision accordingly.

16 As to the use of notes in legislation, see p160.
17 See pp329–339.
18 See Lord Hoe, 'Managing the Statute Book' [1992] Stat LR 165, 173.

(2) An Order in Council under this section may prescribe penalties for contravention of prohibitions imposed by the Order; but the penalties so prescribed shall not exceed those specified respectively in paragraphs (a) and (b) of section 4(1) of this Act.

(3) No recommendation shall be made to Her Majesty to make an Order in Council under this section unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament.

Antarctic Treaty Act 1967 [UK] s6.

See also Merchant Shipping (Load Lines) Act 1967 [UK] s2 of which requires the Board of Trade in making load line rules to 'have regard in particular to the Convention of 1966'.

INCONSISTENCY WITH OTHER LEGISLATION

In the event of any inconsistency between the provisions of this Part, or the Convention, and the operation of any other law, the provisions of this Part and the Convention prevail to the extent of the inconsistency.

Canada–Japan Income Tax Convention Act 1965 [Can] s2(2).

Nothing in this section shall prevent the bringing of any proceedings for damages in any Court in New Zealand in respect of the personal injury or personal injury by accident suffered by any person, in New Zealand or elsewhere, if the cause of action is any liability for damages under the law of New Zealand pursuant to any international convention relating to the carriage of passengers.

Accident Rehabilitation and Compensation Insurance Act 1992 [NZ] s14(4).

INCONSISTENCY OF ENGLISH TEXT WITH OFFICIAL TEXT

If there is any inconsistency between the text in English in Part I of the First Schedule to this Act and the text in French in Part II of that Schedule the text in French shall prevail.

Carriage by Air Act 1961 [UK] s1(2).

See *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 699. If the Convention does not provide for inconsistency between texts in different languages, the courts may resort to a foreign language text. See *Fothergill*'s case (supra) and *Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, [1977] 3 All ER 1048.

TERMS TO HAVE IDENTICAL MEANINGS IN DOMESTIC LEGISLATION AND CONVENTION

A provision similar to the following may be convenient, particularly if the Convention bristles with technical language:

Terms and expressions used in this Act but defined in the Convention, shall, unless the context otherwise requires, have the same meaning as in the Convention.

Antarctic Marine Living Resources Act 1981 [NZ] s2(2).

TRIBUNALS[19]

Introduction

The huge number of tribunals now in existence in Commonwealth jurisdictions presents a kaleidoscopic picture that defies classification. In some countries the structure lacks system and appears haphazard or fortuitous. This is not surprising, and not necessarily alarming, in as much as the establishment of each tribunal is the result of a singular decision that a tribunal will be able to perform a particular function better than the ordinary courts of law or the Minister or any other person or authority of central or local government. Such decisions have become increasingly frequent with the result that the functions performed by tribunals now include administrative, judicial and legislative functions and others that are not readily categorised in this manner. The variety is extreme and well known; and if each tribunal is to be designed so that it will best perform its purpose, flexibility must be regarded as more important than uniformity. As the Franks Report said, 'Tribunals should ensure cheapness, accessibility, freedom from technicality, expedition and expert knowledge.'

Three general requirements must, however, take precedence before the attractions of what is expedient. They are openness, fairness and impartiality.

In one way or another, tribunals exist to carry out the policy of the government. Of course, the policy element of the function varies greatly and indeed a line must be drawn somewhere excluding from the purview of tribunals those functions that are so enmeshed with government policy that they should properly remain the direct responsibility of the Minister.[20] Drafters must do what they can to ensure that legislation does not place a tribunal in the impossible position of having to take 'policy' decisions without the benefit of criteria or guidelines. Adherence to criteria or guidelines by a tribunal is not incompatible with independence and impartiality so long as those criteria or guidelines are contained or provided for in the statute itself or made in general terms and publicly. The tribunal may be required to 'give effect to' policy directions or perhaps perform the less stringent duty to 'have regard to' policy directions. Such directions should always be in writing and signed by a Minister. They should be published and a copy laid before the legislature. The power to give directions should not be capable of delegation. An alternative approach that may be followed where considerations of policy are important is for the legislation to restrict the role of the tribunal to that of making recommendations to the Minister. This enables and requires the Minister to make (and take responsibility for) decisions with a major policy component. The role of the tribunal is largely restricted to that of fact-decider.

The need for flexibility in relation to tribunals has been already stressed. Nevertheless, as regards both the constitution and the procedure of tribunals,

19 This subject deserves a much more comprehensive treatment than is possible here. There is much interesting reading available. See *Garner's Administrative Law* (7th edn) (B.L. Jones); Report of the Franks Committee on Administrative Tribunals and Enquiries (Cmnd 218 (1957)); S. A. de Smith, *Judicial Review of Administrative Action* (4th edn); Report by Justice, 'The Citizen and the Administration', 1961 (The Whyatt Report); Record of the Third Commonwealth and Empire Law Conference, Sydney 1965, pp63–105; the Annual Reports of the Council on Tribunals; and N. D. Vandyk, *Tribunals and Enquiries*.

20 Political importance is not the only test. Practical considerations such as the need for speed and administrative convenience are also relevant. See G. Ganz, 'Record of the Third Commonwealth and Empire Law Conference', p92.

drafters may contribute to a desirable rationalisation by judicious consistency and adherence to generally accepted principle.

Although the composition of tribunals is obviously a matter for particular decision, there is real value in a consistent approach to matters concerning the method of appointment, security of tenure of office and duration of office. The role of the chairperson of a tribunal is vital and there is much in favour of making all such appointments subject to the approval of the Minister of Justice or Attorney General, or at least to be made only after consultation with that Minister or the Attorney General.[21] If the need to achieve relevant expertise and experience and the need to foster independence are to be satisfied, appointments should be for a fixed term and members of tribunals should not face the possibility of removal from office except for established cause. Provision for the appointment of multi-member panels can achieve an available membership with the various disciplines or skills desirable for the purposes of the tribunal. This is particularly useful for tribunals with functions covering a broad range of activities. It may also be useful to provide for the appointment of advisers with special skills to sit with members and participate in the hearing although such advisers are not themselves members of the tribunal.

Care must be taken not to 'over-judicialise' tribunals at the expense of expeditious and inexpensive action and freedom from technicality. It is well to remember that the lawyer's ideas of justice are not inevitably apposite to all the purposes of tribunals. As R. Else-Mitchell J has said, with great perception and clarity[22]

> Excessive concentration on analytical concepts and a too literal construction of statutory instruments do not really give the expertise which is necessary to an efficient and expeditious determination of administrative questions, whilst an intractable and emotional faith in the technique of cross-examination as the ultimate touchstone of most legal disputes tends to divert attention from the real policy considerations which it is the function of administrative tribunals to apply.

The procedure of a tribunal must be designed to serve the particular purposes of that tribunal, not to serve the traditional devices of advocacy. If tribunals may not properly be regarded as the prerogative preserve of lawyers, they may also not be regarded as an appendage of the administration. The view of the Franks Committee that 'tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than part of the machinery of administration' is now unchallenged.

Rules of procedure designed for a tribunal must strike a delicate balance between formality and informality. The rules may be widely read by non-lawyers and they should be free from lawyers' jargon. Their style should aim at simplicity and clarity.

Above all, the procedure must accord with the criteria set by the Franks Committee—openness, fairness and impartiality—for these are what the majestic conception of natural justice is all about. 'No worthier summary or analysis of the principles of natural justice could be phrased,' said Lord Morris.[23] 'Fair play in action' as natural justice has been described must be the guiding principle.

21 The Tribunals and Inquiries Act 1992 [UK] provides for the selection of chairmen of certain tribunals from a panel of persons appointed by the Lord Chancellor. See also Orr, Report on Administrative Justice in New Zealand, p68.

22 Record of the Third Commonwealth and Empire Law Conference, p74. See also R. M. Jackson, *The Machinery of Justice in England* (6th edn) pp523–527.

23 Lord Morris, 'Natural Justice' Current Legal Problems 1973, 1 at p9.

It is suggested that the following procedural principles are suitable for general application.[24]

(1) Not less than 14 days' notice of the time, date and place of the hearing should be given to all persons entitled to appear.
(2) Within the limits imposed by the nature of the tribunal's function, the procedure should enable all parties to know in advance the case they have to face and the issues to be determined.
(3) Parties should be entitled to appear personally or to be represented by a lawyer or other person of their choice.
(4) If they do not choose to appear or be represented, parties should be able to make submissions in writing.
(5) Parties and the tribunal should be enabled to require the attendance of witnesses.
(6) Hearings should be in public except for cases involving national security, intimate, personal or financial matters, or professional reputation.
(7) Parties should be enabled to call witnesses, produce exhibits, challenge the evidence of others and address the tribunal.
(8) The tribunal should have power to receive evidence which it thinks would assist it to deal effectively with the matter before it even though that evidence would not be admissible in a court of law.
(9) Absolute privilege should be given to the members of a tribunal.[25]
(10) Upon request by a party, the tribunal should be obliged to state in writing material findings of fact and reasons for the decision.
(11) Parties not legally represented should be advised of their rights of appeal and any time limit applicable.

Tribunals for the discipline of members of a profession or trade have particular needs. It is desirable that a representative of the public who is not a member of the profession or trade should participate in the process. The legislation should also ensure that the investigative process and the adjudicative process should be kept distinct and carried out by different bodies or persons. The complainant as well as the defendant should be given a fair opportunity to make submissions to the tribunal.

'The courts dislike attempts by Parliament to oust or curtail their jurisdiction.'[26] Provisions to the effect that the decision of a tribunal shall be 'final' or 'final and conclusive' or 'shall not be called in question in any court of law' or 'shall not be questioned in any legal proceedings whatsoever' are not likely to be construed by the courts as meaning what they appear to say. This is particularly so if no avenue of appeal is provided. Nor are such formulae likely to be effective to exclude judicial review where there is error of law or want of jurisdiction.

24 The following passage owes much to G. S. Orr's Report on Administrative Justice in New Zealand.
25 Orr, Report on Administrative Justice in New Zealand at p73 recommends that a like privilege be given to witnesses and counsel appearing before tribunals, but de Smith, *Judicial Review of Administrative Action* (4th edn) p88 has argued, 'There is undoubtedly much to be said in favour of denying absolute privilege to parties and witnesses appearing before administrative tribunals, for the proceedings are usually lacking in the traditional formality that may tend to deter irresponsible persons from making maliciously untrue statements.'
26 *Bennion*, pp66-69. See also *Garner*, pp228 et seq; *de Smith*, pp364–376; G. L. Peiris, 'Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law' (1982) PL 451; H. E. Markson, 'Ouster Clauses' (1980) 124 Sol J 420.

The subject cannot be adequately discussed in a few lines and, of course, the courts of different countries may tread different paths. However, a warning is necessary: the ice is very thin for the drafter of an ouster clause and the water below cold and deep.

Check list for legislation establishing and regulating tribunals

Establishment

1 Establishment of tribunal
2 Composition of tribunal
3 Appointment of chairperson and other members
4 Qualification of members
5 Disclosure of financial and other interests of members
6 Duration of office
7 Eligibility for re-appointment
8 Continuance in office until successor takes office
9 Resignation and removal from office
10 Deputy/Acting members
11 Power to hold office concurrently with other offices
12 Constitution for particular matters, sitting in divisions, quorum
13 Decisions where members hold differing opinions
14 Oath/Affirmation of office
15 Protection of members acting in good faith
16 Appointment of special advisers/assessors
17 Remuneration and allowances
18 Seal of tribunal and custody of seal
19 Appointment of Secretary/Registrar and staff of tribunal
20 Tribunal expenses
21 Provision of services to tribunal

Functions

22 Functions and jurisdiction of the tribunal (prescription of decision-making or recommendation duties)
23 Resolution of matters in dispute by conciliation
24 Directions, criteria or guidelines for performance of functions
25 Legislation to bind Crown/Government
26 Reference of questions to court, or transfer of proceedings to court
27 Exercise of specified jurisdiction by chairperson
28 Questions of law to be decided by chairperson
29 Duty to give effect (or have regard to) lawful Ministerial directions (including corresponding power to give directions)
30 Duty of member to disclose relevant interest
31 Right of persons with interest to attend and be heard
32 Decisions to be final
33 Validity of proceedings not affected by defect in appointment or want of form
34 Registrar to provide assistance
35 Registrar to submit annual report
36 Secrecy requirement

37 Privilege of proceedings

Powers

38 Power to make interim orders
39 Power to stay decision pending appeal
40 Power of chairperson to arrange business and place of hearings
41 Power to delegate
42 Power to extend time
43 Power to investigate, require information or documents
44 Power to hold preliminary hearings for directions and other interlocutory matters
45 Power to adjourn hearings
46 Power to summon witnesses, administer oaths
47 Power to proceed despite non-appearance of party
48 Power to maintain order
49 Power to waive procedural irregularities
50 Power to exclude public in specified circumstances (proceedings otherwise to be in public)
51 Power to restrict publication of evidence or reports
52 Power to order payment of costs, witnesses' expenses
53 Power to regulate procedure not provided for
54 Power to make rules of procedure

Procedure

55 How to begin application or appeal
56 Service on affected persons
57 Application for directions
58 Proceedings for further particulars
59 Discontinuance of proceedings
60 Notice of time, date and place of hearing
61 Representation
62 Appointment of officer to assist tribunal
63 Submissions may be made in writing
64 Witnesses not to be prejudiced by giving evidence
65 Procedure at hearing
66 Admissibility of evidence
67 Incriminating answers
68 Evidence by written statement
69 Record of proceeding, summary of evidence
70 Decision (findings and reasons) to be of majority and in writing
71 Consent decisions and ancillary orders
72 Correction of accidental errors in decisions and orders
73 Rights of appeal
74 Parties to be notified of rights of appeal
75 Service of notices
76 Fees, witnesses' allowances
77 Forms
78 Authentication of documents
79 Offences in relation to tribunal (failure of witness to attend, refusal to be sworn or give evidence, contempt, disorder during hearing)

Forms

Establishment

[1–4]

(1) The Forestry Tribunal is established.

(2) The Tribunal consists of
(a) the chairperson who must be a legal practitioner; and
(b) 2 other persons, at least one of whom must have wide knowledge and experience of the forestry industry.

(3) The Minister responsible for forestry is to appoint the chairperson after consultation with the Attorney General and is to appoint the 2 other members after consultation with the Forestry Industry Council.

[6, 7]

(1) A member holds office for such term not exceeding 4 years as is specified in the member's instrument of appointment.

(2) A member is eligible for re-appointment.

[9]

35 (1) The Governor-General may suspend a member of the Tribunal from office on the ground of misbehaviour or physical or mental incapacity.

(2) The Minister shall cause a statement of the ground of the suspension to be laid before each House of the Parliament within 7 sitting days of the House after the suspension.

(3) Where such a statement has been laid before a House of the Parliament, that House may, within 15 sitting days of that House after the day on which the statement has been laid before it, by resolution, declare that the member of the Tribunal should be restored to office and, if each House so passes such a resolution, the Governor-General shall terminate the suspension.

(4) If, at the expiration of 15 sitting days of a House of the Parliament after the day on which the statement has been laid before that House, that House has not passed such a resolution, the Governor-General may remove the member from office.

(5) If a member of the Tribunal becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with his creditors or makes an assignment of his remuneration for their benefit, the Governor-General shall remove him from office.

(6) A member of the Tribunal shall not be removed from office except as provided by this section.

36 A member of the Tribunal may resign his office by writing signed by him and delivered to the Governor-General.

Trade Practices Act 1974 [Aust] ss35, 36.

(1) The office of a member of the Tribunal becomes vacant if
(a) the member dies; or
(b) the member's term of office expires; or
(c) the member resigns by signed notice of resignation delivered to the Attorney General; or
(d) the member is convicted of an indictable offence; or
(e) the member is removed from office under subsection (2).

(2) The Governor General may remove a member of the Tribunal from office if satisfied that
(a) the member is permanently incapable of performing his or her duties; or
(b) the member has engaged in dishonourable conduct; or
(c) the member is incompetent; or
(d) the member has neglected his or her duty; or
(e) the member is bankrupt.

[10]

(1) The Attorney General may at any time appoint not more than 6 persons as deputy members of the Tribunal to provide a pool of persons to act as members, upon the request of the chairperson, during the absence or incapacity of members other than the chairperson.

(2) If a member of the Tribunal, other than the chairperson, is absent or incapacitated, the chairperson may request a deputy member to act as a member in place of the member who is absent or incapacitated; and a deputy member, while so acting as a member, has and may exercise the powers and duties of a member.

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(1) The Minister must appoint persons to be deputies of each member of the Tribunal, but no person may be a deputy of more than one member.

(2) Each deputy may act for the member for whom he or she is deputy during any period that the member is incapacitated by illness, absence from the State, or other sufficient cause from performing the duties of member.

(3) A deputy is to be regarded as a member of the Tribunal while acting as a member.

(4) No act of a deputy, or act of the Tribunal while a deputy is acting as a member of the Tribunal, can be questioned in a court on the ground that the occasion for the deputy to act had not arisen or had ceased.

[11]

A member of the Tribunal may hold that office concurrently with any other office.

A member of the Tribunal cannot hold any political office in the service of the Government nor engage in any trade, profession or vocation except with the consent of the Governor-General.

[12, 13]

(1) The President must preside at all sittings of the Tribunal.

(2) The President and 2 other members of the Tribunal constitute a quorum at any sitting of the Tribunal, but the President must, as far as is practicable, ensure that all members are present at any sitting at which, in the President's opinion, difficult or important matters are to be considered.

(3) Every question before the Tribunal is to be determined by the opinion of the majority of the members present, but if the members present are equally divided in their opinions, that of the President prevails.

[15]
No action lies against a member of the Tribunal for anything the member may say or do or omit to do while acting in good faith in the intended performance of the functions of a member.

[16]
(1) The chairperson of the Tribunal may appoint as a special adviser for a proceeding a person whose specialised knowledge or experience is such that he or she will be able to assist the Tribunal in that proceeding.

(2) A special adviser may sit with the Tribunal and assist it as requested but is not a member of the Tribunal.

Functions

[23]
The Tribunal
(a) may endeavour, by all reasonable and equitable means, to resolve by conciliation a complaint that is the subject of a proceeding; and
(b) must take all steps that it considers reasonable and equitable in the circumstances to effect an amicable settlement of a complaint that is the subject of a proceeding and may adjourn a proceeding at any stage to enable the parties to negotiate for that purpose.

[24]
(1) The Tribunal must give effect to [have regard to] any direction concerning the forestry policies of the Government given to the Tribunal by written memorandum signed by the Minister .

(2) The Minister cannot give a direction to the Tribunal in respect of a particular application or proceeding before the Tribunal or a direction that would derogate from the duty of the Tribunal to act judicially.

(3) The Minister must cause every direction given to the Tribunal to be published in the *Gazette* and a copy laid before the legislature as soon as practicable after giving the direction.

[26]
(1) The Tribunal may, on its own initiative or on the application of a party, refer a question of law arising in a proceeding before it for determination by the Supreme Court.

(2) If a question of law arising in a proceeding is referred to the Supreme Court, the Tribunal must not
  (a) make a decision to which the question is relevant until the question is determined by the Supreme Court; or
  (b) proceed in a manner, or make a decision, that is inconsistent with the determination of the question by the Supreme Court.

[27, 44]

(1) The Tribunal, constituted by the chairperson, may conduct a preliminary hearing to decide interlocutory and preliminary matters.

(2) In a preliminary hearing, the Tribunal may
  (a) give directions for the conduct of the proceeding;
  (b) require parties to file pleadings;
  (c) require parties to make discovery or allow inspection of evidentiary material.

[31]

Any person who satisfies the Tribunal that the person has a substantial interest in a proceeding may appear and be heard in that proceeding and may produce evidence and cross examine witnesses.

[33]

An act or proceeding of the Tribunal is not to be regarded as invalid because of a defect in the appointment of a member of the Tribunal or a vacancy in its membership.

[34]

The registrar must ensure that assistance is reasonably available free of charge, either from the registrar personally or from a member of the registrar's staff, to any person who asks for help in completing the forms required under this Act or asks for information concerning the procedure ordinarily adopted by the Tribunal.

Powers

[38]

(1) The Tribunal may make an interim order to preserve, pending determination of the matters at issue, the existing state of affairs between the parties to the proceeding or the rights of the parties to the proceeding.

(2) An interim order may be made on the Tribunal's initiative or on the application of a party to the proceeding and may be made at any time after an application has been made to the Tribunal.

[43]

Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person

(a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or

(b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or

(c) to appear before the Commission at a time and place specified in the notice to give evidence, either orally or in writing, and produce any document or class of documents specified in the notice.

Commerce Act 1986 [NZ] s98.

[46, 66]

The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may

(a) issue a summons to any person requiring him to appear at the time and place mentioned therein to testify to all matters within his knowledge relative to a subject matter before the Board and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to such subject matter;
(b) administer oaths and examine any person upon oath, affirmation or otherwise; and
(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it.

Immigration Appeal Board Act [Can] s7(2).

(1) The chairperson, or the registrar on the direction of the chairperson, may, by written notice given to a person, require the person to appear before the Tribunal at a specified time and place to give evidence or produce specified documents.

(2) The chairperson, or other person presiding at the hearing of a proceeding, may administer an oath or affirmation to a person appearing as a witness.

(3) A person who is given a notice under subsection (1) must
(a) attend at the time and place specified in the notice; and
(b) continue to attend as required by the chairperson or other person presiding until excused from further attendance.

Penalty: $2000.[27]

[50, 51]

(1) Subject to subsection (2), all proceedings before the Tribunal are to be held in public.

(2) If the Tribunal is satisfied, either because of the confidential nature of the evidence or otherwise, that it is appropriate to do so, the Tribunal may direct that a proceeding, or part of a proceeding, shall be held in private.

The Tribunal may order that all or part of the evidence of a person be heard in private and may prohibit or restrict the publication of any evidence if the Tribunal considers that the reasons for making such an order or orders outweigh the public interest in a public hearing and publication of that evidence.

The Tribunal may direct that any evidence given before it, or the contents of any document produced to it, or any information that might enable a person who has

27 As to this form of penal provision, see p355.

appeared before the Tribunal to be identified, must not be published or must not be published except as the Tribunal directs.

[53]

(1) The Tribunal may decide its own procedures, except so far as its procedures are prescribed by regulations under this Act.

(2) The Tribunal is to conduct its proceedings without procedural formality but must observe natural justice.

(3) The Tribunal may permit and regulate the use in any proceeding of any telecommunication facility that the Tribunal considers will assist in the determination of the proceeding.

[54]

(1) The Secretary of State may make rules for regulating the exercise of the rights of appeal conferred by section 13 of this Act and the practice and procedure of the Tribunal.

(2) Without prejudice to the generality of sub-paragraph (1) above, rules under this paragraph may in particular make provision
- (a) with respect to the period within which an appeal can be brought and the burden of proof on an appeal;
- (b) for the summoning of witnesses and the administration of oaths;
- (c) for securing the production of documents and data material;
- (d) for the inspection, examination, operation and testing of data equipment and the testing of data material;
- (e) for the hearing of an appeal wholly or partly in camera;
- (f) for hearing an appeal in the absence of the appellant or for determining an appeal without a hearing;
- (g) for enabling any matter preliminary or incidental to an appeal to be dealt with by the chairman or a deputy chairman;
- (h) for the awarding of costs;
- (i) for the publication of reports of the Tribunal's decisions; and
- (j) for conferring on the Tribunal such ancillary powers as the Secretary of State thinks necessary for the proper discharge of its functions.

Data Protection Act 1984 [UK] Sched 3, para 4.

Procedure

[55, 56]

(1) An appeal to the Tribunal is commenced by filing a written notice of appeal with the registrar and paying the prescribed fee.

(2) A notice of appeal must state the grounds of appeal.

(3) A notice of appeal must be filed within 28 days after the appellant receives notice of the decision that is appealed against, but the Tribunal may extend the period for filing a notice of appeal.

(4) The Tribunal must cause a copy of a notice of appeal to be given to the Authority who made the decision that is the subject of the appeal.

[61]

A party or other person who is allowed to appear in a proceeding may appear personally or be represented by another person.

(1) Any claimant or other person entitled to appear before the Tribunal may appear either personally or, with the leave of the Tribunal, by
  (a) a barrister or solicitor of the High Court; or
  (b) any other agent or representative authorised in writing.

(2) Any such leave may be given on such terms as the Tribunal thinks fit, and may at any time be withdrawn.

Treaty of Waitangi Act 1975 [NZ] Second Sched, para 7.

[63, 68]

(3) In an inquiry, the Authority may, if it thinks fit, permit a person appearing as a witness at the inquiry to give evidence by tendering, and verifying by oath or affirmation, a written statement and, where evidence is so given, the Authority shall make available to the public in such manner as the Authority thinks fit the contents of the statement other than any matter
  (a) that the person who gave the evidence objects to being made public; and
  (b) the evidence of which the Authority is satisfied would have been taken in private if that evidence had been given orally and the witness had objected to giving it in public.

(4) In an inquiry, the Authority may, if it thinks fit, require or permit a party to the inquiry desiring to make submissions to the Authority to make those submissions in writing and, where submissions are so made, the Authority shall make available to the public in such manner as the Authority thinks fit the contents of the submissions.

Prices Surveillance Authority Act 1983 [Aust] s31(3), (4).

[66]

The Tribunal is not bound by the rules of evidence and may inform itself on any matter as it considers appropriate.

(1) The Tribunal may receive and take into account any relevant evidence or information, whether or not that evidence or information would be admissible in court proceedings.

(2) The Tribunal may, on its own initiative, make investigations and inquiries and seek and receive evidence additional to that tendered by the parties to the proceeding.

(3) Evidence and information received or ascertained by the Tribunal under subsection (2) must be made available to each party to the proceeding.

[67]

(1) A person appearing before the Commission to give evidence or produce documents is not excused from answering a question, or producing a document, on the ground that the answer to the question, or the document, may tend to incriminate that person.

(2) Evidence given by a person before the Commission is not admissible against that person in any criminal proceedings other than proceedings for offences against this Act.

Cf *Trade Practices Act 1974* [Aust] s159.

[70]
The decision of the Tribunal may be given orally or in writing and in either event must contain the reasons for the decision.

(1) If the Tribunal does not state its reasons for any decision or order, a party to the proceeding or a person permitted to appear at the proceeding may, by notice served on the registrar within 7 days after the date of that decision or order, require the Tribunal to state its reasons.

(2) The Tribunal must, within 14 days after receiving a notice requiring it to state reasons, state its reasons for the decision or order.

(3) Every party to the proceeding and person permitted to appear at the proceeding is entitled upon request to be given free of charge a copy of those reasons.

[72]
The Tribunal has power at any time, by certificate signed by the President, to correct any error arising from an accidental slip or omission in a decision or ancillary order of the Tribunal.

[76]
(1) No fee is payable for lodging any document with the Tribunal or for the hearing of any proceeding, or the performance of any other function by the Tribunal.

(2) A person who appears as a party before the Tribunal must bear that person's own costs and the Tribunal cannot award costs to or against a party.

(3) A person required under this Act to appear as a witness before the Tribunal is entitled to be paid the prescribed allowances for travelling and other expenses
(a) by the party to the proceeding who required that person to appear; or
(b) in any other case, by the registrar.

[78]
A document requiring authentication by the Tribunal is sufficiently authenticated if it is signed by the President of the Tribunal.

[79]
A person commits an offence and is liable to a fine not exceeding $2000 who
(a) wilfully insults or obstructs a member of the Tribunal or any officer of the Tribunal in the course of a hearing of the Tribunal; or
(b) wilfully insults or obstructs any witness or person in attendance at a hearing of the Tribunal; or
(c) wilfully interrupts or otherwise misbehaves at a hearing of the Tribunal.

A person served with a summons to appear as a witness before the Tribunal must not, without reasonable excuse

(a) fail to attend as required by the summons; or
(b) fail to appear and report from day to day unless excused, or released from further attendance, by the Tribunal.
Penalty: $2000.

A person appearing as a witness before the Tribunal must not, without reasonable excuse
(a) refuse or fail to be sworn or to make an affirmation; or
(b) refuse or fail to answer a question that the person is required to answer by the presiding member; or
(c) refuse or fail to produce a document that the person was lawfully required to produce by summons.
Penalty: $2000.

A person must not
(a) insult or disturb a member of the Tribunal in the exercise or performance of the member's powers or duties as a member; or
(b) interrupt an inquiry; or
(c) create a disturbance, or take part in creating or continuing a disturbance, in a place where the Tribunal is conducting a proceeding; or
(d) do any other act or thing that would, if the Tribunal were a court of record, constitute a contempt of that court.
Penalty: $5000 or 6 months' imprisonment.

Chapter 15

Supplementary provisions

THE DELEGATION OF LEGISLATIVE POWER[1]

General principles

> The extent to which a power should be delegated always requires careful consideration. The power should not extend to matters of principle on which a decision of Parliament ought to be taken.[2]

> ... the central and recurrent problem of delegated legislation is how to determine what is general and therefore should be left in the Bill for parliamentary consideration and what is particular and therefore should be left for governmental regulation.[3]

The line traditionally drawn is between principle and detail, between policy and the details or technicalities of its implementation. The distinction is based on the principle that representative democracy demands that supreme legislative authority should be exercised by persons directly responsible to the electorate.

One significant benefit of delegated legislation is that it saves the parliamentary time that would be unnecessarily spent if masses of detail were contained in Bills. The statute book also benefits if it is not burdened with lengthy unmanageable detail. It is easier both for legislators and subsequently for others to use a statute if its principles and major provisions are prominent and free of complex detail.

However, the traditional rules restricting delegated legislation to procedure and detail do not allow adequately for the practical needs of modern government, for there are undoubtedly factors which in certain circumstances make delegated legislation on matters of substance both legitimate and desirable. These include

- legislative schemes, such as those involving economic controls, that demand a high degree of flexibility for their successful operation;
- circumstances where considerable flexibility may be needed to modify a

1 The delegation of power to issue codes of practice is treated as a special subject and discussed at p243.

2 Sir Courteney Ilbert, *Legislative Methods and Forms*, p310; S. A. de Smith, *Constitutional and Administrative Law*, pp337–341. See also D. L. Pearce, *Delegated Legislation in Australia and New Zealand*.

3 J. A. G. Griffith, 'Delegated Legislation—Some Recent Developments', 12 Modern Law Review 297, 306.

legislative scheme to meet local or exceptional circumstances requiring special treatment;
- circumstances where the technical content of laws is such that they are incomprehensible to anybody without knowledge in the field (laws on telecommunications or the operation of aircraft for example);
- schemes of a kind that several tiers of legislation are necessary to make them work. Matters such as town and country planning, public health, merchant shipping and civil aviation fall within this class;
- the necessity to cope with emergencies of various kinds.

In particular circumstances these considerations may be weighty, but they do not mean that the traditional views have been made obsolete by the needs of modern government and can be ignored. The traditional rules still hold good, but are subject to relaxation where this can be justified for sufficient reason. This is a matter for balanced consideration at the design stage of every major legislative scheme. The guidelines of legislative policy must always be established by principal legislation. It is within the sphere of the drafter's responsibility to make sure that extensive legislative power is not delegated for the wrong reasons.

There are three common 'wrong' reasons:

1. extravagant demands made by the executive; not inspired by a crazed thirst for power but made simply because 'it is, after all, easier to administer a wide grant of power, and gaps in statutes can more readily be filled by delegated legislation when no real limitation is placed on the making of such legislation';[4]
2. incomplete preparatory work on the part of the instructing officer or department;
3. over-reaction by the drafter to the ultra vires doctrine.[5]

The extent to which legislative power should properly be delegated in a particular case is not a matter which is capable of being considered in isolation. It should be considered in relation to

- the identity of the delegate, and the extent, if any, to which it is desired to authorise sub-delegation;
- consultation and other preliminary procedural obligations to be imposed on the delegate;
- the nature and extent of parliamentary supervision intended to be exercised.

Before passing to a discussion of each of these matters, a reminder is necessary that in this field, as in others, it is absolutely essential for drafters to be aware of the interpretation and other relevant general laws in force. There are likely to be provisions regulating the publication, commencement and laying before the legislature of delegated legislation and there may be powers implied generally in all cases where legislative power is delegated.[6]

4 S. D. Hotop, *Principles of Australian Administrative Law* (6th edn) p115.

5 A warning of Sir Carleton Allen is in point—'if the doctrine of ultra vires is to work at all, the powers which the courts are called on to interpret must be clearly defined and must be kept within ascertainable limits': *Law in the Making* (7th edn) p565.

6 For example see ss4, 11, 12, 13 and 14, Interpretation Act 1978 [UK]; Statutory Instruments Act 1946 [UK] and Laying of Documents before Parliament (Interpretation) Act 1948 [UK]; Acts and Regulations Publication Act 1989 [NZ] and the Regulations (Disallowance) Act 1989 [NZ].

Identity of delegate

In a consideration of the propriety of a proposed delegation of legislative power, a critical issue is the degree of accountability of the delegate to the legislature. For this reason legislative power should as a general rule be delegated beneath ministerial level only in exceptional cases where either adequate control is exercised by other means or the power is limited to administrative or procedural matters of little substance. Exceptions to the general rule apply to the long-established practice of delegating legislative powers to local government bodies and to bodies administering particular professions.

In Canada and New Zealand, the general practice is for the delegation of legislative power to be made to the Governor-General in Council, thus in theory affecting the whole Government with responsibility for the exercise of the power.

A similar effect is achieved in the United Kingdom by conferring power exercisable by 'Her Majesty by Order in Council', but in that country the practice of delegating legislative power to a Minister is also common. It is not unusual for the delegation to be to more than one Minister acting jointly.

Other provisions found in the United Kingdom are a stipulation that delegated legislation with financial implications may be made only 'with the consent of the Treasury' or 'with the approval of the Treasury' or 'by the Secretary of State and the Treasury acting jointly'.

There are two alternative methods available by which a Minister may be charged with responsibility for delegated legislation made on the initiative of a local or public authority.

- The power may be vested in the Minister and be exercisable 'on the advice of' or 'on the recommendation of' the authority.[7]
- The power may be vested in the local or public authority and be exercisable 'with the concurrence (or "consent" or "approval") of the Minister' or the legislation may be subject to the Minister's confirmation.

The practical effect of these alternatives is the same. The initiative for legislation rests with the local or public authority yet the Minister accepts responsibility in return for an effective veto. In the absence of a specific power, the Minister has no more than a veto and cannot modify what is submitted.[8]

An interesting variation is seen in s1 of the Level Crossings Act 1983 [UK] under which the power of the Secretary of State to make an order arises only if the operator of a crossing requests that an order be made and attaches a draft order. The operator must previously have given notice to affected local authorities and the Secretary of State must consider their representations (if any) before making an order.

If power to make bye-laws or other subordinate legislation is being conferred on a Board or other body of persons and there is no general provision in the statute indicating how resolutions of the body may be evidenced, a provision should be

7 Variations exist in the expression of the formula. Section 47 of the Housing Loans Insurance Act 1965 [Aust] provides that regulations 'shall not be made unless the regulations are in accordance with a recommendation made to the Minister by the Corporation'. Section 41 of the Surveyors Act 1966 [NZ] provides for regulations to be made by the Governor-General 'on the advice of the Minister given on the recommendation of the Board'.

8 Paragraph 6 of Sched 3 to the Airports Act 1986 [UK] empowers the Minister to confirm bye-laws 'with or without modification'. The extent to which the Minister could modify under this provision what is put up for confirmation is not clear

included specifying the manner in which the making of the legislation is to be signified. For example

> It is sufficient proof of the making of bye-laws by the Board if the bye-laws are signed by the chairman and one other member of the Board.

Sub-delegation[9]

Power to sub-delegate legislative power may be given expressly or arise by implication. It is justifiable only in special circumstances because the identity of the holder of a delegated legislative power should be decided by the legislature and should be certain. Whether such a power exists is a matter of statutory interpretation. If the statute is of such generality that on a fair reading of the whole it is clear that two or more tiers of delegated legislation are necessary to give it practical effect, then a power of sub-delegation may be implied.[10] Nevertheless, if power to sub-delegate is thought to be necessary it is important for this to be given expressly and for the sub-delegate to be identified. Similarly, if only a limited power of sub-delegation is to be conferred, the limits should be plainly defined. For example

> Any regulations made under this Act may provide for such authorities or persons as may be specified in the regulations to be empowered to make orders, proclamations, regulations, or to give notices or instructions for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as are necessary or expedient.

See also Civil Aviation Act 1982 [UK] s105(2), Sched 13, Part III.

Consultation and procedure

The long-established practice of consultation with interests which will be affected by proposed delegated legislation has in recent times been increasingly supplemented by a statutory obligation making consultation a condition precedent to the valid exercise of the delegated power.[11]

A direction to consult may take one of a number of possible forms.

GENERAL AND SPECIFIC DIRECTIONS

A direction to consult may name specifically the person or body to be consulted, it may be expressed in general terms, or it may include both a general and a specific direction.

9 Generally, see E. A. Driedger, 'Subordinate Legislation', 38 Can Bar Review 1, 21; *Hotop*, pp139–141.

10 See *Hawkes Bay Raw Milk Producers' Co-operative Co Ltd v New Zealand Milk Board* [1961] NZLR 218, CA.

11 On consultation generally, see Griffith, 12 Modern Law Review 297, 306; J. F. Garner, 'Consultation in Subordinate Legislation', [1964] Public Law 105; The Indian Law Institute, *Delegated Legislation in India*, p39; *Garner's Administrative Law* (6th edn by B. L. Jones) pp68–70; A. D. Jergesen, 'The Legal Requirements of Consultation', [1978] PL 290; and *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190 and *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164.

The simplest case is where the person or body to be consulted is named. For example

> The Minister, after consulting the Productivity Council, may make regulations for ...
>
> The Minister of Finance, after consulting the Governor of the Central Bank, may make regulations for ...

A direction to consult, expressed in general terms, is usually phrased subjectively so that a decision as to who is to be consulted is left to the person on whom the power is conferred. For example

> Before the Minister makes any regulations under this section, the Minister must
> (a) consult with such organisations as appear to the Minister to be representative of interests substantially affected by the regulations; and
> (b) consult such other persons as the Minister considers appropriate.

However, the obligation may be imposed with some measure of objectivity as in the following form:

> The Minister may make regulations for all or any of the following purposes after consulting such persons as the Minister has reason to believe are representative of interests affected by the regulations:

General and specific directions are seen in combination in the following example

> Before making any order or regulations under any provision of this Act to which this subsection applies, the Minister must consult
> (a) the Animal Health Board; and
> (b) such bodies as the Minister considers are representative of veterinary surgeons, pork importers, exporters and consumers; and
> (c) such other persons as the Minister thinks appropriate.

A general direction must be precise enough to leave the authority in no doubt as to the nature of the obligation to consult. The following example does not meet this requirement:

> The Secretary of State may, after consulting any scientific authority or authorities, by order make such modifications in any of the Schedules to this Act as he considers necessary or desirable for any of the following purposes ...
>
> *Endangered Species (Import and Export) Act 1976* [UK] s3.

An obligation to consult and a requirement for the approval of a third party may be combined in one empowering provision. For example

> Regulations prescribing fees payable to the Registrar under this Act or the period mentioned in section 8(2) above shall be made after consultation with the Registrar and with the approval of the Treasury ...
>
> *Data Protection Act 1984* [UK] s40(7).

Genuine consultation takes time and there is an obvious difficulty if the need for proposed regulations is too urgent to await the results of consultation. Public

safety may be involved. In such a case provision may be made for regulations of limited duration as seen in the following form:

> Where the Secretary of State proposes to make safety regulations it shall be his duty before he makes them
> (a) to consult such organisations as appear to him to be representative of interests substantially affected by the proposal;
> (b) to consult such other persons as he considers appropriate; and
> (c) in the case of proposed regulations relating to goods suitable for use at work, to consult the Health and Safety Commission in relation to the application of the proposed regulations to Great Britain;
> but the preceding provisions of this subsection shall not apply in the case of regulations which provide for the regulations to cease to have effect at the end of a period of not more than twelve months beginning with the day on which they come into force and which contain a statement that it appears to the Secretary of State that the need to protect the public requires that the regulations should be made without delay.
>
> *Consumer Protection Act 1987* [UK] s11(5).

ADVISORY COMMITTEES

Another device used for consultative purposes is the establishment by statute of an advisory body charged with the function of advising the Minister on proposed delegated legislation. Appointments to the committee are usually the responsibility of the Minister who is obliged to consult the committee before exercising the legislative power.

> (1) The Secretary of State for the time being charged with the exercise of the power to make building regulations and the Secretary of State for Wales acting jointly shall appoint a committee, to be known as the Building Regulations Advisory Committee, for the purpose of advising the Secretary of State on the exercise of his power to make building regulations, and on other subjects connected with building regulations.
>
> (2) The Secretary of State may pay such expenses incurred by members of the Building Regulations Advisory Committee as he may, with the approval of the Treasury, determine.
>
> (3) Before making any building regulations containing substantive requirements, the Secretary of State shall consult the Building Regulations Advisory Committee and such other bodies as appear to him to be representative of the interests concerned.
>
> *Building Act 1984* [UK] s14.

A most important body exercising functions of this nature in the United Kingdom is the Council on Tribunals which, by virtue of the Tribunals and Inquiries Act 1992 [UK], must be consulted before procedural rules are made for certain specified tribunals.

A procedure under which a Minister is obliged before making a statutory instrument to consult an advisory body, to provide an opportunity to submit representations and in the Minister's discretion cause a public inquiry to be held, may be found in the Wildlife and Countryside Act 1981 [UK] s26.

INDIVIDUAL OBJECTIONS AND REPRESENTATIONS

Provision may be made enabling individuals to object to proposed delegated legislation upon its publication in draft form in accordance with a statutory requirement. The nature of the publication required should be prescribed as should the procedure for objection. If an inquiry is to be held following an objection, the nature and procedure of the inquiry should also be specified.

A simple form is seen in s4 of the Sea Fisheries Regulation Act 1966 [UK] which follows:

> (1) Before making an order creating a sea fisheries district the Minister shall cause a draft of the order to be published locally in such manner as he may direct, and shall, if any objection is made to the draft order or any of the provisions thereof, cause such local inquiry to be held as may in his opinion be required.
>
> (2) Due notice of an inquiry under this section shall be given by advertisement or otherwise, and the report of the person holding the inquiry shall, if the order to which the inquiry related is to be made, be laid before Parliament with the draft of the statutory instrument containing the order.

A variation is seen in Sched 3 of the Airports Act 1986 [UK] which contains a procedure requiring an airport operator to give at least one month's notice in one or more local newspapers before submitting proposed bye-laws for confirmation by the Secretary of State. The notice must specify a period of not less than one month during which representations may be made to the Secretary of State. A copy of the proposed bye-laws must also be available for public inspection for a month at the office of the airport operator and a copy must be supplied on payment of a reasonable fee.

In the United Kingdom it is only in exceptional cases that the individual person is given a right of objection to proposed delegated legislation, but in the case of federal law in the United States of America this is the general rule. Section 4 of the Administrative Procedure Act (1946) provides for general notice of proposed rule-making to be published in the Federal Register and subject to exceptions 'the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity to present the same orally in any manner'.[12]

An instance of an opportunity being given the public to make representations regarding proposed delegated legislation is seen in s38(3) of the Trade Descriptions Act 1968 [UK] which provides that:

> (a) before making the order the Board of Trade shall consult with such organisations as appear to them to be representative of interests substantially affected by it and shall publish, in such manner as the Board think appropriate, notice of their intention to make the order and of the place where copies of the proposed order may be obtained; and
>
> (b) the order shall not be made until the expiration of a period of twenty-eight days from the publication of the notice and may then be made with such modifications (if any) as the Board of Trade think appropriate having regard to any representations received by them.

12 The Administrative Procedure Act of the USA is reprinted as Appendix 11 of J. F. Garner's *Administrative Law* (5th edn).

See also the Airports Act 1986 [UK] s63(5) and Sched 3.

The following form is from the Motor Vehicle Safety Act 1993 [Can] s 11:

> (3) Regulations proposed to be made under this Act shall be published in the *Canada Gazette* and a reasonable opportunity afforded to interested persons to make representations to the Minister with respect to them.
>
> (4) Subsection (3) does not require the publication of proposed regulations
> (a) that have been modified as a result of representations made to the Minister following their previous publication under that subsection; or
> (b) that would make no substantive change to existing regulations.

ADVISORY COMMITTEE—LAYING REPORT TO MINISTER BEFORE PARLIAMENT

A consultative procedure of interest is contained in s184 of the Pension Schemes Act 1993 [UK]. Before making regulations the Minister is obliged to refer the proposals, in the form of draft regulations or otherwise, to the Social Security Advisory Committee. The Committee then reports on the proposals to the Minister who is obliged to lay this report before Parliament together with any regulations the Minister makes. The Minister in such a case is in a delicate position. He must either accept the recommendations of the Committee or be prepared to defend a contrary decision in Parliament.

This procedure is not suitable in many circumstances, but it does provide a particularly effective means for the representation to the Minister and to Parliament of the views of affected parties.

This kind of consultative process ensures the participation of the affected parties in the legislative process in a real and practical way. Such consultation means something—unlike the window-dressing which may be permitted to pass for consultation where the direction to consult is general and the choice of persons to be consulted is subjective.

PREPARATION BY AFFECTED INTERESTS

Perhaps the most drastic form of consultation arises where the statute hands over the role of initiator of delegated legislation to a public or local authority (the affected interests) and restricts the role of the Minister to that of confirmation, approval or enactment upon the advice or recommendation of the authority.

Although in a rather special position, bye-laws made by local authorities often fall within this group. Other examples are certain marketing orders, development scheme orders, levy schemes and compulsory acquisition orders and also bye-laws of the type authorised by s63(5) and Sched 3 of the Airports Act 1986 [UK].

Publication[13]

Parliament can only hope to control and supervise what it is aware of. Laws will not be complied with unless affected persons are aware of them. The interests of affected persons as well as the interests of Parliament demand the swift publication

13 See *Kersell*, pp6–14; See also discussion at [1982] PL 569 and [1983] PL 395.

and availability to the public of all delegated legislation. In the United Kingdom, the Statutory Instruments Act 1946 provides for the publication of all statutory instruments but not all delegated legislation falls within the definition of that term.[14]

Gaps also exist in comparable legislation in other Commonwealth countries. It follows that specific provision for publication must be made in the enabling statute if the general law is not adequate.

For example—

> The Director may by order published in the Gazette prescribe the amount of tuition fees.

Here is an example of a direction as to local publication—

> Upon making an order under this Part, a competent authority must send the order for publication to each local authority affected by the order, and every such local authority must cause the order to be published in such manner as the local authority think sufficient and proper to ensure publicity.

Parliamentary supervision

SCRUTINY OR REVIEW COMMITTEES

Parliamentary committees can perform valuable services in relation to the supervision of delegated legislation but are beyond the scope of this work.[15] In some jurisdictions their work includes reviewing the delegation of legislative powers.

LAYING BEFORE LEGISLATURE[16]

A general obligation to lay delegated legislation before the legislature is found in Australia, New Zealand, Hong Kong and a considerable number of other countries thus, at least in theory, directing the attention of members of the legislature to the legislation and providing a means for its disallowance. It is desirable that the law imposing the general obligation should declare the consequences of failure to comply, eg that the delegated legislation should be void and of no effect (as provided by s48(3) of the Acts Interpretation Act 1901 [Aust]).[17]

In the United Kingdom, no general statutory rule exists but specific provision, in one of several common forms, is included in many statutes. Variations are employed from time to time but the principal methods of laying are below. Practice has not always been consistent in selecting which procedure should be provided for but the simpler negative resolution procedure, under which delegated

14 See *Garner's Administrative Law* (7th edn) (ed B. L. Jones) pp60 et seq.

15 See *Kersell*, pp28 et seq and Sir Cecil Carr, 'Parliamentary Control of Delegated Legislation', [1956] Public Law 200. See also J. R. Mallory, 'Parliamentary Scrutiny of Delegated Legislation in Canada', [1972] Public Law 30.

16 See *Kersell*, pp14–27; *Indian Law Institute*, pp165–198; A. I. L. Campbell, 'Laying and Delegated Legislation' [1983] PL 43.

17 See s48, Acts Interpretation Act 1901 [Aust]; Regulations (Disallowance) Act 1989 [NZ]; s34, Interpretation and General Clauses Ordinance [HK].

legislation may be annulled by parliamentary resolution, is very common. The disadvantages of this procedure are that busy parliamentarians do not have time to direct their minds to every piece of subsidiary legislation laid before them and, in addition, the shortage of parliamentary time may inhibit their apparent freedom of action.

However, the same consideration of shortage of parliamentary time weighs against the extensive use of the affirmative resolution procedure, under which a parliamentary resolution is necessary to confirm the delegated legislation, unless the content is of such importance or is so potentially controversial that the positive attention of Parliament is necessary. The case for the affirmative procedure is strong where the effect of the delegated legislation is to modify principal legislation, or it has significant financial implications or where the principal legislation is bare and has left much to the delegated legislation.[18]

Simple laying

The standard form in the United Kingdom is—

> Any Order in Council under this section shall be laid before Parliament after being made.

In general, instruments which must be laid under such a requirement must be laid before coming into operation.[19]

Negative resolution procedure

This method obliges the laying of the instrument which may, if desired, be of immediate effect but is in any event subject to annulment by resolution of the legislature. This method avoids delay in operation. The usual formula in the United Kingdom is:

> Any regulations made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

In some Australian jurisdictions this procedure has been further developed so that a time limit for laying is provided and a failure to lay within that period results in the expiry of the instrument. For example

> (1) Subordinate legislation must be tabled in the Legislative Assembly within 14 sitting days after it is notified in the Gazette.
>
> (2) If subordinate legislation is not tabled under subsection (1), it ceases to have effect.
>
> *Statutory Instruments Act 1992* [Q].

Section 51 of the same Act contains the following supplementary provisions that apply if subordinate legislation ceases to have effect because it is not tabled or is disallowed:

> (2) The subordinate legislation is taken never to have been made or approved and any law or provision of a law repealed or amended by the legislation is revived.

18 See 36 Modern Law Review 64.
19 See s4, Statutory Instruments Act 1946 [UK].

(3) However, subsection (2) does not affect anything done or suffered under the legislation before it ceased to have effect.

Affirmative resolution procedure

There are several alternatives in common use.

- The instrument is laid in draft and requires an affirmative resolution before it may be made.

  No order shall be made under this section unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.

- The instrument is made before laying but its operation is deferred until the instrument is approved by affirmative resolution.

  An order under this section shall be of no effect unless laid before and approved by a resolution of each House of Parliament.

- The instrument is made before laying but its continuance after a stated period is conditional upon the instrument being approved by affirmative resolution.

  (1) An order under section 7
  (a) shall be made by statutory instrument;
  (b) shall be laid before Parliament after being made; and
  (c) shall cease to have effect (without prejudice to anything previously done in reliance on the order) after the expiry of the period of 28 days beginning with the date on which it was made unless within that period it has been approved by a resolution of each House of Parliament.
  (2) In reckoning for the purposes of subsection (1) any period of 28 days, no account shall be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

A variation of the affirmative resolution procedure is seen in a New Zealand form in which an obligation to lay regulations within 16 sitting days is followed thus:

> All regulations laid before Parliament in any session pursuant to section 4(5) of this Act shall expire on the close of the last day of that session except so far as they are expressly validated or confirmed by an Act of Parliament passed during that session.
>
> *Petroleum Demand Restraint Act 1981* [NZ] s6(1).

Special procedure

In the United Kingdom, an empowering section may provide that an order 'shall be subject to special procedure'. This means that the order is subject to the procedure for publication and service of notice, petitions, report and parliamentary committee consideration laid down in the Statutory Orders (Special Procedure) Acts 1945 and 1965. Such a procedure is useful where local interests must be given an opportunity to oppose the proposed order if they wish. An instance is found in Sched 3 to the Land Drainage Act 1991 [UK].

Drafting enabling provisions

Classification of delegated legislation according to nomenclature is generally in a state of muddle. For a long time and in many places names such as rules, regulations, orders, notices, notifications, instruments, directions, schemes, proclamations, bye-laws and ordinances have been used inconsistently and indiscriminately.

The confused inheritance from the past is not easily reformed but drafters need not add fuel to the fire. It is suggested that

- 'regulations' should be the general term to describe delegated legislation of general application;
- 'rules' should be restricted to rules of a procedural nature, as for example rules of court or rules of procedure for an inquiry or tribunal;
- 'orders' should be the general term for miscellaneous legislative directions, orders, notices, and determinations of a particular or limited application to specific places, persons or classes of persons. This term might reasonably replace 'notices', 'notifications', 'instruments',[20] 'directions', 'proclamations' and 'schemes';
- 'bye-laws' should be restricted to laws of local application made by local or public authorities;
- 'ordinances' should be restricted to principal legislation in dependent territories.

The enabling provision should stipulate explicitly the form which delegated legislation is to take. Authority should never be given to make 'rules, regulations and orders ...'. Of course, one statute may authorise the making of various categories of subordinate legislation, but in order to avoid ambiguity one subsection should authorise the making of one category only and the nature of that category should be made clear.

It was suggested earlier in this chapter that wide legislative powers should not be delegated for the wrong reasons. Where it is practical to do so, a drafter should require, before drafting an enabling provision, to see an outline of, or at least a scheme for, all proposed delegated legislation. The drafter must know what it is he or she is expected to authorise. There are two considerations. First, there is the obvious necessity to cast the enabling provision in appropriate terms and, secondly, there is the necessity to get the legislative scheme right; in other words to ensure that matters which ought by reason of their importance or substance to be in primary legislation are not, either with malice aforethought or in blissful ignorance, to be slipped into subordinate legislation.

In all but the simplest cases, it is necessary to include a general regulation-making power and a series of more particular powers. It is usual to state the general power first and follow it with a series of paragraphs lettered consecutively containing the particular powers, although the reverse order is followed in New Zealand sections.

An alternative is for series of specific powers to be presented separately from the general empowering clause. Such clauses begin

> The regulations may provide for

20 This suggestion does not derogate from the acceptability of 'statutory instrument' or indeed any similar term used to describe various forms of delegated legislation collectively.

(a) ...
(b) ... etc

Regulations under this Act may—
(a) ...
(b) ... etc

In large and complex statutes, it is possible that specific powers may be scattered throughout the statute as well as those gathered in the general regulation-empowering provision. This is convenient for some users and inconvenient for others. It may assist users of a particular provision to know that the provision is supplemented by a regulation-making power but it does the reverse for the user who is approaching the statute from the general regulation-making provision and wants to know the extent of those powers. It is desirable to adopt a procedure under which all delegations of legislative power in the statute are either gathered together or are referred to in a note, perhaps presented beneath the general power. Such a note might read—

NOTE: In addition to the powers conferred in section 99, delegated legislative powers are also contained in sections 26, 28, 44, and 66.

GENERAL POWERS

There are many forms in current use and the differences are probably of very little significance.

The Minister may make regulations for carrying the provisions of this Act into effect and without prejudice to the generality of this provision
(a) ...
(b) ... etc

The Governor-General may make regulations, not inconsistent with this Act, prescribing matters
(a) required or permitted by this Act to be prescribed; or
(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[Aust]

The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
(a) ...
(b) ...
(c) ... etc
(x) providing for such matters as may be contemplated by or necessary for giving full effect to this Act and for its administration.

[New Zealand]

Other phrases in use for the same general purpose include 'for the better carrying out of the objects and purposes of this Act', 'to give effect to the provisions of this Act or for its better administration' and 'for carrying the purposes and provisions of this Act into effect'. The words 'not inconsistent with this Act'

included in the Australian form are redundant. There is no doubt that subordinate legislation cannot override an Act in the absence of a specific enabling provision to that effect.[21]

The apparent breadth and shadowy perimeters of the forms and phrases above are misleading because enabling provisions, whether general or particular, will be construed contextually with regard to the scope and purposes of the Act. Further, all the principles and presumptions usually applicable to the interpretation of statutes will apply; for example a power to tax, or legislate retrospectively, or deprive people of their property, or bind the Crown will not be readily implied.[22]

It is wise to regard general powers of this kind as ancillary or incidental to the purposes of the Act and as authorising administrative and procedural provisions but not provisions affecting substantive rights or imposing penal sanctions. In a Privy Council case,[23] Lord Guest adopted the following statement from an Australian decision:

> The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.

Delegations of legislative power should be drafted in such a way that legislators, courts and others affected are able to see clearly the limits of the power. Provision for a subjective test of necessity or expediency has been used in an attempt to remove the question of vires of delegated legislation from the authority of the courts. A subjective form is still used in Canada. Undoubtedly a formula of this kind restricts judicial review but it appears not to oust it completely because regulations must still fall within the four corners of the powers given by the legislature.[24] Only in the most exceptional cases, such as provision for emergency or war-time regulations, should a subjective criterion be introduced and even then it is desirable that the concept of reasonableness be introduced.

PARTICULAR POWERS

Care should be taken when drafting enabling provisions to get the balance right between generality and particularity. There is an especial need to avoid sloppiness and to rid the draft of superfluity. The paragraphs should be arranged in series so that any which concern matters of substance precede those that are procedural or administrative. So far as practicable, the paragraphs should form a logical sequence.

One or more of three techniques may be adopted. Authority may be conferred to legislate:

- for specified purposes;
- in respect of specified subject-matter;

21 See F. A. R. Bennion, *Statutory Interpretation* (2nd edn) p152.

22 Driedger, 38 Can Bar Review 1.

23 In *Utah Construction and Engineering Pty Ltd v Pataky* [1965] 3 All ER 650 at 653, Lord Guest referred to *Shanahan v Scott* (1957) 96 CLR 245 at 250.

24 See *McEldowney v Forde* [1971] AC 632 at 659–61; *Reade v Smith* [1959] NZLR 996; *Customs and Excise Comrs v Cure and Deely Ltd* [1962] 1 QB 340, [1961] 3 All ER 641.

- by stipulating particular powers.[25]

Power to legislate for specified purposes or in respect of specified subject-matter will more readily be construed as implying ancillary and incidental powers than will the stipulation of a particular power. However, this depends very largely on the breadth of meaning of the stipulative verb used. 'Prohibit', 'restrict', 'determine', 'prevent' may be construed narrowly but verbs like 'manage', 'regulate', 'control' are of wide signification.

Care must be taken to ensure that all the paragraphs in the series are drafted in such a way as to flow easily and grammatically from the introductory words. Particularly in the case of a long series of paragraphs, it is alarmingly easy to make the kind of mistake illustrated by paragraph (f) of the following example:

The Minister may make regulations
(a) with respect to the duties ...
(b) prescribing ...
(c) providing for ...
(d) regulating ...
(e) determining the procedure for ...
(f) the regulation of ...

POWER TO AMEND PRIMARY LEGISLATION

The Donoughmore Committee on Ministers' Powers regarded it as 'inconsistent with the principles of parliamentary government that the subordinate lawmaking authority should be given by the superior lawmaking authority power to amend a statute which has been passed by the superior authority'.[26]

This statement is sound as a general principle because the enactment and amendment of Acts of the legislature are prime constitutional responsibilities of the legislature in a democracy. However, the delegation of power to amend primary legislation by so-called 'Henry VIII clauses' is not necessarily improper if the power is contained within precisely defined limits that do not affect the principles of the primary legislation. There are a number of purposes for which delegations of this kind are generally considered acceptable. In such cases, consideration should always be given to the need to ensure publication and an appropriate level of parliamentary supervision.

The Deregulation and Contracting Out Act 1994 [UK] appears to be an extension of previous practice but the apparently wide power to amend primary legislation by order is subject to conditions including the following:

- a restriction on the penalty that can be attached to a new criminal offence
- a prohibition on including power for forcible entry, search or seizure
- a requirement for consultation with representative interests
- a draft order and specified explanatory information to be laid before Parliament
- an obligation to take account of parliamentary representations before the order is made.

25 See E. A. Driedger, *Legislative Forms and Precedents* (2nd edn) pp191 et seq, and 38 Can Bar Review 1, pp27 et seq.
26 Cmnd 4060, p59.

Some examples of acceptable practice follow:

Power may be given to amend provisions of primary legislation listing substances or objects or bodies to which an Act applies

(1) A person who, in any calendar year, makes or imports not less than ten chargeable vehicles is liable to be registered by the Commissioners.

(2) The Treasury may from time to time by order substitute another number for that specified in subsection (1) above.

Car Tax Act 1983 [UK] s4.

(1) This Act applies to the historic properties listed in Schedule 1.

(2) The Minister may make regulations amending Schedule 1 after consulting the Historic Properties Corporation.

Power may be delegated to amend primary legislation to meet emergencies[27]

(1) On the recommendation of the Minister, the President may at any time while a declaration of chemical emergency is in force make such regulations as the President believes, on reasonable grounds, are necessary or desirable for the management or elimination of the chemical in respect of which the emergency has been declared or otherwise for dealing effectively with the emergency.

(2) The Minister must, to the extent that is practical in the circumstances, consult such persons as the Minister believes on reasonable grounds are representative of interests affected by the proposed regulations before recommending that the President make regulations under this section.

Power is commonly given to amend local Acts in circumstances where a general Act covers similar subject-matter to that contained in various existing local Acts

For example

(1) The Secretary of State may by order
   (a) repeal any provision of a local Act passed before or in the same Session as this Act if it appears to him that the provision is inconsistent with or has become unnecessary in consequence of any enactment contained in this Act or of regulations made under any such enactment;
   (b) amend any provision of such an Act if it appears to him that the provision requires amendment in consequence of any enactment contained in this Act or of regulations made under any such enactment or of any repeal made by virtue of the preceding paragraph; and an order made in pursuance of this subsection may include such incidental or transitional provisions as the Secretary of State considers are appropriate in connection with the order.

(2) It shall be the duty of the Secretary of State, before he makes an order in pursuance of subsection (1) above amending or repealing any provision of a local

27 See also Final Report on Emergencies, NZLC R 22.

Act, to consult each local authority which he considers would be affected by the amendment or repeal of that provision.

(3) The power to make orders conferred by subsection (1) above shall be exercisable by statutory instrument; and any statutory instrument made in the exercise of that power shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Health and Social Services and Social Security Adjudications Act 1983 [UK] s31.

Power or even a duty to amend an Act by regulation in order to give effect to revisions of an international convention may be desirable

The Minister shall, by order, amend the schedule to incorporate any amendment to the Convention as soon as it is practicable after the amendment takes effect, and table any amendment in both Houses of Parliament within fifteen sitting days after the order is made.

Canada Wildlife Act s12(2).

The Governor-General may by Order in Council

(a) amend Schedule 4 (which contains the Protocol to the Convention) by making such amendments to the text of the Protocol as are required to bring that text up to date; or

(b) repeal Schedule 4 and substitute a new Schedule 4 containing an up to date text of the Protocol.

In s8 of the International Transport Conventions Act 1983 [UK], power is given to 'make such amendments of this Act as Her Majesty considers appropriate in consequence of the revision'. This is a very wide power but tempered somewhat by the obligation to have a draft order approved by both Houses of Parliament before the order is made.

Power may also be delegated to adjust an Act affecting a broad class of persons to fit the exceptional circumstances of a smaller class or classes within the broad class

An Act of wide application such as the Race Relations Act 1976 [UK] may require a means of dealing with specific problems which cannot be foreseen at the time of enactment. See s73 of that Act.

Delegation of legislative power may also be acceptable when the object is to bring up to date obsolete measures or procedures, eg to facilitate metrication

(1) The appropriate Minister may by regulations amend

(a) any of the relevant statutory provisions; or

(b) any provision of an enactment which relates to any matter relevant to any of the general purposes of this Part but is not among the relevant statutory provisions; or

(c) any provision of an instrument made or having effect under any such enactment as is mentioned in the preceding paragraph,

by substituting an amount or quantity expressed in metric units for an amount or quantity not so expressed or by substituting an amount or quantity expressed in metric units of a description specified in the regulations for an amount or quantity expressed in metric units of a different description.

(2) The amendments shall be such as to preserve the effect of the provisions mentioned except to such extent as in the opinion of the appropriate Minister is necessary to obtain amounts expressed in convenient and suitable terms.

(3) Regulations made by the appropriate Minister under this subsection may, in the case of a provision which falls within any of paragraphs (a) to (c) of subsection (1) above and contains words which refer to units other than metric units, repeal those words if the appropriate Minister is of the opinion that those words could be omitted without altering the effect of that provision.

Health and Safety at Work etc. Act 1974 [UK] s49(1) to (3).

POWER TO EXEMPT

The practical effect of a power to exempt a person from some provision of primary legislation may be as serious as those resulting from a power to amend primary legislation. The effect may also be discriminatory, and consideration should therefore be given to the desirability of requiring that the form of any exemption be of a legislative character and therefore made public and subject to the other safeguards available with respect to delegated legislation.

(1) The Minister may by order in the Gazette remit in whole or in part any fee payable by any person for a licence to import capital goods into ... if the Minister is satisfied that it is in the public interest to do so.

(2) Any such remission may apply either to specific instances or generally in respect of specified capital goods or capital goods of a specified class.

Regulations under this Act may provide for the exemption in a specified case or class of case of persons or things, or a class of persons or things, from all or any of the provisions of this Act or the regulations; and an exemption so provided may be unconditional or on specified conditions and either total or to an extent that is specified.

POWER TO LEGISLATE RETROSPECTIVELY

Delegated legislation may have retrospective effect only if the primary legislation containing the delegation either has that effect or authorises the delegated legislation to have that effect. '... no statute or order is to be construed as having a retrospective operation unless such a construction appears very clearly or by necessary and distinct implication in the Act.'[28]

Most instances of this kind operate to confer a benefit, such as the increase of a rate of interest to investors or a tax benefit or the amount of a pension or welfare benefit. The legislature can control the extent of the retrospectivity explicitly as in the following form:

An order increasing the amount of a benefit payable under this Part may be made with retrospective effect not greater than 3 months before the date the order is published in the *Gazette*.

28 Somervell LJ in *Master Ladies Tailors Organisation v Minister of Labour and National Service* [1950] 2 All ER 525, 528 and see also *Howell v Falmouth Boat Construction Co Ltd* [1951] AC 837, [1951] 2 All ER 278, HL.

POWER TO APPLY SUBORDINATE LEGISLATION TO CROWN OR GOVERNMENT

Delegated legislation may not bind the Crown or Government unless the principal legislation under which it is made either itself binds the Crown or declares that the delegated legislation may or shall bind the Crown.

The following form may be adapted:

> Her Majesty may by Order in Council provide for the application to the Crown of such of the provisions of this Act and of any regulations or order made under this Act as may be specified in the Order, with such exceptions, adaptations and modifications as may be so specified.
>
> *Food Act 1984* [UK] s133(1).

PENAL PROVISIONS

In the absence of a general power such as is commonly found in the more modern interpretation statutes, specific provision must be made empowering delegated legislation to include penal sanctions.

A paragraph may be included in the series of special powers:

> ... prescribing offences against regulations made under this section and prescribing fines not exceeding $200 in respect of any one offence.

> Regulations made under this section may provide that the contravention of any provision constitutes an offence and may prescribe penalties for any offence not exceeding a fine of $500 or imprisonment for six months, or both.

The above two forms set maximum limits in respect of the penalties which may be prescribed by delegated legislation; this is in most cases the best practice. There are two reasons why primary legislation should not itself fix the penalties. First, it is unreasonable that the legislature should be asked to assess the penalty for a variety of offences not yet in being and of a gravity not accurately foreseeable. Secondly, where a number of offences are likely to be provided for, some will very probably be more serious than others and it is appropriate that the penalties fixed by law should reflect this.

This general rule may properly be departed from where it is known that the delegated legislation will create only very minor offences and a low penalty is fixed. Section 46 of the Forestry Act 1967 [UK] in which a penalty equivalent to level 2 on the standard scale is fixed for contraventions of bye-laws authorised to be made by the Forestry Commissioners under that section provides an example.[29]

It is important that the penalty be limited or fixed with precision. Section 71(2) of the Industrial and Provident Societies Act 1965 [UK] gives power to prescribe 'reasonable' fines—an astonishing example of unjustifiable vagueness.

POWER TO PRESCRIBE FEES OR CHARGES

Authority to charge a fee must be conferred by statute unless the charge can be made on a contractual basis. The circumstances will determine whether an

29 See p372.

authority should simply be empowered to charge fees or whether the level of fees should be set by regulation. The second course will be necessary if Parliament is to retain a supervisory power. A simple power follows:

> may prescribe fees to be paid in respect of matters arising under or provided for or authorised by this Act.

Qualification of a general power can be included if desired.

> In making regulations prescribing fees, the Minister must have regard to the desirability of securing that the fees are sufficient to cover the expenses incurred by the Minister in discharging the Minister's functions under this Act.

MISCELLANEOUS FORMS EMPOWERING DELEGATED LEGISLATION

> prescribing fees or charges payable in respect of any application, licence, permit or other document under this Act;
>
> prescribing the forms or contents of applications, licences, registers, notices, orders and other documents required for the purposes of this Act, or authorising the Commissioner to prescribe such forms;
>
> prescribing requirements as to information to be given in or in connection with returns, applications and other documents delivered or made for the purposes of this Act, and the evidence to be supplied in support;
>
> as to the use of facilities provided by the ... and the conduct of persons within premises in which such facilities are contained;
>
> regulate the authentication of any certificate, notice or other document issued under this Act;
>
> require that any information or document required to be given or furnished be verified by statutory declaration;
>
> Regulations under this Part of this Act may make different provision for different cases or circumstances, and may contain incidental, supplementary or transitional provisions;
>
> Regulations made under the provisions of subsection (1) may require acts or things to be performed or done to the satisfaction of a prescribed person and may empower a prescribed person to issue orders to any other person requiring acts or things to be performed or done, imposing conditions and prescribing periods and dates upon, within or before which, such acts or things shall be performed or done or such conditions shall be fulfilled.
>
> *Dairy Industry Ordinance* [Tanz] s26(2).
>
> providing the procedure for the service of notices and documents under this Act and the times at which they shall be taken to have been served;
>
> prescribing the procedure to be followed for objections and appeals under this Act, and the making, consideration, hearing and determination of objections and appeals.

Chapter 16

Penal provisions

INTRODUCTION

Penal provisions never stand alone; they form part of the wider criminal law and that must never be disregarded. They are subject to restrictive construction and the benefit of doubt in case of possible alternative constructions will be given to the accused.[1]

A penal provision consists of two essential parts: first, a statement of the prohibited act, omission or other course of conduct and secondly, provision for the sanction that is applicable in case of a breach. The prohibition or obligation alone is ineffective, 'For it is but lost labour to say, "Do this, and avoid that", unless we also declare "this shall be the consequence of your non-compliance".'[2]

The design stage of the drafting process should include consideration, at least in broad outline, of the conduct (if any) to which a penal sanction must be attached in order that the proposed law will be capable of achieving its purpose. Consideration should be given whether a penal sanction is really necessary for the course of conduct in question. For example, provision for a penalty recoverable as a civil debt might be appropriate or perhaps cancellation or suspension of a licence or permit would be sufficient. When these questions have been answered, it is desirable also to consider whether the conduct intended to be penalised would infringe some existing law. New offences are often created unnecessarily.

A further area that calls for consideration is whether commission of the offence is to require in some degree a guilty mind as is usual or whether the special circumstances are such as to justify that the offence should be one of strict liability.[3]

Penal provisions created by regulatory statutes must fit naturally into and take proper account of the wider context of the general criminal law including criminal procedure and evidence. A working knowledge of those fields is necessary equipment for the drafter and, in that regard, this chapter can do no more than refer at this stage to some of the factors likely to be of practical significance.

Jurisdiction of courts

The extent of the criminal jurisdiction possessed by the various courts must be taken into account. This may turn on a distinction between indictable and

1 See *DPP v Ottewell* [1970] AC 642 at 649 per Lord Reid.
2 *Blackstone's Commentaries*, i 57.
3 See p360.

summary offences, between felonies and misdemeanours, on statutory lists of specified offences or on the quantum of punishment. Criminal jurisdiction will not be implied. The general rules must be complied with or specific provision made. Care must be taken to ensure that new offences created will be triable in an appropriate level of court.

Limited locality jurisdiction

If the jurisdiction of a court is limited to matters arising within a certain locality, or an offence is such that it may be committed extra-territorially, provision along the lines illustrated in the following examples may be necessary:

> A proceeding for an offence against this Act may be commenced, and the offence may for all incidental purposes be treated as having been committed, in any place in the Republic.

> A proceeding against any person for an offence under this Act may be commenced before the court in the Republic having appropriate jurisdiction in the place where that person is for the time being, and for all incidental and consequential purposes the offence shall be regarded as having been committed in that place.

> Any offence against this Act that is committed within New Zealand fisheries waters, or within the Convention Area by a New Zealand citizen or by use of a New Zealand vessel, shall be deemed to have been committed in New Zealand.
>
> *Driftnet Prohibition Act 1991* [NZ] s26(1).

Attempts

The general law may make provision for 'attempts' and if so specific provision is otiose. The following provision is typical of many:

> (1) A provision in an Act which creates or results in the creation of an offence is to be taken to include a provision that an attempt to commit such an offence itself constitutes an offence which may be dealt with and punished in the same manner as if the offence had been committed.
>
> (2) A person who is charged with an offence may be convicted of having attempted to commit that offence although the person was not charged with the attempt.
>
> (3) This section does not affect any law relating to attempts to commit offences at common law.

Time limits

Regard must be paid to statutory time limits for instituting prosecutions. A general provision for some quite short period of limitation, such as six months, is usual for offences triable summarily by magistrates.[4] Special considerations may justify

4 See, for example, s127 Magistrates' Courts Act 1980 [UK].

extending or reducing the general period. If the nature of the offence is such that it is probable that in many instances offences will not be discovered until the statutory period has passed, the period may require to be extended by provision similar to the following:

> Notwithstanding [reference to section containing general rule], summary proceedings for an offence under this Act may be instituted at any time within 2 years after the commission of the offence.

One possibility is for the institution of proceedings after the expiration of the ordinary period to be restricted to cases in which the Attorney General has given his consent. This can be achieved by adding the following words to the form above:

> ; but no such proceeding may be instituted more than 6 months after the commission of the offence except with the consent of the Attorney General.

Some other alternatives follow:

> (1) A proceeding for an offence against this Act may be commenced within 6 months after the day on which evidence, sufficient in the opinion of the Attorney General to justify the proceeding, comes to the Attorney General's knowledge.
>
> (2) A certificate of the Attorney General as to the day on which evidence of the kind referred to in subsection (1) came to the Attorney General's knowledge is conclusive evidence of the contents of the certificate for the purposes of this section.

> Notwithstanding anything in section 127 of the Magistrates' Courts Act 1980, an information relating to an offence under this Act which is triable by a magistrates' court in England and Wales may be so tried if it is laid at any time within three years after the commission of the offence and within twelve months after the date on which evidence sufficient in the opinion of the Director of Public Prosecutions, the Secretary of State or the Industrial Assurance Commissioner, as the case may be, to justify the proceedings comes to his knowledge.
>
> *Insurance Companies Act 1982* [UK] s94(2).

> An information in respect of an offence against this section may be laid at any time within 6 months after the time when the commission of the offence first became known or should have become known to the Commission.

A really broad brush is applied in the following example which permits the Attorney General to extend the time limit.

> Notwithstanding anything in any other Act, proceedings for the summary prosecution of an offence against this Act may be brought at any time within the period of three years after the commission of the offence or, with the consent in writing of the Attorney General, at any later time.
>
> *Insurance Act 1973* [Aust] s129.

Conversely, it is possible that particular circumstances may require that a time limit should be imposed rather than extended and a simple form may be adequate for this purpose. For example

A prosecution may not be instituted later than 2 years after the time when the subject matter of the prosecution arose.

Motor Vehicle Safety Act [Can] s18(2).

Institution of prosecutions

The general law as to who may institute and prosecute public criminal proceedings may require to be extended or restricted. For example

(1) A proceeding for an offence under this Act may be instituted and conducted by an inspector or by some member of the Public Service authorised in writing for the purpose by the Minister.

(2) An inspector or member of the Public Service who has in the course of that person's duty instituted or conducted a proceeding for an offence under this Act is not to be personally responsible for any costs incurred by or awarded against that person in connection with that proceeding .

Proceedings in respect of an offence created by or under this Act shall not, without the written consent of the Attorney General, be taken by any person other than
(a) a party aggrieved, or
(b) a local authority or body whose function it is to enforce the provision in question.

Building Act 1984 [UK] s113.

It may be desired to restrict prosecutions to cases where the Attorney General (or Director of Public Prosecutions) has personally consented.[5] A form similar to the following is usual

No prosecution in respect of an offence against this Act may be instituted in any court without the consent in writing of the Attorney General.

However, this form is not sufficient if the offence is such that it may be necessary to arrest an alleged offender and have him or her charged and remanded before the trial begins. To cover this situation, the following additional provision or something like it is necessary:

(2) A person charged with an offence against this Act may be arrested, or an arrest warrant issued and executed, and the person may be remanded in custody or on bail although the consent of the Attorney General to the institution of the prosecution has not been obtained, but no further proceedings may be taken until that consent has been obtained.[6]

If it is considered necessary to ensure that persons are not kept in remand custody for an unreasonable time while the consent of the Attorney General is sought, the following form may be used:

(3) Notwithstanding subsection (2), if a person is remanded in custody under that subsection, the person must, after the expiration of 28 days from the date on

5 See Bernard M. Dickens, 'The Attorney General's Consent to Prosecutions', 35 Modern Law Review 347.

6 See Prosecution of Offences Act 1985 [UK] ss2, 25, 26.

which the person was so remanded, be discharged from custody on entering into a recognisance without sureties unless within that period the Attorney General has consented to the institution of the prosecution.

Aiding, counselling etc

General provision may exist on the statute book concerning those who aid, abet, counsel, procure or are accessories to an offence.[7]

GENERAL FORMS

There are many satisfactory general forms in use for the creation of criminal offences. It is preferable that one or two forms should be adhered to for general use and departed from only where the constituent ingredients of a proposed offence make a different approach advantageous. Three methods of expression are available:

- the declaratory method
- the conditional method
- the directory method.

In each method

(a) the prohibited act, omission or course of conduct must be stated with clarity and precision; and
(b) a breach of the prohibited act, omission or course of conduct should be declared to be an offence; and
(c) a punishment should be specified.

In many cases (but not every case), these three ingredients can conveniently be combined in one sentence.

Declaratory forms

The following illustration follows the declaratory method:

> A person who ... [*set out the elements of the offence*] commits an offence and is liable to ... [*set out punishment*].

Although it is acceptable for a declaratory form to begin 'Any person who', or 'Every person who', or 'Whoever', the simpler declaration of 'A person who' is recommended strongly. Another variant of the declaratory form begins 'It shall be an offence for...' or in better shape 'It is an offence for...'[8]

If the offence is one which may be committed only by a limited class of persons, the word 'person' may need to be modified or replaced. For example

7 See p356.
8 An interesting example of the use of this form is in the Firearms Act 1968 [UK] which sets out in schedule form (Sched 6) the mode of prosecution and the punishment prescribed for each offence.

A master of an aircraft or vessel who ...
An owner or occupier of a factory who ...
A holder of a licence under this Act who ...
An employer who ...

Another common variation of the general declaratory form is

Every person who ... is guilty of an offence and shall be liable to ...

The words 'commits an offence', expressed in the present tense, are both simpler and clearer than the traditional expression 'shall be guilty of an offence'.

Conditional forms

A less direct approach, without apparent advantage, involves the use of a conditional clause. For example

If a person ... [*set out the elements of the offence*] ... that person is guilty of an offence and liable to ...

In some instances, the conditional clause follows the statement that an offence is committed.

A person commits an offence if that person ... [*set out the elements of the offence*].

Directory forms

Under the directory method, the course of conduct which must or must not be followed is expressed positively in the form of a command or negatively in the form of a prohibition.

A mine manager must maintain accurately and keep up to date a record book showing every accident at the mine.

No person shall spray, or permit to be sprayed, any water from the mouth or from any mouth-sprayer upon any articles which are being ironed or pressed in any laundry.

Provisions of these kinds are incomplete; they state what is commanded or prohibited but neither declare a contravention to constitute an offence nor specify a penalty. A supplementary provision is required, either as a subsection of the same section or elsewhere. It is often expressed in the following manner when intended to be of application to a number of provisions.

A person who contravenes or fails to comply with any of the provisions of section ____ or ____ commits an offence and is liable to ...[9]

9 The words 'or fails to comply with' are probably unnecessary. See *R v Commonwealth Court of Conciliation and Arbitration* (1953) 89 CLR 636 at 649.

When the directory method is used, it is important that the provision declaring that the prohibited conduct or omission constitutes an offence should refer to particular sections and, if need be, subsections. It should not be in the following general omnibus form.

> Any person who contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided shall be liable to ...

The above form is seriously deficient and should never be used. It may be found in the statutes of many jurisdictions but of course that is not of itself a valid argument in its favour. It fails to identify the conduct or omission constituting an offence and therefore produces uncertainty as to which breaches of provisions of the Act do amount to offences. Statutes contain many directory statements that are not intended to constitute offences (eg notice of an appeal shall be given within 14 days) and the form may result in offences being created unintentionally.

Statement of penalty

A practice in general use in Australia is clear, concise, convenient and strongly recommended. It consists of stating the prescribed penalty at the foot of a provision that establishes the offence. For example

> A person shall not obtain payment of a subsidy by means of a false or misleading statement.
> Penalty: $1000 or imprisonment for 12 months.

This form relies on a supplementary provision usually found in interpretation legislation in a form along the following lines:

> If a penalty
> (a) is specified in an Act without qualification at the foot of a section; or
> (b) is specified at the foot of a subsection of a section of an Act, but not at the foot of the section; or
> (c) is specified at the foot of a section of an Act and expressed to apply to a specified subsection or specified subsection of the section,
> then, unless the contrary is expressly provided, that specification indicates that a contravention of the section or subsection, or, as the case may be, any of the subsections, is an offence and that the offence is punishable on conviction by a penalty not exceeding that specified.

The punishment for an offence need not be stated in the same sentence as the statement of the offence. In a large statute which creates numerous offences attracting the same level of punishment, needless repetition is avoided if the punishment for such cases is provided by including a provision similar to one of the following:

> Every person who commits an offence against this Act for which no other penalty is provided is liable to ...

> A person guilty of an offence under this Act for which no other penalty is provided is liable to ...

However, general penalty provisions are likely to be presented much later in the Act than the offences to which they relate and may be difficult to find quickly. They are not recommended for general use. A measure of repetition is a small price to pay for the advantage resulting from presenting simply and unambiguously the penalty imposed in respect of an offence as part of the offence section, either integrated with the statement of the offence or stated immediately below it in the Australian style.

To summarise, it is apparent that there are many acceptable methods of achieving a similar legal result. The following general form is chosen for its simplicity and intelligibility:

> A person who ... [*set out the elements of the offence*] commits an offence and is liable to ... [*set out the punishment*].

A warning against redundancy and circumlocution is necessary. Consider this example:

> Any person who ... shall be deemed to have committed an offence against the provisions of this Act and shall be liable on conviction before a court of competent jurisdiction to a ...

Shorn of its wool, this form may be reduced to the following:

> Any person who ... is guilty of an offence and is liable to ...

The 'deeming' provision is misconceived and the remainder of the words omitted add nothing.

PARTIES TO OFFENCES

The drafter must have no doubts concerning the persons who may commit a particular offence. As a general rule, if the application of an offence is limited to the members of a group or class of persons, this should be made clear in the penal provision.[10]

An important illustration of the limitation of offences to members of a particular class arises in legislation of extra-territorial application in which the application of offences is often restricted to citizens of the country concerned.

General provision in some jurisdictions makes unnecessary particular provision for secondary or ancillary offenders. For example

> (1) When an offence is committed, each of the following persons is to be taken to have taken part in committing and to be guilty of the offence and may be charged with actually committing it—
>
> (a) a person who actually does the act or makes the omission which constitutes the offence; and
>
> (b) a person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence; and
>
> (c) a person who aids or abets another person in committing the offence; and

10 See the examples at p 354.

(d) a person who counsels or procures any other person to commit the offence (who may be charged either with committing the offence or with counselling or procuring its commission).

(2) A conviction of counselling or procuring the commission of an offence has the same consequences in all respects as a conviction of committing the offence.

(3) A person who procures another to do or omit to do any act of such a nature that, if the person had himself or herself done the act or made the omission, the act or omission would have constituted an offence on his or her part is guilty of an offence of the same kind, and may be charged with doing the act or making the omission, and is liable to the same punishment, as if he or she had done the act or made the omission.

Where the purpose of a penal provision is to prohibit an act which is the result of the joint contributing acts of a number of persons, the imposition and apportionment of responsibility for the act may require special provision.

An offence committed by a person due to the default of another person may be made the responsibility of that other person. For example

> Where the commission by any person of an offence under this Part of this Act or an instrument made under this Part is due to the act or default of some other person, the other person shall be guilty of an offence and may be charged with and convicted of the offence whether or not proceedings are taken against the first-mentioned person.
>
> *Weights and Measures Act 1985* [UK] s32.

VICARIOUS LIABILITY[11]

Vicarious liability 'is a necessary doctrine for the proper enforcement of much modern legislation ... but it is not one to be extended.'[12]

Whether one person will be held responsible for the acts of another is a matter of construction in each case. 'Regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.'[13] The drafter must leave no doubt. Such an important matter should in no circumstances be left to implication.

If the doctrine of vicarious liability is held to apply, a person subject to a statutory duty to which a penal sanction is attached who chooses to delegate the performance of that duty to another person (usually but not necessarily an employee) will nevertheless be personally liable for breaches of that duty by that other person. In many cases, the delegate's 'knowledge' will be imputed to him or her.[14]

11 See J. Ll. J. Edwards, *Mens Rea in Statutory Offences*, Chapter 7; Glanville Williams, *Textbook of Criminal Law* (2nd edn) Chapter 3; Smith and Hogan, *Criminal Law* (7th edn) pp53–86; P. T. Burns, 'The Test of Vicarious Criminal Liability' (1967) Crim LR 702.

12 Lord Goddard CJ in *Gardner v Akeroyd* [1952] 2 QB 743 at 751.

13 Atkins J (as he was then) in *Mousell Bros Ltd v London and North-Western Rly Co* [1917] 2 KB 836 at 845.

14 See *Vane v Yiannopoullos* [1965] AC 486, [1964] 3 All ER 820, HL; *Gifford v Police* [1965] NZLR 484, CA; *Howker v Robinson* [1973] QB 178, [1972] 2 All ER 786.

Responsibility for employees, contractors, agents, etc

Where an offence is committed against this Act or against any regulation made under this Act by any person acting as the agent or servant of another person, or being otherwise subject to the supervision or instructions of another person for the purposes of any employment in the course of which the offence was committed, that other person shall, without prejudice to the liability of the first-mentioned person, be liable under this Act in the same manner and to the same extent as if he had personally committed the offence if it is proved that the act which constituted the offence was committed with his consent or connivance or that it was attributable to any neglect on his part.

Arms Act 1983 [NZ] s67.

(1) If an employee or agent of the licensee, or a person acting or purporting to act on behalf of the licensee commits an offence against this Act for which the licensee would have been liable had it been committed by the licensee on premises to which the licence relates, the licensee is to be taken also to have committed an offence and is liable to the same penalty as is prescribed for the principal offence.

(2) A licensee may be proceeded against and convicted under subsection (1) although the employee or agent has not been proceeded against or has not been convicted under this Act.

(3) It is not a defence to an offence under subsection (1) to show that the licensee did not know, or could not reasonably have been aware of or have prevented the offence committed by the employee or agent or had taken reasonable steps to prevent the commission of the offence.

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(1) The holder of a licence must ensure that everyone acting under the authority complies with this Act.

(2) If another person acting under the licence commits an offence against a provision of this Act, the holder of the licence commits the offence of failing to ensure that the other person complied with the provision.
Penalty: (*the penalty prescribed for the provision*)

(3) Evidence that the other person has been convicted of an offence against the provision while acting under the licence is evidence that the holder of the licence committed the offence of failing to ensure the other person complied with the provision.

(4) It is a defence for the holder of the licence to prove that
(a) the holder issued appropriate instructions and used all reasonable precautions to ensure compliance with this Act; and
(b) the offence was committed without the holder's knowledge; and
(c) the holder could not by the exercise of reasonable diligence have stopped the commission of the offence.

Cf *Fisheries Act 1994* [Q] s219.

If an offence under Part 3 is committed by a person at a mine to which this Act applies, the mine manager, as well as the person who committed the offence, commits the offence and each of them is severally liable to conviction if

(a) the mine manager is proved knowingly to have permitted or employed the person to commit the offence; or
(b) the offence is proved to have been committed with the consent or connivance of the mine manager; or
(c) the offence is proved to be attributable to any neglect on the part of the mine manager.

Responsibility for children and animals

If a young person is employed in any factory in contravention of the provisions of this Act, the parent of the young person shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 1 on the standard scale, unless it appears to the court that the contravention occurred without the consent, connivance, or wilful default of the parent.

Factories Act 1961 [UK] s158.

Without limiting the provisions of section 66 of the Crimes Act 1961 (which relates to persons aiding or abetting the actual offender or counselling or procuring the commission of an offence), every person is guilty of an offence against section 3 or section 4 of this Act, as the case may be, who
(a) being the parent or a person in charge of any child under the age of sixteen years, knowingly permits the child to commit an offence against either of those sections, or fails without reasonable cause or excuse to prevent the child from committing or continuing such an offence; or
(b) being the owner or a person in charge of any animal, knowingly permits such an offence to be committed in respect of that animal, or fails without reasonable cause or excuse to prevent the commission or continuation of such an offence; or
(c) being the owner or occupier of any land, knowingly permits such an offence to be committed on that land, or fails without reasonable cause or excuse to prevent the commission or continuation of such an offence thereon.

Animals Protection Act 1960 [NZ] s5.

CORPORATIONS

Interpretation legislation usually provides that in the construction of penal provisions the expression 'person' includes a body corporate unless the contrary intention appears.[15] In some instances, the definition may be such as to include 'any corporation sole or body corporate or politic'.

Although, of necessity, a corporation must act through servants and agents, it nevertheless can as a matter of law perform the actus reus of an offence and may be guilty of offences involving mens rea.[16] There are, of course, some offences that cannot be committed by a corporation; bigamy is the stock example.

In the absence of statutory provision, a corporation cannot be convicted of an offence for which the only possible punishment is imprisonment.[17]

15 See L.H. Leigh, *The Criminal Responsibility of Corporations in English Law* (LSE Research Monographs No 2; Weidenfeld and Nicolson).
16 See *R v ICR Haulage Ltd* [1944] KB 551, [1944] 1 All ER 691, CCA; *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [1971] 2 All ER 127, HL.
17 *R v Ascanio Puck & Co and Paice* (1912) 76 JP 487.

The servants and agents of a corporation may also be made criminally liable for offences committed by the corporation. For example

> (1) If a corporation commits an offence under this Act and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or any person who was purporting to act in any such capacity, that person, as well as the corporation, commits the offence.
>
> (2) If the affairs of a corporation are managed by its members, subsection (1) applies to the acts and defaults of a member in connection with the member's functions of management as if the member were a director or the corporation.

> (1) If a corporation commits an offence under this Act, a director, manager, secretary or other similar officer of the corporation who was in any way by act or omission, directly or indirectly, knowingly concerned in or a party to the commission of the offence also commits that offence.
>
> (2) If it is necessary in a proceeding for an offence under this Act to establish the intention of a corporation, it is sufficient to show that an employee or agent of the corporation had that intention.

> If a body corporate commits an offence against this Act, every director and other person concerned in the management of the body corporate commits the offence unless that person proves that
> (a) the offence was committed without his or her consent or connivance; and
> (b) the person exercised all such diligence to prevent the commission of the offence as ought to have been exercised by that person having regard to the nature of his or her functions in that capacity and to all the circumstances.[18]

MENS REA AND STRICT LIABILITY[19]

> It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.[20]

The problem of mens rea or strict liability arises whenever a criminal offence is to be created. In every case, the drafter must consider whether the offence is to be one of strict liability, requiring no particular state of mind on the part of the offender, or one which is committed only if the offender has in some degree a guilty state of mind. Unless the drafter is clear in his or her mind as to the intention

18 See also the forms at p364.

19 This topic is of such importance and complexity that it is quite impossible to deal with it satisfactorily in a few lines, and familiarity with the relevant passages in the standard texts on criminal law is strongly recommended. See particularly, *Edwards*; *Glanville Williams*, Chapters 1–7; *Smith and Hogan*, Chapters 4–6; S. T. Stallybrass, 'The Eclipse of Mens Rea', 52 Law Quarterly Review 60; Lord Devlin, *Samples of Lawmaking*, Chapter 4. See *Sweet v Parsley* [1970] AC 132, [1969] 1 All ER 347, HL.

20 Lord Goddard in *Brend v Wood* (1946) 62 TLR 462 at 463.

in this matter then, of course, there is little hope of anyone else subsequently being very clear as to the legislative intention.

Many different words and phrases are used to establish some particular state of mind as a necessary ingredient of an offence and reasonable familiarity is essential with the case law on such expressions as 'maliciously', 'wilfully', 'knowingly', 'fraudulently', 'dishonestly', 'with intent to evade tax', 'without lawful justification', 'recklessly', 'without lawful excuse', 'negligently'.[21]

It is very likely that many a drafter uses the phrase 'without lawful excuse' or 'without reasonable excuse' with none too clear a vision of what the phrase is likely to mean in the proposed context. This is not too surprising as the phrase has a comforting effect on one's liberal tendencies and anyway there is not much authority about. See *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 2 QB 426, [1972] 3 All ER 232.

'Calculated to' is an ambiguous phrase better replaced by 'likely to'. As Professor Hood Phillips says, 'Parliamentary draftsmen should stop using this ambiguous word which is calculated to confuse, and should use language that conveys the intended rather than the likely meaning.'[22]

'Causing', 'permitting', 'allowing' and 'suffering' also deserve study.[23] It is necessary to approach all these expressions, and the mass of case law they have generated, with a measure of caution. Without exception, they are vague expressions capable of substantial variation in meaning according to context. Definition may be desirable in some cases if uncertainty is to be avoided.[24]

It has become customary in certain fields for offences of strict liability to be created because the subject-matter in those areas is such that it is considered justifiable to demand a high standard of positive care and control in the interests of society as a whole. Thus, a penal provision phrased in absolute terms is likely to be construed as one of strict liability where the statute is concerned to regulate food and drugs, poisons, animal foods, fertilisers, weights and measures, merchandise marks, public health, and building requirements. Nevertheless, although the statute may be dealing with a grave social evil, strict liability is not likely to be construed as intended where its imposition would not improve the observance of the law.[25]

In *Sweet* v *Parsley* [1969] 1 All ER 347 at 363 Lord Diplock said

> But where the subject-matter of a statute is the regulation of a particular activity involving potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not, the court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who choose to participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not lightly to be drawn, nor is there any room for it unless there is something

21 'Unlawfully' is an ambiguous word which should be avoided. See *Glanville Williams*, pp27–29; *R v Smith* [1970] NZLR 1057, CA.

22 See 'Calculated to Confuse', 89 Law Quarterly Review 175.

23 As to 'causing' see *Alphacell Ltd v Woodward* [1972] AC 824, [1972] 2 All ER 475, HL.

24 See Sir Bernard MacKenna, 'The Undefined Adverb in Criminal Statutes' (1966) Crim LR 548.

25 On this point and for a useful treatment of the problems of mens rea, see *Lim Chin Aik v R* [1963] AC 160, [1963] 1 All ER 223, PC; *Warner v Metropolitan Police Comr* [1969] 2 AC 256, [1968] 2 All ER 356, HL; *R v Strawbridge* [1970] NZLR 909. See also (1976) Crim LR 376; *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, [1984] 2 All ER 503.

that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation (see *Lim Chin Aik v R*).

In a context where doubt is likely, this should be removed by specific provision. The following example is an adaptation of s30 of the Food Act 1981 [NZ]:

(1) In a prosecution for selling food contrary to this Act it is not necessary to prove that the defendant intended to commit the offence.

(2) Subject to subsection (3), it is a good defence in any such prosecution if the defendant proves—
(a) that he or she did not intend to commit an offence against this Act; and
(b) that—
(i) in a case where it is alleged that anything required to be done to or with the food was not done, the defendant took all reasonable steps to ensure that it was done; or
(ii) in a case where it is alleged that anything prohibited was done to or with the food, the defendant took all reasonable steps to ensure that it was not done.

(3) Subsection (2) applies only if, within 7 days after the service of the summons or such further time as the court may allow, the defendant has delivered to the prosecutor a written notice of intention to rely on that subsection and specifying the reasonable steps the defendant claims to have taken.

(4) The defendant may not give evidence of any step other than those specified in the notice under subsection (3) except with the leave of the court.

SPECIAL DEFENCES

Age of accused

In proceedings against a person for an offence under subsection (1), it is a defence for that person to show that at the time the alleged offence took place he or she was under the age of 18 and was not acting in the course or furtherance of a business.

Weather or other reasonable cause

It is a defence to a prosecution for an offence against a provision of subsection (2) or (3) if the person charged proves that he was prevented from complying with the provision by stress of weather or other reasonable cause.

Cf *Customs Act 1901* [Aust] s60(4).

Emergency action

In any proceedings against a person for an offence under section 4 of this Act consisting in the carriage of goods or persons to or from a ship or aircraft it shall be a defence for him to prove—

(a) that the ship or aircraft was, or was believed to be, wrecked, stranded or in distress, and that the goods or persons carried were carried for the purpose of preserving the ship or aircraft, or its cargo or apparel, or saving the lives of persons on board of it; or

(b) that a person on board of the ship or aircraft was, or was believed to be, suffering from hurt, injury or illness, and that the goods or persons were carried for the purpose of securing that the necessary surgical or medical advice and attendance were rendered to him.

Marine, &c, Broadcasting (Offences) Act 1967 [UK] s7(1).

Protection of health, property, environment

It is a defence to a prosecution for an offence under this section if the defendant proves that

(a) the action or occurrence to which the prosecution relates was necessary to save or protect life or health of some person or persons, to protect serious damage to property, or to avoid an adverse effect on the environment; and

(b) the conduct of the defendant was reasonable in the circumstances; and

(c) the defendant took reasonable and timely steps to remedy or mitigate the effects of the action or occurrence.

Action beyond control of defendant

(1) It is a defence to a prosecution for an offence under this section if the defendant proves that

(a) the action or occurrence to which the prosecution relates was due to an occurrence beyond the control of the defendant, such as but not restricted to natural disaster, mechanical failure, sabotage or other criminal activity; and

(b) the action or occurrence could not reasonably have been foreseen or provided for by the defendant; and

(c) the defendant took reasonable and timely steps to remedy or mitigate the effects of the action or occurrence.

(2) Subsection (1) does not apply unless within 14 days after being served with the summons (or such further time as the court may allow) the defendant notifies the prosecutor in writing that the defendant intends to rely on subsection (1) and specifies the facts that the defendant intends to rely on under that subsection.

Course of business or employment

In proceedings for an offence under any of the preceding provisions of this Part consisting of the advertisement for sale of any food, it shall be a defence for the person charged to prove—

(a) that he is a person whose business it is to publish or arrange for the publication of advertisements; and

(b) that he received the advertisement in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to an offence under that provision.

Food Safety Act 1990 [UK] s22.

Without prejudice to the liability of any equipment to be forfeited, it shall be a defence for any person charged with an offence under subsection (1) above in respect of the use for trade of any equipment to show—

(a) that he used the equipment only in the course of his employment by some other person; and

(b) that he neither knew, nor might reasonably have been expected to know, nor had any reason to suspect, the equipment to be false or unjust.

Weights and Measures Act 1985 [UK] s17(2).

Mistake, accident, act of another and diligence

(1) In any proceedings for an offence under this Part of this Act, subject to subsection (2) below, it shall be a defence for the person charged to prove—

(a) that the commission of the offence was due to a mistake or to reliance on information supplied to him or to the act or default of another person, an accident or some other cause beyond his control; and

(b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

(2) If in any such case the defence provided by subsection (1) above involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless, within a period ending seven clear days before the hearing, he has served on the prosecutor a notice in writing giving such information identifying or assisting in the identification of that other person as was then in his possession.

Registered Homes Act 1984 [UK] s18.

As to this precedent see *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [1971] 2 All ER 127, HL.

Warranty

See Weights and Measures Act 1985 [UK] s33; Medicines Act 1968 [UK] ss122, 123; Food Act 1981 [NZ] s31.

Precautions and diligence

(1) In any proceedings for an offence under this Act it is a defence for the person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

(2) Without prejudice to the generality of subsection (1) above, a person is to be taken to have established the defence provided by that subsection if he proves

(a) that he acted under instructions given to him by his employer; or

(b) that he acted in reliance on information supplied by another person without any reason to suppose that the information was false or misleading,

and in either case that he took all such steps as were reasonably open to him to ensure that no offence would be committed.

(3) If in any case the defence provided by subsection (1) above involves an allegation that the commission of the offence was due to an act or omission by another person, other than the giving of instructions to the person charged with the offence by his employer, or to reliance on information supplied by another person, the person charged shall not, without leave of the court, be entitled to rely on that defence unless within a period ending seven clear days before the hearing he has served on the prosecution a notice giving such information identifying or assisting in the identification of that other person as was then in his possession.

Food and Environment Protection Act 1985 [UK] s22.

Any conduct engaged in on behalf of a corporation by an executive officer, employee or agent of the corporation within the scope of that person's actual or apparent authority is to be taken in a proceeding for an offence against this Act to have been engaged in also by the corporation unless the corporation proves that it took reasonable precautions and exercised proper diligence to avoid the conduct.

EVIDENCE BY CERTIFICATE[26]

When provision is made for matter to be provable by the certificate of a particular public officer or other specified person, the primary function of the provision is to declare the admissibility as evidence of the certificate and in this way to ensure that the certificate cannot be excluded by a court. In addition, the provision may go further and determine the probative value of the certificate as evidence.

A certificate may be declared to be 'evidence', 'prima facie evidence', 'sufficient evidence', or 'conclusive evidence' of its contents.

If the certificate is declared to be 'evidence', it is evidence which, if accepted by the court, establishes a fact in the absence of acceptable evidence to the contrary.

If the certificate is declared to be 'sufficient evidence', it is evidence which if there is no contradictory evidence establishes a fact. The term is, however, not always free from ambiguity when considered in context.[27]

The term 'prima facie evidence' is no longer in use in the United Kingdom. It is also criticised by Driedger as ambiguous.[28] It is better avoided.

'Conclusive evidence', in the absence of fraud or patent inaccuracy, precludes evidence to the contrary and provision that a certificate is conclusive evidence is therefore proper only where either the accuracy of what is certified is quite beyond doubt or the matter is such that a definitive ruling from a public authority is appropriate.

In most cases, it is best to provide that a certificate is 'evidence'. From a practical point of view, the certificate is likely in any proceedings to be given the probative value appropriate to the comprehensiveness and relevance of its content.

It does not of course follow that because a certificate is made evidence, the court will be satisfied by it. A certificate must be complete and must be most carefully drafted. A certificate has no magic of its own. Admissibility is no more than the

26 See E. A. Driedger, *Legislative Forms and Precedents* (2nd edn) Chapter V.
27 See 17 Halsbury's Laws of England (4th edn) 22, 116–117.
28 *Driedger*, p268.

gateway to proof. Particular care must be taken with preserving the chain of evidence of possession where expert evidence concerning some item is to be given by certificate. In some contexts it will be desirable to prescribe the form of the certificate.

Where certificate is evidence

(1) In any proceeding for an offence under this Act, a certificate signed by or on behalf of a licensing authority and stating
  (a) that, on any date, a person was or was not the holder of an operator's licence, a special authorisation or a transport manager's licence granted by the authority;
  (b) the dates of the coming into force and expiration of any such licence or authorisation granted by the authority;
  (c) the terms and conditions of any operator's licence or special authorisation granted by the authority;
  (d) that a person is by virtue of an order of the authority disqualified from holding or obtaining an operator's licence, a special authorisation or a transport manager's licence indefinitely or for a specified period;
  (e) that, on any date or during any specified period, any such licence or authorisation granted by the authority was of no effect by reason of a direction that it be suspended,

is evidence of the facts stated in the certificate.

(2) A certificate stating any of the matters mentioned in subsection (1) and appearing to be signed by or on behalf of a licensing authority is to be presumed to be so signed unless the contrary is proved.

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(1) The Registrar may issue a certificate stating
  (a) that a particular person was or was not registered as the holder of a water permit on a particular day or during a particular period;
  (b) the type or conditions of a particular water permit;
  (c) the suspension or cancellation of a water permit;
  (d) any other particulars recorded in the register of water permits.

(2) A certificate under this section is admissible in a proceeding as evidence of its contents.

For the admission of evidence, by certificate of a constable, for the purpose of determining by whom a vehicle was being driven or used, see Road Traffic Offenders Act 1988 [UK] s11. See also Video Recordings Act 1984 [UK] s19 and Tokyo Convention Act 1967 [UK] s6.

Where certificate is sufficient evidence

(1) Subject to subsection (3), a certificate of an analyst appointed under subsection (4) stating that the analyst has analysed or examined a substance and stating the result of the analysis or examination is admissible in any proceeding under this Act as sufficient evidence of the matters in the certificate and of the correctness of the result of the analysis or examination.

(2) A document purporting to be a certificate referred to in subsection (1) is, unless the contrary is established, presumed to be such a certificate and to have been properly given.

(3) A certificate must not be admitted in evidence under subsection (1) in a proceeding for an offence against this Act unless the defendant has been given a copy of the certificate together with reasonable notice of the intention to produce the certificate as evidence in the proceedings.

(4) The Minister may appoint a person to be an analyst for the purposes of this Act.

(5) In a proceeding for an offence against this Act, the defendant cannot adduce evidence in rebuttal of an analyst's certificate in relation to any matter of which the certificate is sufficient evidence unless, within 5 days after a copy of the certificate is given to the defendant in accordance with subsection (3), or such further time as the court may allow, the defendant gives notice in writing to the prosecutor to the effect that he intends to adduce evidence in rebuttal of the certificate in relation to that matter.

A certificate appearing to be signed by the Commissioner is admissible in any proceeding against an institution for the recovery of penal tax and is sufficient evidence of the matters stated in the certificate to the extent that the certificate certifies that

(a) the financial institution named in the certificate was liable to duty in respect of the period specified in the certificate;
(b) an assessment of duty was properly made against the institution;
(c) the particulars of the assessment are as stated in the certificate;
(d) notice of the assessment was duly served upon the institution;
(e) the amount specified in the certificate was at the date of the certificate payable as duty by the financial institution named in the certificate.

Where certificate is conclusive evidence

(1) A certificate signed by the Minister responsible for foreign affairs that on a date stated in the certificate a specified country was or was not a Commonwealth country, or that a specified territory was or was not one for whose international relations a specified Commonwealth country was responsible, is conclusive evidence of what is stated in the certificate.

(2) A certificate that purports to have been signed by the Minister responsible for foreign affairs for the purposes of this section is presumed, unless the contrary is proved, to have been signed by that person.

63(7). A certificate of a veterinary inspector to the effect that an animal is or was affected with a disease specified in the certificate shall, for the purposes of this Act, be conclusive evidence in all courts of justice of the matter certified.

79(1). In any proceedings under this Act no proof shall be required of the appointment or handwriting of an inspector or other officer of the Minister or of the clerk or an inspector or other officer of a local authority.

Animal Health Act 1981 [UK] ss63(7), 79(1).

A certificate signed by the Secretary of External Relations and Trade and stating

(a) that a specified country is or is not a country in respect of which the Convention is in force as between that country and New Zealand; and

(b) where applicable, that there is in effect in respect of any specified provision of the Convention a reservation made by any Contracting State pursuant to Article 42 of the Convention

shall, unless the contrary is proved by the production of another certificate issued under this section (being a certificate that was issued after the first-mentioned certificate was issued), for all purposes be conclusive evidence of the matters stated in the certificate.

Guardianship Amendment Act 1991 [NZ] s6.

Certificates

A form of certificate should not be prescribed as a matter of course. That may be quite unnecessary. On the one hand a prescribed form may provide a useful reminder of necessary procedures and ensure completeness; on the other hand a prescribed form may prove too inflexible and restrictive. Prescription is justifiable in the form that follows because of the necessity in that context of establishing a chain of possession clearly.

FILM PROCESSING CERTIFICATE

The Criminal Procedure Code
(Section 154A)

I, _____ of _____ an officer appointed under section 154A of the Criminal Procedure Code, certify that

(1) On the _____ day of _____ 19 ___ at _____ , I received a sealed packet from _____ purporting to be sent by _____ which contained exposed [and processed] photographic film(s), under cover of a letter No ___ dated _____ purporting to be sent by _____ requesting that I should process the said film(s) and [prepare from it photographic print(s) and enlargement(s)].

(2) That letter and packet were each signed and dated by me and are attached as annexures 1 and 2 respectively.

(3) In response to that request I processed the said film(s) and [prepared from it photographic print(s) and/enlargement(s)] each of which I have signed and attached to this certificate as annexure(s) _____.

(4) The photographic print(s) and [enlargement(s)] attached to this certificate as annexure(s) _____ is/are as nearly as may be exact reproduction(s) from the exposed [and processed] film(s) submitted to me and have in no way been retouched, altered or otherwise interfered with in the process of their preparation.

Signed at _____ on _____ 19_____

.....
(Signature)

Power to make regulations as to evidence by certificate

See Trade Descriptions Act 1968 [UK] s31.

Admissibility of written statements

It is appropriate only in exceptional circumstances to provide for the admissibility of written statements of evidence. Availability in court for cross-examination is highly desirable to provide credibility to the evidence of a witness, but where the duties of an officer are such that the officer cannot readily be made available to give oral testimony, a provision similar to the following may possibly be necessary:

(1) Where in any proceedings before a court in the United Kingdom for an offence committed on board an aircraft the testimony of any person is required and the court is satisfied that the person in question cannot be found in the United Kingdom, there shall be admissible in evidence before that court any deposition relating to the subject matter of those proceedings previously made on oath by that person outside the United Kingdom which was so made
   (a) in the presence of the person charged with the offence; and
   (b) before a judge or magistrate of a country such as is mentioned in Schedule 3 to the British Nationality Act 1981 as for the time being in force or which was part of Her Majesty's dominions at the time the deposition was made or in which Her Majesty had jurisdiction at that time, or before a consular officer of Her Majesty's Government in the United Kingdom.

(2) Any such deposition shall be authenticated by the signature of the judge, magistrate or consular officer before whom it was made who shall certify that the person charged with the offence was present at the taking of the deposition.

(3) It shall not be necessary in any proceedings to prove the signature or official character of the person appearing so to have authenticated any such deposition or to have given such a certificate, and such certificate shall, unless the contrary is proved, be sufficient evidence in any proceedings that the person charged with the offence was present at the making of the deposition.

(4) If a complaint is made to such a consular officer as aforesaid that any offence has been committed on a British-controlled aircraft while in flight elsewhere than in or over the United Kingdom, that officer may inquire into the case upon oath.

(5) In this section—
deposition includes any affidavit, affirmation or statement made upon oath; and **oath** includes an affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing;
and subsections (4) and (5) of section 92 above shall apply for the purposes of this section as they apply for the purposes of that section.

(6) Nothing in this section shall prejudice the admission as evidence of any deposition which is admissible in evidence apart from this section.

Civil Aviation Act 1982 [UK] s95.

(1) In any civil or criminal proceedings a written statement purporting to be a report made by a British or foreign sea-fishery officer on matters ascertained in the course of exercising his powers under section 9 above for the purpose of enforcing the provisions of any convention mentioned in that section shall be admissible as evidence to the like extent as oral evidence to the like effect by that officer.

(2) Subsection (1) above shall be taken to be in addition to, and not to derogate from, the provisions of any other enactment relating to the reception or admissibility of documentary evidence.

Sea Fisheries Act 1968 [UK] s11.

PRESUMPTIONS

In order to facilitate the proof of facts material to an offence, a statute may include a presumption as to one or more of those facts. If evidence may be admitted conflicting with the presumption, it is known as a rebuttable presumption. If evidence conflicting with the presumption is not admissible, the presumption is irrebuttable.

When drafting a presumption, or considering whether it would be proper and useful to include a presumption, the drafter must keep in the forefront of his or her mind one word—fairness. The presumption central to our system of criminal law must not be forgotten—the presumption of innocence until proof of guilt beyond reasonable doubt. The drafter must not by including presumptions aimed at making the task of the prosecution easier tip the scales of justice unfairly.

An irrebuttable presumption is suitable only to facilitate the proof of a fact, the truth of which is not open to dispute, by a person with indisputable knowledge of that fact. An example might be a certificate given by the Minister of Foreign Affairs that a particular country was or was not a party to an international convention at a particular time.

A rebuttable presumption shifts the burden of proof to the defendant and is proper only when such a departure from established principle is fair and reasonable in the particular circumstances. This may be so where there are serious practical difficulties facing the prosecution in proving a fact which would not face a defendant able to disprove the fact.

A few examples follow, but these are not necessarily acceptable in other contexts.

If a question arises in any proceeding under this Act as to whether any forest produce is the property of the Crown, the forest produce is presumed to be the property of the Crown until the contrary is proved.

Where the owner or person in charge of an animal is charged with an offence against this Act relative to disease or to any illness of the animal, he shall be presumed to have known of the existence of the disease or illness unless and until he shows to the court's satisfaction that—

(a) he had not knowledge of the existence of that disease or illness, and

(b) he could not with reasonable diligence have obtained that knowledge.

Animal Health Act 1981 [UK] s79(2).

If it is alleged in any proceeding for an offence under this section that a person was at any time under the age of 18 years and the person appears to the court to have been

under that age at that time, the person is presumed for the purposes of the proceeding to have then been under that age unless the contrary is proved.

A document that purports
(a) to be the *Gazette*; or
(b) to have been printed or published by the Government Printer; or
(c) to have been printed or published by authority of the President of the Republic,
is presumed, unless the contrary is proved, to be what it purports to be and to have been so printed or published and to have been published on the date on which it purports to have been published.

If liquor is supplied to a person who has paid for admission to or seating in the premises where the liquor is supplied, the liquor is presumed, unless the contrary is proved, to have been sold to the person to whom it was supplied.

If, on the hearing of a proceeding for an offence requiring proof that premises were kept or used for playing a game of chance, a person is found to have been playing a game of chance on those premises, it must be presumed, unless the contrary is proved, that the games played at those premises were games played for money.

ONUS OF PROOF IN RELATION TO EXCEPTIONS

In many instances the task of drafting an offence provision is complicated by the necessity to provide for one or more exceptions. A simple example would be a provision making it an offence to purchase an elephant except with a permit. On a prosecution where does the onus of proof lie? Must the prosecution prove the negative that no permit was issued or does the onus rest on the defendant to prove that he or she had been issued with a permit? Too often drafters evade their responsibilities and do not provide the specific guidance that is necessary. The matter is much too important to be left to the uncertainties of statutory interpretation. In the absence of a specific statement, courts distinguish between a requirement which forms part of the statement of a general rule and one which is regarded as outside the general rule. In the former case the exception is categorised as an element of the offence for the prosecution to prove. In the latter case, the defendant has the onus of proving that he or she falls within the exception.[29]

The criteria relevant to presumptions are similarly relevant to this area. Concern to facilitate prosecution must not derogate unfairly from the fundamental principle of innocence until proof of guilt. In some jurisdictions there may be a general provision applicable about the onus of proof in relation to exceptions. In such a case, the drafter must consider whether the general rule is appropriate in the particular context and must also be concerned to make it clear whether particular words in the draft do or do not amount to an exception.

PUNISHMENT

Those who instruct the drafter are obliged to provide information as to the degree of seriousness with which they believe particular offences in draft legislation ought

29 *Vines v Djordievitch* (1955) 91 CLR 512 at 519; *Chugg v Pacific Dunlop Ltd* (1990) 64 ALJR 599 at 602.

to be regarded; but the drafter is obliged to consider those views in the wider context of the existing law. The drafter is concerned in the interests of justice to do what is practicable to ensure that analogous offences attract liability to similar punishments. However, social policy on punishment is inconstant and ever-developing, and the desirability of consistency certainly does not require that the draft of a statute should blindly adopt penalties prescribed for analogous offences in existing legislation. Indeed, comparisons of this kind often reveal a pressing need to revise the penalties in the existing legislation.

There must always be a reasonable regard for consistency, but the principal aim must be to fix an appropriate maximum penalty having regard to the social implications of the offence, the profit to be made from it, the possible need to impose a deterrent sentence, the likelihood of persons charged with such an offence being able to pay a fine, and the reform potential of likely offenders.

It is important not to slide into the habit of providing for imprisonment and a fine as a matter of course. Provision for imprisonment may be both unnecessary and unsuitable.

The prescription of a minimum punishment is to be avoided as such a provision may prevent a court from doing justice in exceptional cases. One effect of such a provision may be an undesirable reluctance to convict.

Although there is in many countries a rule of general application that where imprisonment is the only punishment specifically prescribed a court may impose a fine as well as or instead of imprisonment, it is nevertheless good practice to specify that a fine may be imposed. It is a small point but it is perhaps worth adopting a consistent practice of mentioning the fine before the imprisonment.

In the absence of special reasons to the contrary, there should be a reasonably consistent relationship in different statutes between the maximum fines prescribed and the maximum terms of imprisonment prescribed. However, when the offence is one from which considerable pecuniary gain may be achieved, particularly at the public expense, for example in a revenue or currency matter, it may be appropriate to provide for very high maximum fines.

Rapid change in the value of money plays havoc with consistency in the levels of punishment. An attempt to overcome this problem may be seen in s37 of the Criminal Justice Act 1982 [UK] which establishes a standard scale of five levels of fine for summary offences. The levels are subject to alteration by order. A somewhat similar scheme operates in some Australian states.

General form for fine and imprisonment

> A person who ... commits an offence and is liable to a fine not exceeding $2000 or to imprisonment for a term not exceeding 6 months, or to both.

If preferred, the phrase 'or to both' may be expanded to 'or to both such fine and imprisonment'.

Where a greater maximum penalty is prescribed for prosecution on indictment

> A person who ... is liable
> (a) on conviction on indictment, to a fine not exceeding $2000 or to imprisonment for a term not exceeding 6 months, or to both;
> (b) on summary conviction, to a fine not exceeding $1000.

Where a greater maximum penalty is prescribed for a second offence

A person who ... is liable
(a) in the case of a first offence, to a fine not exceeding $1000; and
(b) in the case of a second or subsequent offence, to a fine not exceeding $2000 or to imprisonment for a term not exceeding 6 months, or to both.

Under the above form, the greater penalty may be imposed only where the second or subsequent conviction relates to the same offence. The form may be adapted where other related offences are also to be taken into account. For example

A person who ... is liable
(a) if it is that person's first conviction of an offence under this Act and the person has not been convicted of an offence under the Advertisements (Hire-Purchase) Act 1957, to a fine not exceeding $500; and
(b) in any other case, to a fine not exceeding $1 000.

Where a greater maximum penalty is prescribed for a body corporate

A person who ... is liable
(a) in the case of an individual, to a fine not exceeding $1000; and
(b) in the case of a body corporate, to a fine not exceeding $2000.

Where monetary benefits have accrued to offender

Where the person has been convicted of an offence and the court is satisfied that monetary benefits accrued to the person as a result of the commission of the offence,
(a) the court may order the person to pay an additional fine in an amount equal to the court's estimation of the amount of the monetary benefits; and
(b) the additional fine may exceed the maximum amount of any fine that may otherwise be imposed under this Act.

Canada Wildlife Act s13(5).

Where the offence is continuing in nature[30]

There is an important distinction between two kinds of continuing offence. In one case, the statute does no more than increase the maximum penalty that may be imposed for a single offence of a continuing nature. The following words may be added to the sanction provision

... and if the offence is a continuing one to a further fine not exceeding $25 for every day or part of a day during which the offence has continued.

In the second case, the continuation after conviction of the act or omission constituting the offence amounts to a quite separate further offence or offences. If this is the intention, a specific provision must create the further offence unequivocally and specify a penalty. For example

30 See *Grice v Needs* [1979] 3 All ER 501, [1980] 1 WLR 45.

A person who commits an offence against this section is liable to a fine not exceeding $500; and if the offence of which a person is convicted is continued after the conviction, that person commits a further offence and is liable to a fine not exceeding $25 for every day on which the offence is so continued.

Alternatively, the following form creates a separate offence for each day that the act or omission continues after conviction—

... that person is guilty of a separate and further offence in respect of each day after the day of the conviction during which the offence continues and is liable in respect of each such separate and further offence to a fine of $25.

A separate offence may be created for each day on which the offence is committed or continued before conviction.

A person who commits or continues an offence on more than one day is liable to be convicted for a separate offence for each day on which the offence is committed or continued.

Canada Wildlife Act s13(3).

Time may be allowed for compliance as in the following form—

Where provision is made by or under this Act for the imposition of a daily penalty in respect of a continuing offence—

(a) the court by which a person is convicted of the original offence may fix a reasonable period from the date of conviction for the defendant to comply with any directions given by the court, and

(b) where the court has fixed such a period, the daily penalty is not recoverable in respect of any day before the period expires.

Building Act 1984 [UK] s114.

One consequence of provision for a daily penalty as seen in the above forms is that the maximum penalty is left open. If the offence continues for a sufficiently long time, the maximum amount of possible daily penalties may grow to an amount that is disproportionate to the gravity of the offence. In some contexts it may be desirable to provide for a maximum. For example

... and if the offence is a continuing one to a further fine not exceeding $25 for every day or part of a day during which the offence has continued but not exceeding a total maximum fine of $10 000.

Amendment of penalty

If an amending law increases the penalty for an existing offence, the new penalty is, in the absence of a statutory provision to the contrary, applicable to persons convicted after the date the amendment comes into force who committed the offence before that date.

The following form, which makes general provision to the contrary, may be adapted for particular use:

If the penalty for an offence is varied between the time the offence is committed and the time of conviction, the person convicted is liable to the penalty in force at the time the offence was committed.

FORFEITURE[31]

A forfeiture provision must provide for the following matters:

- the property to which it applies,
- the circumstances giving rise to forfeiture,
- whether a conviction is necessary to sustain the forfeiture,
- whether the forfeiture arises by operation of law or an order of forfeiture or condemnation must be made by a court or public official,
- the moment in time when the ownership of the property forfeited vests in the transferee, and
- who is to be the transferee of property forfeited and to be responsible for its disposal.

(1) On the conviction of any person for an offence against any of sections 4 to 9 of this Act,
  (a) any vessel used in respect of the commission of the offence; and
  (b) any vehicle or other conveyance, fishing gear, implement, appliance, material, container, goods, or equipment used in respect of the commission of the offence; and
  (c) any fish or marine life in respect of which the offence was committed

shall be forfeit to the Crown, and shall be disposed of in such manner as the Minister thinks fit.

(2) On the conviction of any person for an offence against section 11 of this Act, any goods used in respect of the commission of the offence shall, unless the Court for special reasons relating to the offence thinks fit to order otherwise, be forfeit to the Crown and shall be sold or disposed of in such manner as the Minister thinks fit.

Driftnet Prohibition Act 1991 [NZ] s30(1) and (2).

Section 11 (referred to in subsection (2) above) prohibits supplying and provisioning driftnet fishing vessels.

(1) The court by which a person is convicted of any offence under this Act may order the forfeiture of
  (a) any deer or venison in respect of which the offence was committed or which was found in that person's possession;
  (b) any vehicle, animal, weapon or other thing which was used to commit the offence or which was capable of being used to take, kill or injure deer and was found in his possession.

(2) Where the offence of which the person is convicted is an offence under any of sections 1, 10 and 11 above or under subsection (3)(c) below, the court, without prejudice to its powers under subsection (1) above
  (a) may disqualify that person for holding or obtaining a licence to deal in game for such period as the court thinks fit;
  (b) may cancel any firearm or shotgun certificate held by that person.

31 See *Driedger*, p258. Forfeiture is often the consequence of the exercise of powers of search and seizure, as to which, see p238. See also D. C. Heming, 'Forfeiture Orders', 1983 Law Soc Gaz 958.

(3) Where the court cancels a firearm or shotgun certificate under subsection (2)(b) above

(a) the court shall cause notice in writing of that fact to be sent to the chief officer of police by whom the certificate was granted; and

(b) the chief officer of police shall by notice in writing require the holder of the certificate to surrender it; and

(c) if the holder fails to surrender the certificate within twenty-one days from the date of that requirement, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the standard scale.

Deer Act 1991 [UK] s13.

(1) Where an inspector has seised any product or other thing pursuant to subsection (1) of section 15 and the owner thereof or the person in lawful possession thereof at the time of seisure consents in writing to the forfeiture of the product or other thing, such product or other thing is thereupon forfeited to Her Majesty.

(2) Where a person is convicted of an offence under this Act and any product or other thing seised pursuant to subsection (1) of section 15 by means of or in relation to which the offence was committed is then being detained, such product or other thing—

(a) is, upon such conviction, in addition to any punishment imposed for the offence, forfeited to Her Majesty if such forfeiture is directed by the court; or

(b) shall, upon the expiration of the time for taking an appeal from the conviction or upon the final conclusion of the proceedings, as the case may be, be restored to the person from whom it was seised or to any other person entitled to possession thereof upon such conditions, if any, relating to sale or advertising as may be imposed by order of the court and as, in the opinion of the court, are necessary to avoid the commission of any further offence under this Act.

Consumer Packaging and Labelling Act [Can] s17(1), (2).

(1) If a person is convicted of an offence against this Act, the court that convicted the person may order the forfeiture to the Crown of any thing produced to the court that is shown to relate to the commission of the offence.

(2) The court must not order the forfeiture of any thing to the Crown if a person claiming to be the owner or otherwise interested in it applies to be heard by the court unless an opportunity has been given to that person to show cause why the order should not be made.

(3) A thing forfeited to the Crown under this section may be sold or otherwise disposed of as the Minister directs.

Forfeiture is not a satisfactory penalty in some circumstances because its impact may fall unfairly on innocent persons or persons who have not been convicted but have some kind of interest in the property forfeited. In some jurisdictions, this is dealt with administratively by the return or sale of forfeited property but that is not very satisfactory. Such practice may be haphazard in effect and is not necessarily equitable. There is merit in providing a legislative framework such as the following:

(1) A person whose property has been forfeited to the Crown under section xx or a person who has a legal or equitable interest in any such property may apply to the Minister, within 28 days of the conviction that led to the forfeiture, for the release of the property forfeited.

(2) An application under this section cannot be made by the person convicted of the offence that led to the forfeiture.

(3) After considering an application under this section, the Minister may order the release of the forfeited property on payment to the Crown of an amount the Minister thinks appropriate, being an amount that does not exceed the amount the property forfeited would, in the estimation of the chief executive officer, be likely to realise if sold by public auction.

(4) In considering whether to order the release of any property, the Minister must have regard to
(a) the relationship between the person applying for release of the property and the person convicted of the offence; and
(b) the extent to which the applicant was in a position to foresee that the property would be used in connection with the commission of an offence against this Act when it passed to the possession of the offender.

PROVISIONS SUPPLEMENTARY TO PUNISHMENTS

Suspension or cancellation of licence and disqualification

It is of course possible and not uncommon for legislation to provide that a court may cancel or suspend a licence on convicting a person but in many cases it is more appropriate for those powers to be conferred on the licensing authority, usually with some provision for an appeal. The convicting court will only have before it information of the offence and this may be incomplete for a proper consideration of all matters relevant to the person's licence or permit. The position is different where cancellation of a licence is mandatory or usual, for example in the case of the driving licences of persons convicted of drink driving offences.

(1) On convicting the holder of a licence of an offence against section 17, the court may
(a) order that the licence be suspended for such time not exceeding 1 year as is specified in the order; or
(b) order that the licence be cancelled; and
the court may also declare the holder of the licence to be disqualified from holding a licence for such time not exceeding 3 years as the court may specify.

(2) If an order of suspension or cancellation is made, the holder of a licence must produce the licence to the court for suspension or cancellation within such time as the court directs.
Penalty: $500.

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(1) The provisions of this section have effect where a person is proceeded against by a local authority for an offence against regulations made under section 13 in respect—

(a) of any premises used as catering premises; or
(b) of any business carried on at such premises.

(2) If the person is convicted of the offence and the court thinks it expedient to do so—
(a) having regard to the gravity of the offence or (in the case of an offence committed in respect of premises) to the unsatisfactory nature of the premises, or
(b) having regard to any offences against regulations made under section 13 of which the person has been previously convicted,
the court may, on the application of the local authority, make an order disqualifying that person from using those premises as catering premises for such period not exceeding two years as may be specified in the order.

(3) An order under this section shall not be made against any person unless the local authority have, not less than 14 days before the date of the hearing, given that person written notice of their intention to apply for an order to be made against him.

(4) A person subject to an order under this section is guilty of an offence if, while the order is in force—
(a) he uses the premises to which the order relates as catering premises; or
(b) he participates in the management of any business in the course of which the premises are so used by another person.

(5) A person so subject may, from time to time after the expiry of six months from the date on which the order came into force, apply to the court before which he was convicted, or by which the order was made, to revoke the order; but where such an application is refused by the court a further application under this subsection shall not be entertained if made within three months of the refusal.

(6) On any such application the court may, if it thinks proper having regard to all the circumstances of the case, including in particular—
(a) the person's conduct subsequent to the conviction, and
(b) any improvement in the state of the premises to which the order relates,
grant the application.

(7) The court to which an application under subsection (5) is made has power to order the applicant to pay the whole or any part of the costs of the application.
Food Act 1984 [UK] s14.

Order to cease carrying on business

21.(1) If any person makes default in complying with any of the requirements of this Act, and such default continues for a period of 3 months, the Minister of Justice may by notice published in the *Gazette* prohibit that person from carrying on insurance business or any class of insurance business in New Zealand, either absolutely or for such time as he declares.

(2) Notwithstanding subsection (1) of this section, notice of a temporary prohibition under this section shall not be published in the *Gazette* if the period during which

the person is prohibited from carrying on business or any class of business does not exceed 3 months and the Minister of Justice considers publication to be unwarranted.

(3) For the purposes of this section a person shall be deemed to be carrying on insurance business in New Zealand not only if he does so on his own account but also if he acts as agent in respect of insurance business.

22.(1) Any person prohibited from carrying on insurance business or any class of insurance business under section 21 of this Act, or any person as attorney, general agent, or other agent for him or otherwise for or on his behalf, who, after publication of any notice under section 21 of this Act, or with knowledge of a prohibition under that section, receives any application for insurance, or accepts any premium for insurance, or otherwise carries on the business of that person in New Zealand in contravention of the prohibition, commits an offence and shall be liable on summary conviction to a fine not exceeding $200 for every act in contravention of the prohibition in addition to any penalty for which he may be liable under section 20 or section 20A of this Act.

(2) For the purposes of this section, a person shall not be regarded as carrying on insurance business, or any class of insurance business in New Zealand by reason only that he receives premiums or other money or does any other acts in respect of policies that have already been issued.

(3) Subject to subsection (2) of this section, for the purposes of this section a person shall be deemed to be carrying on insurance business in New Zealand not only if he does so on his own account but also if he acts as agent in respect of insurance business.

Insurance Companies Deposits Act 1953 [NZ] ss21, 22 (as substituted in 1983).

Order to pay prosecution expenses

If a person is convicted of an offence under this Act, the court may, whether or not it imposes any punishment, order the person convicted to pay the reasonable costs of and incidental to any measurement, testing, analysis or other matter or procedure undertaken by or on behalf of the prosecution towards the investigation of the offence and the giving of evidence and may make such order as to those costs as the court thinks just.

Order to remedy cause of contravention

(1) Upon the conviction of a person for an offence against section 44, the court may order that person, within a time specified in the order, to do any act the person had failed, refused or neglected to do, and a person who does not duly comply with such an order commits an offence and is liable to a fine of $2000.

(2) An order under this section may be given orally by the court to the defendant or may be served by sending a copy of the order by post to the defendant at his or her last known place of residence or business.

Order to refund amount wrongfully obtained

(1) If a person is convicted of an offence against section 23(1) or 35(2) or (4), the court may, in addition to imposing a penalty, order the person to refund to the Crown the amount of any subsidy wrongfully obtained by that person.

(2) A certificate issued by the appropriate officer of the court specifying an amount ordered to be refunded under this section and the person by whom the amount is to be paid may be registered in a court having civil jurisdiction and enforced as a final judgment of that court.

Payment of compensation for damage

A person who is convicted of an offence against this Act may be held liable for any loss or damage caused by the offence and may be ordered by the court to pay to the Crown, in addition to any penalty imposed by the court for the offence, an amount of compensation for that loss or damage.

If in a proceeding for an offence under this Act the court is satisfied that a person has suffered, or is likely to suffer, loss or damage because of the conduct of another person who contravened a provision of this Act, the court may, on convicting such person, make such orders as it considers appropriate against the person convicted for the purpose of compensating the person wholly or in part for the loss or damage or preventing or reducing the extent of the loss or damage.

INJUNCTIONS

Circumstances may justify provision to facilitate application to the court for a prohibitory injunction to restrain the imminent threat, or the commission or continued commission, of unlawful acts. This may be so, for example, where an offence, taken by itself, is a minor matter attracting only a small penalty but a deliberate continuation of similar offences is socially unacceptable and must be stopped. Another example might be where the owner of a building in a dangerous or insanitary state in breach of building legislation refuses or fails to remedy the situation.

Provision may be necessary to give the enforcing authority the standing necessary to enable it to apply for an injunction. Also it may be desirable to relieve it of the obligation to provide security for costs.

(1) The Supreme Court may grant an injunction in such terms as the Court determines to be appropriate where it is satisfied that a person is involved in, has engaged in, or is proposing to engage in, conduct that constitutes or would constitute a contravention of this Act.

(2) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised
   (a) whether or not it appears to the Court that the person intends to refuse or fail again or to continue to refuse or fail to do that act or thing;
   (b) whether or not the person has previously refused or failed to do that act or thing;

(c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

(3) An interim injunction may be granted *ex parte* pending final determination of the application.

(4) The Court may vary or rescind an injunction at any time.

(5) In the case of an application for an injunction made by the Commissioner, the Court must not require the applicant or any other person as a condition of granting an interim injunction, to give any undertakings as to damages or costs.

(6) An injunction may be granted whether or not proceedings have been taken against the person for the contravention.

(7) If the person has been convicted of a contravention of this Act, an injunction may be granted either in the proceeding for the offence or in a subsequent proceeding.

FIXED PENALTY SYSTEMS

Fixed penalty systems provide an extremely useful and convenient method of relieving pressures on courts and those concerned with enforcement in circumstances where many straightforward clear-cut offences must be dealt with. It is also more convenient for the offender to pay a fixed penalty than to attend a court hearing, provided that is that the offender accepts guilt. Parking and other minor traffic offences are typical examples of the kind of offences that may properly be dealt with under such systems. A comprehensive system is found in Part III and Schedules 1 to 3 of the Transport Act 1983 [UK].

Fixed penalty systems are not appropriate for offences of a complex nature. It would be quite improper to institute such a system in relation to an offence because the prosecution of the offence involved difficulties or expense. Defendants should not be blackmailed into paying fixed penalties for offences that cannot be proved against them. The system must not take advantage unjustly of the convenience for defendants of disposing of an allegation by a payment that may be less than the cost of successfully defending a proceeding in court.

The following form is capable of adaptation:

(1) An inspector who has reason to believe that a person has committed a prescribed offence against this Act may, at or about the time that the alleged offence is believed to have been committed, give an infringement notice to the alleged offender.

(2) An infringement notice must be in the prescribed form and must in every case
(a) contain a description of the alleged offence; and
(b) advise that if the alleged offender does not wish to have a complaint of the alleged offence heard and determined by a court, the amount of money specified in the notice as being the modified penalty for the offence may be paid to an authorised person within 28 days after the giving of the notice; and

(c) inform the alleged offender who are authorised persons for the purposes of receiving payment of modified penalties.

(3) In an infringement notice the amount specified as being the modified penalty for the offence referred to in the notice must be the amount that was the prescribed modified penalty at the time the offence is believed to have been committed.

(4) An authorised person may, in a particular case, extend the period of 28 days for payment of the modified penalty and may do so whether or not that period has elapsed.

(5) If the modified penalty specified in an infringement notice is paid within 28 days or such further time as is allowed and the notice is not withdrawn, the bringing of proceedings and the imposition of penalties are prevented to the same extent as they would be if the alleged offender had been convicted by a court of, and punished for, the alleged offence.

(6) An authorised person may, whether or not the modified penalty has been paid, withdraw an infringement notice by sending to the alleged offender a notice of withdrawal in the prescribed form.

(7) If an infringement notice is withdrawn after payment of the modified penalty, the amount must be refunded.

(8) Payment of a modified penalty is not to be regarded as an admission for the purpose of any civil or criminal proceedings.

(9) The Commissioner may appoint authorised officers for the purposes of this section but may not appoint an inspector to be an authorised officer.

The form above assumes that there is provision elsewhere in the statute for

- the appointment of inspectors;
- the supply to inspectors of warrants or certificates of their appointment and authority to issue infringement notices;
- power to prescribe those documents the form of which is to be prescribed;
- power for inspectors to require persons to give their names and addresses.

Chapter 17

Final provisions

SAVINGS AND TRANSITIONAL

Introduction[1]

The function of a savings provision in legislation is to preserve or 'save' a law, a right, a privilege or an obligation which would otherwise be repealed or cease to have effect.

The function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force.[2] Both terms are loosely used with overlapping meanings; there is little or no advantage in seeking to pursue a watertight distinction between them.

The necessity for savings and transitional provisions is a consequence of change in the law, whether the change is caused by new statute law or by the repeal, repeal and substitution, or modification, of existing statute law. Consideration of whether special savings or transitional provisions are necessary is an important part of every drafting exercise.

An essential skill for a competent drafter consists of knowing what questions should be put to the instructing officer concerning transitional matters. The purpose is to elicit the instructions that are necessary and would have been given if the instructing officer had thought of the matters in question. Instructing officers are notoriously inadequate in the area of savings and transitional provisions, perhaps because they tend to be preoccupied with how a new scheme will operate in the future rather than the mechanics of the transition from the present to the future state of affairs. The instructing officer may need an invitation to lower his eyes from the grandeur of the plan for the future to the mundane and practical problems of the present. It is necessary when the draft has reached an advanced stage to go through it in a painstaking manner and consider each provision as it will apply to circumstances and facts as they will exist on the commencement of the new law. The instructing officer must, if necessary, be persuaded of the importance of getting the savings and transitional provisions right.

In some cases involving a repeal, the provisions of general application which are contained in interpretation legislation will be adequate and the drafter must

1 See E. A. Driedger, *Legislative Forms and Precedents* (2nd edn) pp180–184.

2 A similar function is in some circumstances performed by an application provision. See p208.

be familiar with the content and extent of these. Section 38 of the Interpretation Act 1889 [UK] which follows has been widely adapted:[3]

> (1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.
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> (2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not
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> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
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> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or
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> (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or
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> (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or
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> (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;
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> and any such investigation, legal proceedings, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.

In some jurisdictions the preceding provision has been supplemented by a more extensive provision. The following is an example:[4]

> Where a written law repeals and re-enacts, with or without modification, any enactment
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> (a) all districts or other local divisions or areas;
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> (b) all councils, corporations, boards, tribunals, commissions, trusts, or other bodies constituted, and all elections and appointments of members thereof made;
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> (c) all offices constituted and appointments of officers made;
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> (d) all subsidiary legislation, warrants, certificates, and documents made; and
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> (e) all other acts, matters, and things whatsoever,
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> which, at the commencement of the repealing law, are respectively in existence, or in force or operation, under or for the purposes of such provision, shall, in so far as is consistent with the repealing law, subsist and enure for the purposes of such law and shall continue as if the repealing law had been in operation when they respectively originated or were constituted, made or done and they had originated or been constituted, made or done under that law.

3 See now ss16, 17, Interpretation Act 1978 [UK]. The exact point in time when a 'right, privilege, obligation, or liability' is 'acquired, accrued or incurred' is clearly vital to the practical effect of this section. See *Hamilton-Gell v White* [1922] 2 KB 422, 91 LJKB 875; *Director of Public Works v Ho Po Sang* [1961] AC 901, [1961] 2 All ER 721, PC; *Sifam Electrical Instrument Co Ltd v Sangamo Weston Ltd* [1971] 2 All ER 1074; *Free Lanka Insurance Co Ltd v Ranasinghe* [1964] AC 541, [1964] 1 All ER 457, PC. See also 44 Halsbury's Laws of England (4th edn) 611–617.

4 See A Model Interpretation Bill (Commonwealth Secretariat) cl 33.

An interesting approach may be seen in the savings provision contained in the draft Interpretation Act put forward by the Law Commission in New Zealand.[5] The Commission includes the savings provisions in a clause containing a declaration that in principle an enactment has prospective effect only. The effect of that principle is that new legislation does not in the absence of special provision or special circumstances disturb substantive provisions already established under the previous law. The essence of the savings provisions in the clause is found in its negative statements that give broad effect to that principle. The content of the savings provisions in the Law Commission draft is similar to that in other jurisdictions that are based on the United Kingdom model but is expressed more plainly.

(1) In principle an enactment has prospective effect only.

(2) In particular the coming into force of an enactment, including an enactment repealing or amending an earlier enactment, or the expiry of an enactment
  (a) does not affect any accrued or established right, immunity, duty or liability including any liability in respect of an offence which arises under the earlier enactment;
  (b) does not affect any proceeding or remedy in respect of any such right, immunity, duty or liability;
  (c) does not affect the previous operation of the earlier enactment, including
    (i) anything done or suffered under that enactment, or
    (ii) any amendment made by that enactment to another enactment; and
  (d) does not revive anything not then in force or existing, including any enactment or rule of law which the earlier enactment repealed or abrogated.

It is not uncommon for drafters to dither when the necessity to consider savings and transitional provisions arises. Often, such provisions are included unnecessarily out of a superfluity rather than an abundance of caution. Unnecessary words in a statute should not be tolerated; they may lead to unintended inferences being drawn. Drafters must have the confidence to rely on the effect of interpretation legislation where it is adequate. Savings or transitional provisions that do no more than repeat the general words used in the interpretation legislation have little purpose. On the other hand, the cases on 'right' and 'duty' and other general words demonstrate that general legislation does not always give easy answers to marginal questions. It is to avoid doubt concerning the application of such general words that specific savings and transitional provisions come into their own. Of course, they are also necessary if the requirement is for transitional provisions that are inconsistent with the general provisions in the interpretation legislation.

It is very desirable that savings and transitional provisions should be assembled and presented together. Unless they number just one or two clauses they are best presented in a separate schedule of the statute. Such provisions may be important but they are of temporary concern and should not be scattered about in the substantive provisions serving only, after they are spent, to obscure permanently the continuing substantive provisions. For example, a section providing for the composition of a board established by the statute should not contain a transitional provision relating to the cessation of membership of the members of a board that is being replaced.

5 See 'A New Interpretation Act' NZLC R 17.

A technique that should be used with caution is to empower the making of subordinate legislation for savings and transitional purposes. Note that in the first example set out below the power to make regulations expires after 1 year. An additional need for caution arises if subordinate legislation may modify the effect of an Act. Examples follow:

(1) A regulation may make provision about any matter for which
  (a) it is necessary or convenient to assist the transition from the operation of the Act repealed by this Act to the operation of this Act; and
  (b) this Act does not, in the Minister's opinion, make provision or enough provision.

(2) A regulation under subsection (1) may be given retrospective operation to a day not earlier than the day this Act comes into force.

(3) To the extent to which a regulation under subsection (1) takes effect from a date earlier than the date of its publication in the *Gazette*, the regulation does not operate so as
  (a) to affect in a prejudicial manner the rights of any person existing before that date of publication; or
  (b) to impose liabilities on any person in respect of anything done or omitted to be done before that date of publication.

(4) This section expires 1 year after it comes into force.

The Minister may by order made by statutory instrument provide for such further transitional and saving provisions to have effect in connection with the coming into operation of any provision of this Act as is necessary or expedient.

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(1) The Secretary of State may—
  (a) by regulations make such transitional provision as he considers necessary or expedient in connection with any enactment contained in this Act which derives—
    (i) from Part I or III of Schedule 4 to the Health and Social Services and Social Security Adjudications Act 1983; or
    (ii) from the amendments to the Nursing Homes Act 1975 made by Part II of that Schedule;
  (b) by order repeal any provision of a local Act passed on or before 13th May 1983 if it appears to him that the provision is inconsistent with or has become unnecessary in consequence of any such enactment or of regulations made under any such enactment;
  (c) by order amend any provision of such an Act if it appears to him that the provision requires amendment in consequence of any such enactment or of regulations made under any such enactment or of any repeal made by virtue of this sub-paragraph.

(2) An order made in pursuance of sub-paragraph (1) above may include such incidental or transitional provisions as the Secretary of State considers are appropriate in connection with the order.

(3) It shall be the duty of the Secretary of State, before he makes an order in pursuance of sub-paragraph (1) above amending or repealing any provision of

a local Act, to consult each local authority which he considers would be affected by the amendment or repeal of that provision.

Registered Homes Act 1984 [UK] Sched 2, para 4.

See also Deregulation and Contracting Out Act 1994 [UK] ss1–4.

Some of the forms in this chapter contain references to the 'repealed Act' or some similar phrase and assume that such terms are suitably defined.

Savings

A savings provision is used to preserve what already exists; it cannot create new rights or obligations. Such a provision is of no application to transactions which are complete at the time the savings provision comes into force.

A savings provision is frequently included in legislation to establish beyond doubt that the provisions of that legislation are to be construed as additional to and not in derogation of existing law. The possibility of repeal by implication is thus excluded. In the following two examples, the operation of the common law is saved.

Subject to subsection (1) of section eighty-nine of this Act, nothing in this Act with respect to the duty of highway authorities to maintain highways maintainable at the public expense shall be construed as affecting any exemption from liability for non-repair available to a highway authority immediately before the commencement of this Act as the successor to the inhabitants at large.

Highways Act 1959 [UK] s298.

(1) Nothing in this Act shall authorise a person to use on a road a vehicle so constructed or used as to cause a nuisance, or affect the liability, whether under statute or common law, of the driver or owner so using such a vehicle.

(2) In this section, in its application to England and Wales, 'nuisance' means a public or a private nuisance.

Road Traffic Regulation Act 1984 [UK] s143.

In the following examples, other provisions are declared to be not affected:

Nothing contained in the Port of London Acts 1920 to 1965 shall entitle or oblige the Port Authority to install or use apparatus for wireless telegraphy as defined in the Wireless Telegraphy Act 1949, in contravention of the provisions of that Act.

Port of London Act 1967 [UK] s5.

All powers and duties conferred or imposed by this Act are in addition to, and not in derogation of, any other powers and duties conferred or imposed by Act, law or custom, and subject to any express provision of this Act, all such other powers and duties may be exercised and shall be performed in the same manner as if this Act had not been passed.

Building Act 1984 [UK] s130.

The provisions of this Act are in addition to the provisions of any other enactment or any rule of law under which any remedy or right of appeal or objection is provided for any person or any procedure is provided for the inquiry into or investigation of any

matter, and nothing in this Act shall limit or affect any such remedy or right of appeal or objection or procedure as aforesaid.

Ombudsmen Act 1975 [NZ] s33(3).

In some cases, it may be as well to put beyond doubt that the establishment of a criminal offence is not to be construed as affecting civil rights or remedies. For example:

A contract for the supply of any goods shall not be void or unenforceable by reason only of a contravention of any provision of this Act.

Trade Descriptions Act 1968 [UK] s35.

The repeal of principal legislation has effect to repeal all subordinate legislation made under that legislation unless it is saved by a savings provision. Such a savings provision may be contained in interpretation legislation or may be specifically included. In most cases the saving of subordinate legislation is likely to be only an interim and probably not very satisfactory measure until new subordinate legislation tailored to complement the new statute can be prepared. The legislature may wish to make sure that there is no delay in preparing such subordinate legislation and for that reason may decide to impose a time limit for the continued operation of the existing subordinate legislation. Some examples follow:

All subordinate legislation made under any of the enactments repealed by this Act and in force immediately before the coming into force of this Act, so far as it is not inconsistent with the provisions of this Act, continues in force as if made under this Act.

Every bye-law made under an enactment repealed by this Act and in force immediately before the coming into force of this Act is, so far as it is not inconsistent with this Act, to be taken to have been lawfully made under this Act and continues in force (unless sooner repealed under this Act) for 2 years after this Act comes into force and then expires.

An order under section 17 of the Dairy Industry Act 1963 which has effect when this Act comes into force continues to have effect as if that section had not been repealed, but the Minister may at any time vary or revoke the order.

Until regulations are made under this Act to provide for a matter that may be prescribed by regulations, the regulations made under the Conservation Act 1957 and in force immediately before the coming into force of this Act apply as if made under this Act.

Other functions which may be performed by savings clauses include:

PRESERVATION OF OBLIGATIONS

For all purposes in respect of any tax which at the commencement of this Act has been already assessed or paid or is still assessable or payable in or for the 1994–95 income year or any previous income year in accordance with the provisions of the repealed enactments, all the provisions of those enactments, including their penal provisions, and all regulations, warrants, and other acts of authority originating under them, shall, notwithstanding the repeal of those enactments, be deemed to remain in full force and effect; and all proceedings under any of those enactments, including proceedings for

the recovery of any fine or penalty in respect of any offence committed, whether before or after the commencement of this Act, may be instituted or continued accordingly as if the enactment had not been repealed.

Tax Administration Act 1994 [NZ] s227(2).

SAVING OF COMPENSATION CLAIMS

If, immediately before this Act comes into force, a claim for compensation under an enactment repealed by this Act has been made or could be made, the claim may be made or continued or enforced in all respects as if this Act had not come into force.

CONTINUANCE OF APPLICATIONS

(1) Every application made under a repealed enactment and wholly or partly heard by the Board when this Act comes into force is to be continued and dealt with in all respects as if this Act had not come into force.

(2) A permit granted as a result of an application determined under subsection (1) is to be granted on the same terms and conditions that would have applied if this Act had not come into force.

(3) Every application made under a repealed enactment that has not been wholly or partly heard by the Board when this Act comes into force is to be taken to be an application made under this Act and this Act is to apply accordingly.

PRESERVATION OF RIGHTS OF APPEAL

(1) In the case of an appeal under the repealed Act that has been commenced but not finally determined before this Act comes into force, the Court is to continue to deal with the appeal as if this Act had not come into force.

(2) When the appeal is finally determined, this Act is to apply subject to any necessary modifications as if the appeal had been finally determined before the Act came into force.

CONTINUANCE OF PENDING PROCEEDINGS

Every proceeding commenced under a repealed enactment may be continued and completed

(a) if the proceeding has been wholly or partly heard, as if the enactments repealed by this Act were still in force; and

(b) in other cases, as if the proceeding had been commenced under this Act.

Except as may be expressly provided in this Act, this Act does not affect the rights of any party to any proceeding commenced in any court before this Act came into force.

Except as otherwise expressly provided in this Act, every matter and proceeding commenced in any court under an enactment repealed by this Act and pending or in

progress immediately before this Act came into force may be continued, completed and enforced under this Act.

Where immediately before the coming into force of this Act

(a) an application has been made under the repealed Act for an order of adoption and the application has not been finally determined; or

(b) a child has been placed in the custody of a person or persons for the purpose of adoption, the consents to adoption required under the repealed Act have been given and any necessary consent of the Director-General under section 23 of the repealed Act has been given,

the application for an order of adoption in respect of that child is to continue and is to be dealt with and completed or otherwise determined in all respects as if this Act had not been enacted.

(1) Where on the day that Part I comes into force any proceedings were pending before the Board of Transport Commissioners for Canada, the Air Transport Board or the Canadian Maritime Commission, hereinafter in this section respectively referred to as the 'former authority', the proceedings shall be taken up and continued under and in conformity with the provisions of Part I, so far as consistently may be; but where on the coming into force of Part I any matter was in course of being heard or investigated by the former authority or had been heard or investigated by the former authority but no order or decision had been rendered thereon, the former authority shall continue to exist, notwithstanding Part I, for the purpose of completing the hearing or investigation and making an order or rendering a decision, as the case may be.

(2) For the purposes of completing a hearing or investigation before it, or making an order or rendering a decision on a matter heard or investigated before the coming into force of Part I, the former authority shall complete the hearing or investigation in accordance with the authority vested in it immediately before the coming into force of Part I and make such order, rule or direction as it could have made under the authority vested in it immediately before the coming into force of Part I.

(3) An order, rule or direction made or given by a former authority pursuant to this section shall be entered as an order, rule or direction of the Canadian Transport Commission and have the same force or effect as if it had been made or given by that Commission pursuant to the authority vested therein under Part I.

National Transportation Act [Can] s89.

PROVISION FOR OFFENCES

All proceedings in respect of offences committed or alleged to be committed against an enactment repealed by this Act may be commenced or continued as if this Act had not come into force.

Where an offence, for the continuance of which a penalty was provided, has been committed under any of the enactments repealed by the Nursing Homes Act 1975 or this Act, proceedings may be taken under this Act in respect of the continuance of the

offence after the commencement of this Act, in the same manner as if the offence had been committed under the corresponding provision of this Act.

Registered Homes Act 1984 [UK] Sched 2, para 4.

PRESERVATION OF EFFECT OF CONVICTION UNDER REPEALED ENACTMENT

For the purpose of determining the punishment which may be imposed on a person in respect of the commission by him of an offence under any provision of this Act, an offence committed by that person under the corresponding enactment repealed by this Act shall be deemed to have been committed under that provision.

Animal Health Act 1981 [UK] s94(2).

CONTINUANCE OF PERIODS OF TIME

Where a period of time specified in an enactment repealed by this Act is current at the Act's commencement, the Act has effect as if the provision corresponding to that enactment had been in force when that period began to run.

Food Act 1984 [UK] Sched 9, para 1.

SAVING OF EXEMPTION

An exemption granted by the Minister under and in respect of a provision of an enactment repealed by this Act continues to have effect according to its substance as if it had been made under section 55 in respect of an equivalent provision of this Act.

PRESERVATION OF SUBSISTING BENEFITS OR ALLOWANCES

If the rate of the annual retiring allowance that is or becomes payable under this Act to any person who is or has been a member of the scheme when this Act comes into force is less than would be payable if this Act had not come into force, the annual retiring allowance is to be paid at the rate that would have been payable if this Act had not come into force.

SAVING OF LICENCES AND PERMITS

Without prejudice to section 17(2) of the Interpretation Act 1978 (repeal and re-enactment) any licence under the Dumping at Sea Act 1974 which is in force immediately before the commencement of this Part of this Act—

(a) shall have effect as from the commencement of this Part of this Act as if granted under this Part of this Act;

(b) in the case of a licence for a specified period, shall remain in force, subject to the provisions of this Part of this Act, for so much of that period as falls after the commencement of this Part of this Act.

Food and Environment Protection Act 1985 [UK] s15(7).

A person who immediately before the coming into force of this Act was registered as a chiropodist under the repealed Act is upon the coming into force of this Act taken to be registered as a podiatrist under this Act and a licence issued to such a person authorising that person to practise chiropody during a period current when this Act comes into force

is to be taken for the purposes of this Act to be a certificate of registration issued under this Act.

Every permit granted under section 27 of the Apples and Pears Marketing Act 1988 and in force immediately before the coming into force of this Act continues in force after this Act comes into force on the same conditions and with the same effect as if this Act had not come into force.

SAVING OF ORDERS

(1) The repeal by this Act of the Water Act 1958 does not affect the validity of an order under that Act which was in force immediately before the repeal took effect and
   (a) the order may be varied by a subsequent order made under and in accordance with that Act as if that Act were still in force; and
   (b) any thing done or omitted after the repeal took effect which would have constituted an offence under that Act if that Act had remained in force constitutes an offence under that Act and is punishable accordingly.

(2) Subsection (1) applies also to an order which has been made under the Water Act 1958 but has not come into operation when the repeal takes effect.

SAVING FORMS IN USE

Every form issued or approved for use by the Commissioner under the repealed Act is to be regarded as issued or approved for use under this Act until another form is issued or approved under this Act in place of that form.

SAVING OF APPOINTMENTS

A person who immediately before the coming into force of this Act was an inspector under the repealed Act continues to be an inspector under and for the purposes of this Act as if that person had been appointed under this Act on the same terms and conditions for a term expiring 2 years after the day on which this Act comes into force.

A person who was a member of the Mines Supervisory Board under an enactment repealed by this Act continues as a member of the Mines Supervisory Board under and for the purposes of this Act for a term expiring on the day on which the appointment of the person would have expired under the repealed enactment.

If within 2 years after the coming into force of this Act, the Board of Examiners is satisfied that the holder of a first class manager's certificate of competency issued under the *Coal Mines Regulation Act 1977* has had adequate relevant experience and has an adequate understanding of the regulations relating to metalliferous mining, the certificate may be regarded and accepted in all respects as if it were a first class mine manager's certificate issued under this Act.

(1) Every person who holds office as a member of the Supervisory Board immediately before this Act comes into force ceases to hold that office when this Act comes into force.

(2) A person who vacates office under subsection (1) is not entitled to compensation for loss of that office.

CONTINUATION OF EMPLOYMENT

Every person who holds an office provided for in Part 2 of the repealed Act when this Act comes into force must be offered employment in the same office by the Development Corporation as from the day when this Act comes into force on terms and conditions of employment no less favourable than those that applied to that person's office under the repealed Act.

(1) On the appointed day
(a) all persons who were employed immediately before that day under section 10 of the repealed Act continue to be employed by the Corporation; and
(b) the terms and conditions, including the salary payable, on which such persons were employed immediately before that day continue; and
(c) there is no break or interruption in the employment of such persons because of the enactment of this Act.

(2) Any employment referred to subsection (1) may be terminated or the terms and conditions varied after the appointed day in the same manner and to the same extent as before that day.

(3) Nothing in this Act affects any rights or liabilities of any person under any provident, benefit, superannuation or retirement fund or scheme relating to any person referred to in subsection (1) or any former employee of the former Commission.

Transitional

GENERAL

1 (1) In so far as anything done under an enactment repealed by this Act could have been done under a corresponding provision of this Act it shall not be invalidated by the repeal but shall have effect as if done under that provision.
(2) Without prejudice to sub-paragraph (1) above, any reference in this Act (whether express or implied) to a thing done or required or authorised to be done, or omitted to be done, or to any event which has occurred, under or for the purposes of or by reference to or in contravention of any provisions of this Act shall, except where the context otherwise requires, be construed as including a reference to the corresponding thing done or required or authorised to be done, or omitted, or to the corresponding event which occurred, as the case may be, under or for the purposes of or by reference to or in contravention of any corresponding provisions of the repealed enactments.

2 Where a document refers expressly or by implication to an enactment repealed by this Act the reference shall (except where the context otherwise requires) be construed as a reference to the corresponding provision of this Act.

3 Where any period of time specified in an enactment repealed by this Act is current at the commencement of this Act, and there is a corresponding provision

in this Act, this Act shall have effect as if that corresponding provision had been in force when that period began to run.

Restrictive Trade Practices Act 1976 [UK] Sched 4, paras 1, 2, 3.

In so far as an instrument made or having effect as if made, or any other thing done or having effect as if done, under any enactment repealed by this section, could have been made or done under a corresponding provision of this Act, it shall, if effective immediately before the coming into force of this Act, have effect subsequently as if it had been made or done under that corresponding provision.

LICENSING AND REGISTRATION

Particular care is necessary where a trade, profession or other activity is to be regulated by statute for the first time. The interests of those persons who are engaged in that activity at the time when the statute commences must be taken into account fairly and protected so far as is considered to be compatible with the public interest. Various possibilities are open.

(a) Issue of first licence may be obligatory

If a person who is carrying on a children's home immediately before the coming into force of this Act applies in the prescribed manner for a licence under section 3 within 60 days after the coming into force of this Act, the Commissioner must proceed to issue a licence to that person in respect of the premises in which he or she was then carrying on a children's home; but upon the issue of that licence all the provisions of this Act shall apply to the licence, the licensee and the acts or omissions on the premises specified in the licence.

Where on the coming into force of this Act a person is actively engaged in the practice of dental prosthetics and has been continuously so engaged for a period of not less than 5 years, that person for the purposes of an application made under section 17 within one year after the coming into force of this Act, is to be taken to be qualified in the manner required by section 49.

(b) Time may be granted

A person who immediately before the date of the commencement of this Act was operating a zoo on any premises may continue to operate that zoo on those premises without a licence under this Act—

(a) during the period of six months beginning with that date; and
(b) if within that period application is made for a licence, until that application is finally disposed of or withdrawn and, if the application is refused, for a further period of six months.

Zoo Licensing Act 1981 [UK] s20(1).

(c) Operation of sanction may be postponed

An example is found in the Hearing Aid Council Act 1968 [UK] which provides for the registration (inter alia) of dispensers of hearing aids. Section 3, which creates offences by unregistered persons, begins—

It shall be unlawful at any time more than six months after the commencement of this Act for

(a) any person ... to act as a dispenser of hearing aids ...

The same result may be achieved by postponing the commencement of the penalty section until a date later than that of the registration section. This technique was provided for in s19 of the Farriers (Registration) Act 1975 [UK].

(d) Temporary option to choose old or new law

(1) During the period of 6 months after this Act comes into force, a person who wants to commence the construction, alteration or demolition of a building may, at that person's option, apply

(a) for a building permit under this Act; or

(b) for the licence that would have been required if this Act had not come into force, in which case the application is to be dealt with in all respects as if this Act had not come into force.

(2) If a building is being constructed, altered or demolished under a licence to which subsection (1) applies and, in the opinion of the Building Authority, reasonable progress is not made for a period of 6 months, that subsection ceases to apply and a building permit under this Act is required.

Different problems arise upon the repeal and replacement of legislation providing for the registration of associations or other bodies.

Every association that was, immediately before the coming into force of this Act, an association registered under the repealed Act is upon the coming into force of this Act taken to be an association registered under this Act, and

(a) the rules of the association, including any amendments of those rules as registered under the repealed Act, are to be taken as if registered under this Act, and

(b) any register kept in accordance with the requirements of the repealed Act is to be taken to be part of the register to be kept under this Act; and

(c) any document referring to a provision of the repealed Act is to be construed as referring to the corresponding provision of this Act; and

(d) any orders, directions, appointments and other acts lawfully made or done under a provision of the repealed Act and in force immediately before the commencement of this Act are to be taken to have been made or done under the corresponding provision of this Act and continue to have effect accordingly.

BODIES CORPORATE[6]

A proposal to establish a new body corporate intended to take the place of an existing body, whether corporate or unincorporate, requires that consideration be given to existing assets and liabilities, contractual and otherwise, existing offices, staff and pending proceedings. The circumstances may be such that there are other

6 See the forms at pp269–271.

matters that require to be dealt with by specific provision to smooth the transitional process. The following transitional provision is suitable for adaptation:

(1) On the day when this Act comes into force, the former Branch is dissolved and
  (a) all assets and liabilities of the former Branch are transferred to and vest in the Society without further assurance and the Society is to have all powers necessary to take possession of, recover and deal with those assets and discharge those liabilities; and
  (b) every agreement, whether in writing or not, and every deed, bond or other instrument to which the former Branch was a party or which affected the former Branch, and whether or not of such a nature that the rights, liabilities and obligations under it could be assigned, is to have effect as if the Society were a party to it or affected by it instead of the former Branch and as if for every reference (however worded and whether express or implied) in it to the former Branch there were substituted in respect of anything to be done on or after such date of coming into operation a reference to the Society; and
  (c) any proceedings pending immediately before the coming into force of this Act to which the former Branch was a party may be continued as if the Society was a party to those proceedings instead of the former Branch; and
  (d) the Executive Committee of the former Branch becomes the Executive Committee of the Society and continues as such until further provision in that regard is made under section 5; and
  (e) all officers of the former Branch become the corresponding officers of the Society and, subject to the provisions of any rules made under section 6, continue in office for the period for which they were appointed or elected as officers of the former Branch.

(2) In this section 'the former Branch' means the Tanganyika Branch of the British Red Cross Society.

Cf *Tanganyika Red Cross Society Act 1962* [Tanz] s8.

Provision may be necessary concerning the position of the members of a body that is to be reconstituted. One possibility follows:

(1) Upon the coming into force of this Act
  (a) the person who immediately before the coming into force of this Act was chairman of the body dissolved and replaced by this Act continues as chairperson of the Corporation for a period of 6 months; and
  (b) the persons who immediately before the coming into force of this Act were directors of the body dissolved and replaced by this Act cease to hold office.

(2) A person who ceases to hold office by reason of subsection (1) is not entitled to compensation for loss of office but is eligible for appointment as chairperson or director of the Corporation.

If a body is to be reconstituted at a time during a financial year, the accountability of the outgoing board members must be considered and an appropriate obligation included. For example

(1) As soon as is practicable after the coming into force of this Act, the National Parks Authority must prepare and submit to the Minister a report, including

financial statements, as required by section 17 of the National Parks Authority Act 1974, but the report and financial statements are to be limited to the period from the preceding 1 July to the day immediately before the day of the coming into force of this Act.

(2) Notwithstanding the repeal by this Act of the National Parks Authority Act 1974, the National Parks Authority is to continue in existence for the purposes of subsection (1).

CONTINUITY OF TAX

A consolidation exercise may require a transitional provision similar to the following:

(1) The continuity of the operation of the law relating to capital transfer tax shall not be affected by the substitution of this Act for the repealed enactments.

(2) Any reference, whether express or implied, in any enactment, instrument or document (including this Act and any enactment amended by Schedule 8 to this Act) to, or to things done or failing to be done under or for the purposes of any provision of this Act shall, if and so far as the nature of the reference permits, be construed as including, in relation to the times, circumstances or purposes in relation to which the corresponding provision in the repealed enactments has or had effect, a reference to, or as the case may be, to things done or failing to be done under or for the purposes of, that corresponding provision.

(3) Any reference, whether express or implied, in any enactment, instrument or document (including the repealed enactments and enactments, instruments and documents passed or made after the passing of this Act) to, or to things done or failing to be done under or for the purposes of, any of the repealed enactments shall, if and so far as the nature of the reference permits, be construed as including, in relation to the times, circumstances or purposes in relation to which the corresponding provision of this Act has effect, a reference to, or as the case may be, to things done or failing to be done under or for the purposes of, that corresponding provision.

(4) Subsection (2) above shall have effect without prejudice to section 17(2) of the Interpretation Act 1978.

(5) In this section 'the repealed enactments' means the enactments repealed by this Act.

Capital Transfer Tax Act 1984 [UK] s275.

REPEALS[7]

In this field, as in so many others, the drafter must be familiar with relevant interpretation legislation. Section 38 (which is set out on page 384) and s11 of the

7 As to repeals generally, see 44 Halsbury's Laws of England (4th edn) 603–617. See also F. A. R. Bennion, *Statutory Interpretation* (2nd edn) pp201 et seq and Aubrey L. Diamond, 'Repeal and Desuetude of Statutes', Current Legal Problems 1975 at p107.

Interpretation Act 1889 [UK] have been generally followed elsewhere. Subsection (1) of s11 provides that an Act which repeals a repealing enactment shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.[8] Subsection (2) of s11 provides that where an Act repeals and substitutes, the repealed provision shall remain in force until the substituted provision comes into force.

In some jurisdictions in which the technique of direct amendment is followed, interpretation legislation contains a provision similar to the following:

> Where a written law which has been amended by any other written law is repealed, such repeal shall include the repeal of all those provisions of such other written law by which the first mentioned written law was amended.

It is necessary to repeal only the principal statute in such cases. But the provision set out above is not really necessary, particularly where interpretation legislation contains a provision similar to the following:

> (1) A reference in a written law to a written law shall be deemed to include a reference to such written law as it may from time to time be amended.
>
> (2) A reference in a written law to a provision of a written law shall be construed as a reference to such provision as it may from time to time be amended.

It is quite clear that repeal of an identified provision means the repeal of the provision as it stands at the time of the repeal.

Repeal may be express or implied, but repeal by implication is not favoured by the courts. In the interests of certainty it is undesirable that the effect of a statute on existing law should be left to implication. The danger is particularly great when drafting further provision intended to complement an existing provision. Meticulous care is necessary to avoid ambiguous inconsistencies which may be construed as implied repeals.[9] Repeal by implication is open also to serious objection in that it fails to perform the basic statutory function of communicating the law as well as determining it.

Repeal should therefore be express and it should also be specific. A broad brush approach is not adequate. To repeal, for example, 'all provisions inconsistent with this Act' serves merely 'to substitute for the uncertainty of the general law an express provision of equal uncertainty'.[10]

No particular form of words is necessary to effect a repeal but it is recommended that the simple form of words 'is repealed' be generally adhered to. The phrase 'is hereby repealed' is in widespread use but 'hereby' is redundant. Thus

> The Dogs Act 1874 is repealed.
>
> Part 4 of the Dogs Act 1994 is repealed.
>
> Section 4 of the Dogs Act 1903 is repealed.

8 See 44 Halsbury's Laws of England (4th edn) 618. Section 15 of the 1978 Interpretation Act has replaced s11(1) and s17(1) of the 1978 Act has replaced s11(2).

9 For a cautionary example, see *Pattinson v Finningley Internal Drainage Board* [1970] 2 QB 33, [1970] 1 All ER 790.

10 See 44 Halsbury's Laws of England (4th edn) 604 footnote 7.

Section 4 of the Dogs Act 1903 is amended by repealing subsections (2) and (3).

The repeal of units of legislation lesser than subsections will be discussed in Chapter 18 where the suggestion is made that the word 'repealed' be used in all cases where that is the function.[11]

With regard to the repeal of subordinate legislation, terminology varies considerably. In many jurisdictions, the practice is to 'revoke' rules, regulations and orders and to 'cancel' proclamations, bye-laws, and notices. The word 'rescind' is also used. The extent to which practice differs throughout the Commonwealth strengthens the view that the varying distinctions traditionally drawn serve no useful purpose and have no logical foundation. It is suggested, in the interest of clarity and consistency, that the 'is repealed' formula should also be adopted for all forms of subordinate legislation.

Where an Act contains a number of repeal provisions, these should not be scattered about like currants in a bun. Repeals should be assembled in one section or, if more convenient because they are numerous, in a schedule.

A repeal schedule can be provided for as follows:

The enactments referred to in the first column of Schedule 2 are repealed to the extent specified in the second column of that schedule.

or more simply

The enactments specified in Schedule 2 are repealed.

If more than one provision is to be repealed, care should be taken to construct the repealing provision so that it does not become a misleading jumble which is difficult to comprehend. The content of the following example would have been much more efficiently communicated had the three amendments been separated into three paragraphs.

In the Superannuation Act 1988, section 4, in section 6(1) the words 'or section 4' and, in section 7(2), paragraph (c) are hereby repealed.

Compared with the above, the following form is much more quickly comprehended:

The Superannuation Act 1988 is amended
(a) by repealing section 4; and
(b) in section 6(1), by repealing 'or section 4'; and
(c) in section 7(2), by repealing paragraph (c).

As a general rule, a repeal provision should contain no other matter, even if the repeal is a consequence of that other matter. A repeal presented in the manner of the following example is easily overlooked.

(3) For the purpose of conferring jurisdiction, any offence under the law in force in, or in a part of, the United Kingdom committed on board an aircraft in flight shall be deemed to have been committed in any place in the United Kingdom

11 See p417.

(or, as the case may be, in that part thereof) where the offender may for the time being be; and section 62(1) of the Civil Aviation Act 1949 is hereby repealed.
Tokyo Convention Act 1967 [UK] s1(3).

SCHEDULES[12]

The use of schedules is a legitimate and helpful device for the clearer presentation and more efficient communication of the content of legislation. The general practice is for matters of principle to remain in the sections of the statute while lesser matters of machinery or detail may be arranged in schedules. The principal purpose of this arrangement is to enable the presentation of the main sections of the enactment uncluttered by material of secondary or incidental importance.

Consistency is of very great importance. A careless, illogical and inconsistent approach to schedule design and content will prove seriously harmful, indeed counter-productive. Consistency of word usage in schedules and the remainder of the text must be preserved. A device intended only to facilitate easy communication may have the opposite effect.[13]

Matter should only be gathered together and presented in a schedule if it has some cohering and unifying feature.

It is essential to bear in mind that the device is no more than one of presentation for the schedule is as much part of the enactment as is the section introducing it, or indeed any other section.[14] It is customary to include in a section of an Act a reference provision in which the schedule is referred to. This may be simple and direct:

> Schedule 3 has effect.

Alternatively, the reference provision may elucidate the purpose of the schedule:

> Schedule 1 has effect with respect to the constitution and proceedings of the Conservation Council.

The nature of the subject-matter of a schedule may on occasion justify the insertion in a statute of a power to amend the schedule by subordinate legislation.[15]

It is recommended that schedules be numbered as 'Schedule 1', 'Schedule 2' and so on rather than 'First Schedule', 'Second Schedule' etc. If there is to be only one schedule, it should nevertheless be designated as 'Schedule 1'. This will facilitate the later addition of further schedules numbered 2, 3 and so on without the need to redesignate the original 'Schedule' as 'Schedule 1'. Sadly, but inevitably, the best constructed statutes are frequently subjected to complex amendments as time passes and additional schedules may be necessary. It is suggested, by way of

12 See pp 140, 253.

13 Note the concern expressed in the Renton Report (paras 6, 10) and the recommendation at para 20.2 (30). See C. Hand, 'Drafting with the user in mind—a look at legislation in 1982–83' [1983] Stat LR 166.

14 See 44 Halsbury's Laws of England (4th edn) 498–499; *Bennion*, pp490–492; *A-G v Lamplough* (1878) 3 Ex D 214; on appeal 47 LJQB 555, CA at p229; *IRC v Gittus* [1920] 1 KB 563, 89 LJKB 313; affd sub nom *Gittus v IRC* [1921] 2 AC 81, 90 LJKB 716, HL.

15 See p343.

example, that two schedules that are inserted between Schedules 2 and 3 be designated as Schedules 2A and 2B.

A schedule should have a descriptive heading and should contain a reference to the section of the Act to which it is attached. For example

SCHEDULE 1

(section 17)

CONSTITUTION AND PROCEDURE OF COUNCIL

In some jurisdictions the practice is followed of printing schedules in a smaller print than that used for the remainder of the text. This is a mistake because it may confuse readers into believing that the matter in schedules has some lesser status than that in the remainder of the statute. There are no rules as to the manner or form in which matter be presented in a schedule, although numbered paragraphs and subparagraphs are usual. In some jurisdictions, the terminology used is 'clauses' and 'items'. It is desirable that the style of numbering adopted in schedules should differ from that for sections to avoid confusion. The use of parentheses and/or italics may assist. Where desirable, the material may be divided into Parts and cross-headings and marginal and other notes may be included.[16] Alternatively a tabulated form, using columns or otherwise, may be adopted if this will aid communication. When a schedule consists of material presented in a tabular form (eg a list of fees or charges) it is desirable that the items be numbered, perhaps in the first of a series of columns in the schedule. Enumeration of this kind enables easy reference to particular items if they are subsequently to be amended or repealed.

Provisions which are particularly suitable for including in schedules include

- repeals. See a form of repeal schedule below
- minor and consequential amendments
- transitional provisions
- the constitution and procedure for a statutory corporation or other body. The English practice in this regard is highly recommended. It enables provisions setting out the essential purpose of a body to be presented immediately after the establishment of the body. This is much to be preferred to the alternative of requiring the reader to wade through a layer of procedural matter before discovering the body's functions
- the form of international and other agreements[17]
- descriptions of areas or plans
- lists of persons or objects to which provisions in the statute apply or do not apply
- other material suitable for presentation in tabulated form, eg rates of taxes or duties, fees, benefits and contributions.

Two examples of a repeal schedule follow. The first uses columns, the second doesn't.

16 As to division into Parts, see p177. As to cross-headings see p183. As to notes see p161.

17 As to international agreements, see p308. As to contracts, see 44 Halsbury's Laws of England (4th edn) 588–589. Before reproducing any agreement in a schedule, a drafter must be quite certain of the purpose in so doing.

SCHEDULE 2

(Section 27)

REPEALS

SHORT TITLE	EXTENT OF REPEAL
Dogs Act 1933 (Cap 222)	The whole Act
Poultry Act 1854 (Cap 22)	Part III
Cruelty to Parliamentary Counsel Act 2010 (Cap 2010)	Section 21 In section 24, subsections (3) and (4)

SCHEDULE 2

See section 27

REPEALS

Dogs Act 1933 (Cap 222)
The whole Act

Poultry Act 1854 Cap 22)
Part III

Cruelty to Parliamentary Counsel Act 2010 (Cap 2010)
Section 21
In section 24, subsections (3) and (4)

In most cases it is better practice not to schedule forms, but instead to enable them to be prescribed by subordinate legislation or, better still, to be specified or issued without formality by a named official or body. Experience frequently reveals the need for recurring revision of forms and a flexible approach is desirable. On the other hand, the subject-matter of a form may in exceptional cases be of such importance that it should be scheduled, eg a form of voting paper, or the form of an oath. Where forms are scheduled it is important that the introductory section should make it clear whether the forms given are to be followed exactly or are subject to modification should circumstances so require.[18]

18 Interpretation legislation may contain a particular provision as to the effect of deviation from forms along the following lines: 'Where a form is prescribed or specified under a written law, deviations from the form that do not materially affect the substance and are not likely to mislead do not invalidate the form used.'

Chapter 18

Amending legislation

INTRODUCTION

The effect of amending legislation is ascertained by the tenor of the principal and the amending legislation read as forming parts of a whole. Amending provisions are not construed as altering completely the character of the principal law unless clear language is found indicating such an intention. On the other hand, it has been said that it is wrong to construe amending provisions in a niggardly and technical spirit with an eye fixed on the old law, since it is easy by such a mode of construction to eviscerate the amending enactment and deprive it of effect.[1]

An appreciation that principal and amending legislation must always be construed to form one coherent whole is of prime importance to drafters. It is easy, but short-sighted and dangerous, to view the drafting of an amending Act as presenting a series of distinct, unrelated, technical problems. A long-sighted view, which sees the amendments in the context of the principal Act, and both Acts in the wider context of all pertinent existing laws, is much to be preferred.

There are four major considerations that must be taken into account in the drafting of amending legislation.

1 The drafter must acquire a comprehensive acquaintance with the whole of the Act that is to be amended and with other pertinent laws[2]

The importance of this unashamedly axiomatic injunction cannot be exaggerated. The duty is similarly onerous no matter what technique of amendment is employed. Temptation to disregard this rule is at its strongest when the instructed amendment appears on the face of it to affect only a small segment of the principal legislation.

2 The language of the amending Act must be consistent with that of the principal Act and with other pertinent laws

This rule has two distinct applications.

The first arises from the ease with which the inattentive drafter can stray from one word used in an Act to another of very much the same meaning. This can be

1 See *Earl Fitzwilliam's Collieries Co v Phillips* [1943] AC 570 at 580.

2 A liberal view is necessary of what constitute other pertinent laws. The term, of course, embraces common law and case law as well as statutes.

done not with the intention of improvement but inadvertently. For example, one might unwittingly stray from 'ocean' to 'sea', or from 'deliver' to 'supply', or 'remuneration' to 'emoluments'.

The second application arises from an appreciation of and a desire to improve perceived imperfections in the principal Act either by removing archaic words or replacing words considered inappropriate.

The consistency of language rule should be adhered to principally because a change in language is likely to give rise to an unintended inference that a change in meaning is intended.[3] However, the rule should not deter a drafter from avoiding the use of archaic words such as 'aforesaid' or 'hereinafter' in the amending legislation. In fact, that legislation may provide a good opportunity to bring the whole of the law up to date stylistically. The focus of the rule is on words that are important to the meaning of the provision. For example, if a principal Act referred to 'coach' it would be a mistake to refer to 'bus' in the amending Act. Likewise, it would be unwise to change from 'engine' to 'motor' although the latter is more commonly used now.

Consistency in language and style produces neater and more easily understood legislation that more readily forms an intelligible whole with the principal legislation.

Another reason for the pursuit of consistency is the necessity to bear in mind that a later amending Act may be looked at by a court for the purpose of assisting it to resolve an ambiguity in an earlier Act which it has amended.[4]

3 The effect of the proposed amendments on provisions of the principal Act other than those directly amended and on other legislation must be studied and necessary consequential amendments must be made

What is new must be related to the old. A failure to make necessary consequential amendments is the surest way to earn a reputation for sloppiness.

A typical error follows from the repeal or amendment of a section and consists of the failure to remove or correct references to that section or its contents in other sections of the principal Act. It is very easy to overlook the necessity for apparently simple and obvious consequential changes in the statute being amended, but the remedy is straightforward—careful and thoughtful study of the whole Act.

A hazard that is much more difficult to deal with is the consequential effect of the repeal or amendment of a section on other written laws. The first and major task is how to identify those laws that should be consequentially amended. This is an easy matter for the minority of drafters blessed with a computerised retrieval system; however for many that remains a dream. Instructions can rarely be relied on to identify all laws requiring amendment and an extremely large search exercise may be desirable if vague general amendments (see page 408) are to be avoided. Of course, general amendments may well be better than nothing.

3 'Where there are different statutes in pari materia though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other': Lord Mansfield LCJ in *R v Loxdale* (1758) 1 Burr 445 at 447; prima facie an alteration in language will be considered intentional: *Brighton Parish Guardians v Strand Union Guardians* [1891] 2 QB 156 at 167, CA.

4 See *Kirkness v John Hudson & Co Ltd* [1955] AC 696, [1955] 2 All ER 345, HL.

4 Amending provisions must be related to circumstances as they exist when those provisions come into force

An absolutely indispensable part of every amending exercise is the consideration of whether specific commencement, application, and transitional provisions are necessary. An amending Act is in no different position from any other Act in this area. The discussion and forms in Chapter 17 are of equal application to amending Acts which repeal enactments within a principal Act as they are to the repeal of whole Acts.

TECHNIQUES OF AMENDMENT

A broad distinction exists between two widely differing techniques of drafting amending legislation. One method may be described as direct and textual, the other as indirect, referential and cumulative.

The direct method needs little explanation. It has been neatly described by H. H. Marshall and Norman S. Marsh in this fashion: 'By textual is meant the specific and seriatim insertion, substitution or deletion of words, paragraphs, sections or subsections in or from the principal Act, in the same way as a new spare part is inserted into an engine in the place of an old one.'[5]

It is of the essence of this method of amendment that new statutory provisions or modifications are, wherever possible, integrated with the old either by direct amendment of the existing statute or by means of the repeal and replacement of the statute.

The indirect method, which is less familiar outside the United Kingdom, consists of a narrative statement in the amending law stating the effect of the amendment. The amending law does not in so many words purport to amend the principal law, nor does it merge with it and lose its separate existence on enactment as an amending law generally does when the direct method is followed. Inherent in the method is the use of much referential legislation. The effect is a cumulative one as statute is piled on statute making comprehension progressively more difficult. Turning again to the admirable paper delivered by Marshall and Marsh to the Third Commonwealth and Empire Law Conference in 1965, the method is described in this way:

> The amendments are drafted in a narrative or discursive style producing an interwoven web of allusion, cross-reference and interpretation which effectively prevents the production of a collection of single Acts each relating to a particular subject otherwise than by the legislative processes of consolidation and repeal. As Sir William Graham Harrison has pointed out, often Act is heaped upon Act until the result is chaotic and almost completely unintelligible.[6]

Here is a simple example of the indirect method taken from section 4 (1) of the Civic Amenities Act 1967 [UK]:

> 4. (1) The power conferred by subsection (1) of section 4 of the Historic Buildings and Ancient Monuments Act 1953 to make grants for the purposes mentioned in that

5 H. H. Marshall QC and Norman S. Marsh, 'Case Law, Codification and Statute Law Revision' Report of Third Commonwealth and Empire Law Conference 407 at 425.

6 Ibid, p424. The statement attributed to Sir William Graham Harrison may be found in JSPTL 1935, p25.

subsection shall include power to make loans for those purposes, and references to grants in subsections (3) and (4) of that section shall be construed accordingly.

The cumulative effect of the use of this technique may be observed in straightforward form by reference to the legislation in the United Kingdom for the protection of birds. A principal Act of comparatively small dimensions (16 sections) was enacted in 1954.[7] When amendments were required in 1967 this purpose was achieved by the enactment of a further separate Act of just twelve sections. The content of the amending provision could undoubtedly have been integrated directly with the 1954 Act if the direct method of amendment had been followed. It may be noted that the indirect technique produces unnecessary complexities such as the following penal provision which creates in section 4 of the 1967 Act an offence under the 1954 Act:

4 (1) Subject to this section, if any person wilfully disturbs any wild bird included in Schedule 1 to the principal Act (wild birds protected by special penalties) while it is on or near a nest containing eggs or unflown young of any such bird he shall be guilty of an offence against that Act and liable to a special penalty under that Act.

The interweaving process is seen further in two later subsections of the same section.

(5) In section 4 of the principal Act (general exceptions to liability under section 1 or an order under section 3 of that Act) references to the said section 1 shall include references to subsection (1) above, and references to such an order shall include references to such an order made by virtue of subsection (2) above.

(6) A licence under section 10 of the principal Act to take or kill any wild birds or to take the nests or eggs of any wild birds shall be taken as authorising any act reasonably incidental to that taking or killing which would otherwise constitute an offence against that Act by virtue of this section.

COMPARISON OF TECHNIQUES

Until the last decade or so, in the United Kingdom most statutory amendments of substance were effected indirectly or non-textually while consequential amendments were effected directly, frequently in schedule form. Often the same amending provision that was made indirectly was immediately repeated in the form of a direct amendment. This practice is seen in s2 of the Protection of Birds Act 1967 [UK] which states:

The power of the Secretary of State under section 2 of the principal Act to prescribe common wild birds whose eggs may be taken or destroyed without contravening section 1 of that Act shall cease; and, accordingly, in subsection (4)(a) of the said section 2 the words from 'or of any other common wild bird' to the end are hereby repealed.

The traditional United Kingdom style, therefore, produced a pottage comprising direct amendments, indirect amendments and provisions incorporating both techniques. The effect, at least to one not nurtured from his early years on English statutes, is confusing, particularly so as it rests on a stream of consistently

7 The Act was repealed in 1981 by the Wildlife and Countryside Act 1981.

invidious and inevitably inconsistent decisions as to which amendments should properly be effected by one method, which by the other, and which by both.

On the other hand in many cases, an amending provision of an indirect nature in narrative form makes better sense and is, when standing alone, more intelligible than a direct amendment to the same effect. This appears to be the major justification for the practice. Ilbert, writing of the indirect method, says that 'for parliamentary purposes [it] is the most convenient, because under it every member of Parliament who knows anything of the subject learns at once the nature of the amendment proposed'.[8] However, the complexity of much modern legislation reduces the strength of this argument.

The apparent lack of intelligibility of some direct amendments can be remedied effectively by including explanatory material in parentheses or by way of notes or more fully by means of a detailed explanatory memorandum. Provided it is made clear that the explanatory material is not part of the Bill, there is no reason why it should not be presented directly beneath or opposite the text itself so that it can be of maximum practical assistance to legislators. Another technique which improves intelligibility is the repeal and replacement of complete provisions instead of multiple direct amendments, but this may not always be politically acceptable in so far as the permissible range of debate may be unacceptably extended.

The advantages of the direct or textual method outweigh heavily the disadvantages. These advantages are

- the direct method produces law which is simpler and easier to understand, provided that reprints, revisions or consolidations are produced frequently
- the direct method reduces the proliferation of statutes
- to some extent, it makes consolidation a running exercise thus facilitating the production of consolidated reprints or revisions without the need for specific legislation
- by encouraging the integration of new and modified provisions with the old, it encourages a view of the law on a particular subject as a whole rather than as a series of interwoven but separate parts
- by directly integrating the new provisions with the old, it reduces the potential for repeal by implication
- it facilitates annotation
- not least, direct amendments are easier to draft.

In the last decade or so there has been a significant change of practice in the United Kingdom and the emphasis has changed so that direct or textual amendment is followed whenever convenience permits. After a useful study of both techniques, the Renton Report welcomed the new practice and recommended that it be applied as generously as possible.[9]

Most Commonwealth countries use the indirect method only in exceptional cases, usually where general amendments are involved. For example, constitutional or other change may require an amendment of a general nature to be produced with haste so that time does not allow the research necessary to identify all the particular laws that need amendment.

For example, when Tanganyika (as it was then) became a Republic in 1962, the following section was enacted:

8 Ilbert, *Legislative Methods and Forms*, p259.

9 See 'The Preparation of Legislation' (The Renton Report) (Cmnd 6053) Chapter XIII. For an earlier critical study, see *Statute Law: the Key to Clarity* (The Statute Law Society).

Save as may be provided in this or in any other written law and unless the context otherwise requires—

(a) any reference in existing law or in any public document to Her Majesty the Queen (whether or not that expression is used) or to the Crown, in respect of Tanganyika, shall be read and construed in respect of any time, or any period commencing, on or after the ninth day of December, 1962, as if it were a reference to the Republic;

(b) any reference in existing law or in any public document to the Governor-General of Tanganyika (including references to the Governor and Commander-in-Chief of the former Trust Territory of Tanganyika, to the Governor in Executive Council, the Governor in Council and the Governor in Council of Ministers, which by reason of any law which had effect immediately prior to the ninth day of December, 1962, are to be read and construed as references to the Governor-General) shall be read and construed in respect of any time, or any period commencing, on or after the ninth day of December, 1962, as if it were a reference to the President;

(c) any reference in existing law or in any public document to the Prime Minister shall be read and construed in respect of any time, or any period commencing, on or after the ninth day of December, 1962, as if it were a reference to the President;

(d) any reference in existing law or in any public document to the Cabinet (including references to any other Council which by reason of any law which had effect immediately before the ninth day of December, 1962, are to be read and construed as references to the Cabinet) shall be read and construed in respect of any time, or any period commencing, on or after the ninth day of December, 1962, as if it were a reference to the Cabinet established by the Republican Constitution.

Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act 1962 s8.

A similar kind of general amendment is illustrated by s81(1) of the Dental Act 1988 [NZ] which states

(1) All references in any enactment to a dentist or registered dentist or duly qualified dentist shall, unless a different intention appears, be deemed to be references to a dentist registered under this Act.

It is interesting to note that in Australia an indirect amendment of a general kind to all laws (s10, Currency Act 1965) providing that references to pounds, shillings and pence should be construed as references to the appropriate number of dollars and cents was later followed by a considerable quantity of specific legislation making direct amendments to the same effect.[10]

DRAFTING DIRECT AMENDMENTS

Design of amending statutes

For a discussion of the design of amending statutes, see page 141.

10 For example, see Statute Law Revision (Decimal Currency) Act 1966 [Aust].

Short titles

Short titles for amending statutes are discussed at page 202.

Reference to the principal Act

To avoid repetition in each section of the short title of the Act that is being amended, it is convenient to provide for that Act to be referred to as 'the principal Act'. This may be done most clearly by a separate section, or perhaps a subsection presented in the same section as the short title, as follows:

> In this Act, the Fruit Export Act 1979 is referred to as the principal Act.

If preferred, the first amending section may include the provision. For example

> Section 4 of the Dogs Registration Act 1954, which is referred to in this Act as the principal Act, is amended by ...

Succeeding sections may then refer simply to the principal Act, as follows:

> Section 5 of the principal Act is amended by ...

If no more than one or two sections of the principal Act are to be amended, it is not necessary to rely on the term 'principal Act' and each amending section may refer to the short title. Thus

> Section 14 of the Tomato Growers Act 1917 is amended ...

Reference to the section amended

Each amending section should begin by referring to the section which is to be amended. For example

> Section 6 of the principal Act is amended by repealing ', other than a water buffalo,'.

This practice directs the attention of the reader immediately to the relevant section of the principal legislation, and it does so more quickly than do the following forms (which are not recommended):

> The principal Act is amended by repealing ', other than a water buffalo,' in section 6.

> The principal Act is amended by repealing in section 6 ', other than a water buffalo,'.

Similarly, to take a more complex reference, it is suggested that the form of the following example is effective, not only because it begins by referring to the section and subsection amended but also because it refers to the units of that section in a convenient order (ie the order which a user must follow to reach the relevant provision).

> Section 6(2) of the principal Act is amended by repealing paragraph (b).

The following forms are disapproved of:

> Paragraph (b) of subsection (2) of section 6 of the principal Act is repealed.

> The principal Act is amended in subsection (2) of section 6 by repealing paragraph (b).

A new section may be added in this form

> After section 6 of the principal Act, the following section is inserted:

This form has the advantage of directing the reader's attention to the position in the principal Act of the proposed new section.

Recommended scope of amending section

As a general rule, it is preferable that one amending section should not amend more than one section of the principal Act, but of course there is no objection to including in one section a series of amendments to one section. The ordinary devices of paragraphing may be used in such cases. For example

> Section 6 of the principal Act is amended
> (a) by repealing subsection (1); and
> (b) in subsection (2), by repealing 'over the age of seventeen'; and
> (c) in subsection (3)
> (i) by repealing paragraph (j); and
> (ii) by inserting at the end of paragraph (k) 'or dogs'.

It hinders ready comprehension if more than one amendment is provided for in one paragraph, particularly if the amendments are not related. An example (of the kind not to be followed) follows:

> Section 17 of the principal Act is amended in subsection (3) by deleting 'and the Minister may cancel a licence' and after subsection (4) the following subsection is inserted:
>
> '(4a) ...'

Notwithstanding the general rule that an amending section should be concerned only with one section of the principal Act, one amending section may repeal contiguous sections of the principal Act. For example

> Sections 6 to 8 of the principal Act are repealed and the following sections are substituted:

However, there may be good reason to have a separate provision in respect of each section, eg the desirability of separate parliamentary consideration or separate commencement provisions.

The following provision is acceptable so long as no amendment is to be made to section 7 of the principal Act:

> Sections 6 and 8 of the principal Act are repealed.

An important feature of the textual method is the particularity of reference to what is amended. The reader should not be required to spend time in searching

for the words or passages subject to amendment. For example, it is technically adequate, but unhelpful, for a section to amend a phrase 'wherever it occurs in the principal Act'. Better practice is for the drafter to identify and refer to all the provisions affected by the amendment. Where these are numerous they will be most helpful if assembled in a table to a section. For example

> The principal Act is amended by deleting 'Director' wherever it occurs in the provisions referred to in the Table to this section and substituting 'Director-General' in each case:
>
> TABLE
>
Section 4	Section 27(3)
Section 4B	Section 29(6), (7)
Section 17(1)(a)	Section 40
Section 23(1), (6)	Section 40B(2)(a), (b), (c).

Parenthetic explanatory material

An important and valuable feature of English amendment practice is the generous provision of explanatory material inserted parenthetically. For example, the London Regional Transport Act 1984 [UK] s1(1) states

> Parts I and II of the 1969 Act (which made provision with respect to transport in and around Greater London and, in particular, established the London Transport Executive to run London Transport Services subject to the overall control of the Greater London Council) shall cease to have effect on the appointed day.

In many contexts the insertions are terser yet no less useful. For example

> In section 33A of the Road Traffic Act 1988 (wearing of seat belts)
> (a) in subsection (4) (production of medical certificates) repeal 'five days', substitute 'one week'; and ...

It is open to argument whether explanatory material is better inserted in the body of the section parenthetically in this fashion or is better provided separately in notes or an explanatory memorandum. The latter course is more flexible and, as there is not the same stringent necessity for brevity, it permits more complete and more accurate information.

Headings for amending sections

As to section headings for amending legislation, see page 186.

Reference to prior amendments

Interpretation legislation generally provides that a reference to a statute is to be construed as a reference to that statute as amended from time to time, thus making it unnecessary to cite amendments when engaged in amending a provision that has already been amended on a previous occasion or occasions. Nevertheless, it is important that some system be adopted by which the reader of an amending statute is made aware of the existence of previous amendments. The less efficient the

reprint or revisionary system, the more important is such a system. Its effectiveness is of even greater importance for drafters if they are to avoid making asses of themselves from time to time by amending an outdated text.

The information is generally provided in footnotes or marginal notes. It is suggested that somewhere on the first page of each amending Act reference should be made by number to all previous enactments which have amended the principal legislation. Further, a note to each amending section should include reference to all previous amendments which have been made to the section under amendment.

In Canada, the position is regulated by s11 of the Publication of Statutes Act. This section requires that marginal notes refer 'to the year and chapter of previous Statutes, whenever the text amends, repeals or changes the enactments of former years'.

Caution against referring to line numbers

It is desirable when drafting amending sections to avoid reference to line numbers because of the possibility of confusion arising from reprints, revisions or amendments to the text having effect to alter the original line numbering. Forms similar to the following should not be used:

> Section 45 of the principal Act is amended by repealing 'apprehended or' where it occurs in line 5.

Nevertheless, where a word or expression which occurs more than once in a sentence is to be amended, the drafter must achieve certainty as to which occurrence or occurrences of that word or expression are the subject of the amendment.

If the amendment is of application to all occurrences of the word or expression, the phrase 'wherever it occurs' or 'wherever occurring' is suitable. Thus

> Section 6 of the principal Act is amended by repealing 'or a district judge' wherever occurring.

> Section 7 of the principal Act is amended by repealing 'banana' wherever it occurs.

If the amendment does not apply to all occurrences, those to which the amendment does apply must be identified clearly. It is good practice to do this by reference to the words immediately before or after the word or expression which is to be amended or by use of a phrase such as 'where it first occurs' or 'where it last occurs'. For example

> Section 6 of the principal Act is amended by repealing 'or a district judge' where it first occurs.

> Section 6 of the principal Act is amended by repealing 'or a district judge' where it occurs after 'magistrate'.

> Section 6 of the principal Act is amended by repealing 'or a district judge' in the second place where it occurs.

Where appropriate, use may be made of the phrases 'at the beginning' or 'at the end'.

Section 6 of the principal Act is amended by inserting 'If the application is refused' at the beginning.

If words forming part of a provision are to be repealed or replaced, those words should be stated in full in the interests of clarity and certainty. Do not follow these forms:

In section 48 of the principal Act, the words from 'the Joint Authority' to the end are repealed.

In section 72 of the principal Act, for the words 'or of' onwards there shall be substituted 'shall be 7 years'.

Numbering practice

Where a paragraph, subsection, section or other separate element of an Act is inserted or repealed, subsequent provisions should not as a rule be relettered or renumbered. Relettering or renumbering is likely to lead to misinterpretations, especially in relation to existing cross-references. Also, where the statute has been subjected to frequent amendment, relettering or renumbering makes it more difficult to identify the content of a particular provision at a particular time in the past.

In the case of insertions, difficulties may be avoided by the use of distinguishing letters. A section inserted in a statute may be given the number of the section which it follows to which is added the capital letter A. The letters B, C, and so on may be added to the same number if more than one section is to be inserted. A similar practice with respect to other insertions is illustrated below.

New Parts of an Act inserted after Part 3 should be numbered 3A, 3B and so on.

Sections inserted between sections 4 and 5 should be numbered 4A, 4B, 4C and so on.

Subsections inserted between subsections (2) and (3) should be numbered (2a), (2b), (2c) and so on.

Paragraphs inserted between paragraphs (d) and (e) should be lettered (da), (db), (dc) and so on. (Not (dd), (ddd) etc.)

Subparagraphs inserted between subparagraphs (iii) and (iv) may be lettered (iiia), (iiib), (iiic) and so on.

Canadian practice is of interest. Sections inserted between sections 4 and 5 would be numbered 4.1, 4.2 and so on. Subsections inserted between subsections (2) and (3) would be numbered (2.1), (2.2), (2.3) and so on.

A possible but uncommon complication is illustrated by assuming that an Act contains sections 2, 2A and 2B and a new section is to be inserted between sections 2 and 2A. In this case, the new section may be numbered 2AA and the sequence 2AB, 2AC etc may follow. Let us suppose however that the new section is to be inserted between 2A and 2B (and not between 2 and 2A). Again the new sequence might be 2AA, 2AB, 2AC etc.

In other words, the 2AA sequence may be used in either of the above situations on a first need basis. In the unlikely event that a further sequence is necessary for the remaining position, it could be 2AAA, 2AAB, etc. Alternatively, as an exceptional measure, it is probably more attractive to adopt the minimum renumbering required to avoid the complication.

A minor renumbering problem occurs when an existing section which is not composed of subsections is to be amended by the addition of a further subsection. It is common practice in many countries to leave the existing section without a subsection number (until added on reprinting or revision) but, nevertheless, to number the new subsection as (2). The following alternative form is accurate, although too punctilious for some tastes:

Section 4 of the principal Act is amended
(a) by inserting before the existing provision, the subsection designation '(1)'; and
(b) by inserting the following subsection

'(2) ...'

Consideration of repeal and re-enactment

If a section (or lesser unit) is to be extensively amended, or an amendment is instructed to be made to a section which has previously been amended in a number of respects, consideration should be given to the repeal and re-enactment of the whole provision as an alternative to the enactment of direct amendments which may be difficult to follow. Repeal and re-enactment of the whole of a provision assists intelligibility for legislators and subsequent users but three points must be kept in mind.

First, repeal and re-enactment of a whole provision may open up for debate in the legislature material which is in fact unaffected by the proposed amendments. Political considerations may therefore require in the case of controversial subject-matter that the scope of the amendment be no greater than necessary.

Secondly, the application of a repeal and re-enactment provision to existing facts may raise additional transitional problems.

Thirdly, the repeal and re-enactment method does not make apparent the nature of the changes in the redrafted provisions. This can and should be remedied in explanatory material.

The considerations set out above in relation to the extensive amendment of sections are of equal application to extensive amendments to Parts of an Act or indeed the whole Act. These may be such as to suggest repeal and re-enactment of a Part or the whole Act rather than messy multiple amendments.

Punctuation

Punctuation of amending provisions does not present many difficulties, but it does require a high degree of care and consistency. It is best considered as performing functions on three distinct levels.

- The punctuation in the formal part of the amending section that introduces a paragraphed amendment or separate elements of it.
- The punctuation identifying the material that is repealed, substituted or inserted.
- The internal punctuation contained in the material that is repealed, substituted or inserted.

The punctuation in the formal part of the amending section that introduces a paragraphed amendment or separate elements of it

Either a colon or a dash or no mark at all may introduce paragraphed material. Amending paragraphs should be separated by semi-colons and coordinated by 'and'.

Thus

> Section 6 of the principal Act is amended
> (a) by repealing subsection (2); and
> (b) by inserting after subsection (3) ...

In some jurisdictions, the introductory function is performed by a colon followed by a dash. Either mark is sufficient; the use of both is an extravagance.

If material inserted in a statute ends with a full stop and a further full stop is provided in the normal fashion to mark the end of the amending section, the result is the slightly comical .'. series of marks. Some countries consider this to be too much and accordingly dispense with the final full stop. Nevertheless, the final full stop does serve a practical purpose by denoting the end of the section and is therefore worthy of its place.

The following is correctly punctuated:[11]

> Section 6 of the principal Act is amended:
> (a) by repealing subsection (2); and
> (b) by repealing subsection (3) and substituting the following subsections:
>
> '(3) ...
> (3a) ... '; and
> (c) in subsection (5), by repealing paragraph (b) and substituting the following paragraph:
>
> '(b) ...'; and
> (d) by repealing subsection (6) and substituting the following subsection:
>
> '(6) ... '.

The punctuation identifying the material that is repealed, substituted or inserted

The most satisfactory method of identifying repealed, substituted or inserted material is to enclose it in inverted commas placed before and after the material in the manner illustrated in the example above.

Some Australian jurisdictions and New Zealand follow the practice of repeating the initial inverted commas at the beginning of each new paragraph of the material but this is unnecessary and adds clutter to the page.

An alternative to the use of inverted commas is the identification of the material only by the use of a wider margin; but the use of inverted commas gives a more definite identification and is also more in keeping with ordinary punctuation usage.

11 The example is inserted to illustrate punctuation usage. In view of the number of amendments and quantity of new material inserted, repeal and replacement of the whole section might well be a better option.

The internal punctuation contained in the material that is repealed, substituted or inserted

So far as material to be repealed is concerned, care must be taken to reproduce exactly the punctuation as it stands in the statute. Especial care is necessary with respect to any mark of punctuation appearing at the beginning or the end of that material. In punctuating material to be inserted, careful attention must be paid to the context into which the new material is to fit.

The error in the following example is not uncommon.

> Section 6 of the principal Act is amended by repealing 'such sums as may be required for the like purpose,' and substituting 'such sums as may be determined by the Treasury.'.

This form introduces an embarrassed full stop into the middle of a sentence. The first of the two full stops should, of course, be replaced by a comma.

FORMS

The forms that follow do not represent the style in use in any particular jurisdiction. The intention is to present forms that communicate the intended meaning as simply and as efficiently as is possible, but, inevitably, this intention has suffered under the burden of the writer's prejudices.

Widespread minor variations in style are apparent when amending laws of Commonwealth countries are compared and in most cases these variations cannot be said to be of much significance. Nevertheless, one criticism of widespread validity is verbosity. For example, in the following rather exaggerated form, all the italicised words might be omitted as of no value:

> Section 6 of the principal Act is *hereby further* amended *in the following respects, that is to say*:
>
> (a) by repealing subsection (1) *thereof*; and
>
> (b) by inserting *therein* after subsection (2) the following *new subsection to stand as subsection (2a)*:
>
> '(2a) ...';
>
> (c) by repealing subsection (4) *thereof* and substituting *therefor* the following *new subsection to stand as subsection (4)*:
>
> '(4) ...'; and
>
> (d) in subsection (5), by inserting immediately after *the word* 'cat' the following *comma and word* ', dog'.

Forms adopting the full narrative form stating each element of the provision amended (eg 'paragraph (b) of subsection (1) of section 27') are open to criticism as being unnecessarily long and that criticism has merit. The forms that follow use the compressed form ('section 27(1)(b)') for elements preceding the element that is the subject of the amendment. The purist may object to the inaccuracy of the reference which strictly is not to a section but to a paragraph and some jurisdictions have bowed to that criticism and would refer to paragraph 27(1)(b). That view is too punctilious.

Even a compressed version of a narrative form can be rather lengthy and of course in an amending Bill repetition in each clause of the lengthy form can appear

rather tedious. Some jurisdictions have adopted abbreviated styles, not always amounting to well-formed grammatical sentences but nevertheless conveying a precise and clear meaning. The forms that follow usually give an alternative to the full narrative version in abbreviated form. The style followed in the abbreviated form (which seems to the writer to have a lot to commend it) is for the first line simply to refer to the provision that is amended or in case of an insertion to the position of the insertion. The next line states in bold face the verb describing the nature of the amendment (eg **Repeal** or **Insert**). The next line states a further verb if the amendment so requires. Amendments of this kind can conveniently be presented in a schedule. A simple example of the form follows:

Section 55
Repeal 'black forest cake'
Substitute 'Dutch apple cake'.

The forms in this chapter avoid five common but unappealing drafting practices.

- The 'shall be' form of the verb (eg 'Section 6 shall be amended ...'). This form is indirect and smacks a little of legal jargon.
- The 'shall have effect as if' formula (eg 'Section 6 shall have effect as if for subsection (2) there were substituted the following subsection'). This is also indirect. The formula may be appropriate for the indirect method of amendment but is quite inappropriate for direct textual amendments. These should in terms amend the principal legislation either by means of a repeal, a substitution or an insertion.
- The use of 'hereby' (eg 'Section 6 is *hereby* repealed'). The word 'hereby' merely states what is obvious.
- The use of words and phrases such as 'the words', 'the passage', 'the words and figures', 'the words and full stop' and so on to describe what is amended, inserted or repealed (eg 'Section 6 is amended by repealing *the following words, commas and full stop* ...').These serve no purpose.
- Inconsistency. It is clearly helpful to persistent readers of statutes if the same formula is used consistently to achieve the same result.

Repeals, deletions and omissions

The practice in some jurisdictions distinguishes between the repeal of Parts and sections of a statute, which are said to be 'repealed', and the repeal of subsections and lesser units which are variously said to be 'deleted', 'omitted', 'struck out' or to 'cease to have effect'. The boundaries of this distinction are not always drawn at the same point, but some such distinction is very common. It is difficult to see that the distinction serves any purpose or marks any real difference in meaning and, if this is so, the distinction is better abandoned. In all cases the nature of the function is the same; the verb 'repeal' is therefore used in all the forms that follow.

1 REPEAL OF A PART

Part 2 of the principal Act is repealed.

Part 2
Repeal the whole Part.

Immediately above is the first of the abbreviated forms anticipated on page 416. The style followed in every case is for the first line to refer to the location of the amendment. The nature of the amendment is indicated beneath in bold print.

2 REPEAL OF SECTION

Section 6 of the principal Act is repealed.

Sections 16 to 23 of the principal Act are repealed.

Section 6
Repeal the whole section.

3 REPEAL OF SUBSECTION

Section 6 of the principal Act is amended by repealing subsection (3).

Section 6
Repeal subsection (3).

4 REPEAL OF PARAGRAPH, ETC

Section 6(3) of the principal Act is amended by repealing paragraph (c).

Section 6(3)(c) of the principal Act is amended by repealing subparagraph (ii).

Section 6(3)
Repeal paragraph (c).

The following form repeals the last of a series of four alternative paragraphs and consequently repositions the word 'or' and the full stop.

Section 17 of the principal Act is amended
(a) by inserting at the end of paragraph (b) the following:

'or'; and

(b) by repealing '; or' at the end of paragraph (c) and substituting a full stop; and

(c) by repealing paragraph (d).

The result is a technically correct but unattractive-looking provision. The alternative and sensible course of action is just to repeal paragraph (d) and leave the correction of the punctuation and the 'and' and the 'or' until the statute is next revised or reprinted .

5 REPEAL OF DEFINITION

Section 2(1) of the principal Act is amended by repealing the definitions of 'prescribed' and 'regulation'.

Section 2(1)
Repeal the definitions of 'prescribed' and 'regulation'.

6 REPEAL OF WORDS, ETC

Section 2(4)(c) of the principal Act is amended by repealing 'or a magistrate'.

Section 2(4)(c)
Repeal 'or a magistrate'.

Section 2 of the principal Act is amended by repealing ': $200 (or in the case of a renewal $100)'.

No particular reference is needed to cover punctuation marks, figures and other symbols. It would be nonsensical in the above example to repeal explicitly 'the colon, symbols, figures, brackets and words'.

Schedule 3 to the principal Act is amended by repealing item 11.

Section 4 of the principal Act is amended by repealing 'excluding water buffalo' where it last occurs.

Substitutions

1 SUBSTITUTION OF PART

Part 3 of the principal Act is repealed and the following Part is substituted:

'PART 3

...'.

Part 3
Repeal the whole Part
Substitute

'PART 3

...'.

2 SUBSTITUTION OF SECTION

Section 6 of the principal Act is repealed and the following section is substituted:

'6 ...'

Section 6
Repeal the whole section
Substitute
'6 ...'.

3 SUBSTITUTION OF SUBSECTION

Section 6 of the principal Act is amended by repealing subsection (2) and substituting the following subsection:

'(2) …'.

Section 6
Repeal the whole subsection
Substitute
'(6) …'.

4 SUBSTITUTION OF PARAGRAPH

Section 6 of the principal Act is amended in subsection (3) by repealing paragraph (b) and substituting the following paragraph:

'(b) …'.

Section 6(3)
Repeal paragraph (b)
Substitute
'(b) …'.

5 SUBSTITUTION OF DEFINITION

Section 2 (1) of the principal Act is amended by repealing the definition of 'bank' and substituting the following definition:

'**bank** means …'.

Section 2(1) of the principal Act is amended in subsection (1)

(a) by repealing the definition of 'Board' and substituting the following definition:

'**Board** means …' ;and

(b) by repealing the definition of 'prescribed'; and

(c) by repealing the definition of 'shop' and substituting the following definitions:

'**shop** means … ;
shopkeeper means …'.

6 SUBSTITUTION OF WORDS, ETC

Section 6 of the principal Act is amended by repealing 'pig' and substituting 'chicken'.

Section 6(2) of the principal Act is amended by repealing the word 'pig' where it first occurs in paragraph (b) and substituting 'chicken'.

Section 6 (4) of the principal Act is amended by repealing 'pig' in the second place where it occurs and substituting 'chicken'.

Section 6 of the principal Act is amended by repealing 'pig' wherever it occurs and substituting 'dog'.

An alternative is to present the substituted material on a separate line so that it stands out more clearly as follows:

Section 6 of the principal Act is amended by repealing 'pig' and substituting the following:
'chicken'.

An abbreviated form is

Section 6
Repeal 'pig'
Substitute 'dog'.

7 SUBSTITUTION IN SCHEDULES

Schedule 3 to the principal Act is amended

(a) by repealing item 2 and substituting the following item:

'2 ...'; and

(b) by repealing the item in the column headed Rates of Excise Duty opposite to item 4 (which relates to beer) and substituting the following item:
'Per 36 standard gallons of worts ... Shs. 342'.

8 SUBSTITUTION OF HEADING

The heading to Part 2 of the principal Act is repealed and the following heading is substituted:

'MISCELLANEOUS TRADING LICENCES'

The heading '*Instruments and Resolutions*' before section 9 of the principal Act is repealed and the following heading is substituted:

'*Procedure*'.

Insertions and additions

Subtle distinctions are drawn in some jurisdictions between the use in amending sections of the terms 'insertion' and 'addition'. Distinctions are made both by reference to the nature of the amending material (ie whether it is a section, subsection, paragraph etc that is being inserted) and also by reference to the position the included material is to take in relation to the existing provision. In essence, the function served by such insertions and additions is surely the same

and it is therefore better practice to use one word only for the performance of the same function. The forms that follow use only the verb 'insert'.

1 INSERTION OF PART

After Part 4 of the principal Act, the following Part is inserted:

'PART 4A
CIVIL REMEDIES

19A. **Civil proceedings**
The Corporation may ...'.

After Part 4
Insert
'PART 4A
CIVIL REMEDIES

19A. **Civil proceedings**
The Corporation may ...'.

2 INSERTION OF SECTION

After section 14 of the principal Act, the following section is inserted:

'14A Duties of employers ...'.

After section 14
Insert
'14A Duties of employers ...'.

If the principal Act is divided into Parts and the new section is so numbered that it might be the last section of one Part or the first section of the next, clarity should be achieved by use of one of the following forms:

After section 14 of the principal Act, the following section is inserted in Part 4:

'14A. Duties of employers ...'.

After section 14 in Part 4
Insert
'14A. Duties of employers ...'.

Before section 15 of the principal Act, the following section is inserted in Part 5:

'14A. Duties of employers ...'.

Similarly where the statute is not divided into Parts but contains cross-headings, it is necessary to make it clear whether a new section might be above or below a heading.

After section 14 of the principal Act and before the heading 'Miscellaneous', the following section is inserted:

'**14A Duties of employers** ...'.

After section 14 and before the heading 'Miscellaneous'
Insert
'**14A Duties of employers** ...'.

3 INSERTION OF SUBSECTION

Section 6 of the principal Act is amended by inserting after subsection (3) the following subsection:

'(3a) ...'.[12]

Section 7 of the principal Act is amended by inserting before subsection (1) the following subsection:

'(1a) ...'.

After section 6(3)
Insert
'(3a) ...'.

4 INSERTION OF PARAGRAPH

Section 6(3) of the principal Act is amended by inserting after paragraph (b) the following paragraph:

'(ba) ...'.

After section 6(3)(b)
Insert
'(ba) ...'.

5 INSERTION OF DEFINITIONS

Section 2(1) of the principal Act is amended by inserting the following definitions:
'**bank** means ...;
police officer means ...;
vehicle includes ...;'.

Where definitions are inserted into an existing series it may be understood that each is to be inserted alphabetically having regard to its initial letter. Some may

12 The numbering of the new subsection as (3a) in this example assumes that subsection (3) is not the final subsection in the section. If (3) is the final subsection, then further subsections may of course be numbered as (4), (5) and so on.

prefer to make specific provision for this by including after 'inserting' the words 'in their appropriate alphabetical positions'.

If a single definition is to be inserted, its prospective position may be easily identified and this is usually expressed although this is not strictly necessary.

Section 2(1) of the principal Act is amended by inserting after the definition of 'bank' the following definition:

'**bank manager** includes ...'.

Section 2(1)
Insert
'**bank manager** includes ...'.

The first line of the above form could, but need not, be

Section 2(1) (after the definition of **bank**)

6 INSERTION OF WORDS, ETC

Section 7 of the principal Act is amended by inserting after 'cat' the following: 'or dog'.[13]

Section 7 (after 'cat')
Insert 'or dog'.

Section 7 of the principal Act is amended in subsection (5)(b)(i) by inserting after 'cat', where it first occurs, the following:
'or dog'.

Section 8 of the principal Act is amended by inserting after 'cat', in each place where it occurs, the following:
'or dog'.

Section 8 of the principal Act is amended by inserting at the end the following:
'or any other service'.

Section 8 of the principal Act is amended by deleting 'Dogs' at the beginning and substituting the following:
'Cats or dogs'.

Section 8 (at the beginning)
Repeal 'Dogs'
Substitute 'Cats or dogs'.

Section 8 of the principal Act is amended in subsection (1):

(a) by inserting after 'dog', where it first occurs, the following:

13 One point of reference is adequate for an insertion. The following is unnecessarily complicated:
Section 4 of the principal Act is amended by inserting between 'cat' and 'licence' the following:
'or dog'.

'under the apparent age of 12 months,'; and

(b) by inserting after 'in subsection (3)' the following:

'or subsection (4a)'.

Section 8 (1)
(a) after 'dog' where it first occurs
Insert 'under the apparent age of 12 months';
(b) after 'in subsection (3)'
Insert 'or subsection (4a)'.

The long title of the principal Act is amended by inserting after 'load lines;' the following: 'and to regulate overseas cargo shipping;'.

The short title of the principal Act is amended by inserting after 'Animals' the following: 'and Birds'.

Before section 1 of the principal Act, the following heading is inserted:
'*Preliminary*'.

Amendments in schedule form

Many legislative projects of a substantive nature involve the consequential amendment of a sizeable number of Acts. Except where just a very few Acts are involved, it is convenient to present consequential amendments in a schedule. There they may be easily found by users. Placing them in a schedule prevents them obscuring the substantive provisions of the statute.

The schedule must of course deal with the amendments accurately and in other respects it should be designed to present the material as clearly and helpfully to users as is achievable. Two alternative forms are set out below. The first would be introduced by a provision such as

The enactments specified in Schedule 2 are amended in the manner indicated in that Schedule.

SCHEDULE 2
ENACTMENTS AMENDED

See section 66

Coal Industry Superannuation Act 1989
Section 4(1)
Repeal paragraph (b)
Substitute
'(b) an employee's inspector appointed under section 17 of the Mines Safety and Inspection Act 1996;'.

Coroners Act 1922
Section 9 (1)(a)(i)
Repeal ' 'Mines Regulation Act 1946'
Substitute 'Mines Safety and Inspection Act 1996'.

Section 26
Repeal the whole section
Substitute

'26 Inquests on accidental deaths at mines

If it is suspected that a death may have been caused by an accident at a mine, a representative of the deceased person and a representative of any trade union of which that person was a member may each examine the locality of the accident and be present at the inquest.'.

SCHEDULE 2
ENACTMENTS AMENDED

Section 66

Coal Industry Superannuation Act 1989	In section 4(1), repeal paragraph (b) and substitute '(b) an employee's inspector appointed under section 17 of the Mines Safety and Inspection Act 1996;'.
Coroners Act 1922	In section 9(1)(a)(i), repeal 'Mines Regulation Act 1946' and substitute 'Mines Safety and Inspection Act 1996'. Repeal section 26 and substitute **'26 Inquests on accidental deaths at mines** If it is suspected that a death may have been caused by an accident at a mine, a representative of the deceased person and a representative of any trade union of which that person was a member may each examine the locality of the accident and be present at the inquest.'.

In most jurisdictions a schedule is not ordinarily used for amending legislation that is directly amending in nature and not consequential but may be of use to dispose of a large number of amendments similar in character. For example

12. The principal Act is amended as set out in Schedule 1.

SCHEDULE 1

Section 12

AMENDMENTS RELATING TO DECIMAL CURRENCY

Provision amended	Repeal	Insert
Section 15(5)	Two thousand pounds	Four thousand dollars
Section 16(1)(a)	Ten thousand pounds	Twenty thousand dollars
Section 41	One hundred pounds	Two hundred dollars
Section 54A	Twenty five pounds	Fifty dollars

Chapter 19

Subordinate legislation

INTRODUCTION

Subordinate legislation seems the most apt of the various titles commonly used to describe legislation made under a delegated power. This title serves as a reminder of the limitations which circumscribe the work of the drafter in consequence of the subordinate relationship of such legislation to the enabling principal legislation. The drafting of subordinate legislation is marked by the necessity to observe two major limitations.

- The validity of subordinate legislation is subject to challenge in the courts.
- Subordinate legislation is construed in the light of the enabling statute and must give way in case of inconsistency with its plain terms.

Validity of subordinate legislation

An attack on the validity of subordinate legislation may be directed against the manner in which the delegated power has been exercised, that is to say it may be argued that the statutory conditions attached to the exercise of the power by the enabling provision or some other law of general application were not fulfilled. Alternatively, it is more likely that an attack may be directed against the content of the subordinate legislation, that is to say it may be argued that the exercise of the power was not in its substance within the scope of the delegated power.

DEFECTS AS TO STATUTORY CONDITIONS[1]

Drafters have some responsibilities as to the performance of statutory conditions.

In the first place, there is the question of the time of exercise of the power. It is self-evident that the power must exist at the time of its purported exercise; and, of course, this moment in time is crucial for it is certainly of no consequence that power may have existed at some earlier or later time.

Section 13 of the Interpretation Act 1978 [UK], the forerunner of which has been generally adopted and in some jurisdictions adapted, gives limited authority

1 See J. A. Griffin and John Goldring, 'Proof of the Due Exercise of Delegated Powers; Application of the Presumption of Regularity', 48 Aust LJ 118.

for the making of subordinate legislation under a power contained in an Act which has been passed but not yet come into operation. See the form at page 120. The limitation must be observed strictly.

In some instances, power to make subordinate legislation is available only during some prescribed period or while certain prescribed circumstances obtain. A check is also necessary to ensure that a power has not expired or been repealed.

Secondly, care must be taken to ensure that a power is exercised by the person or persons authorised.

Section 12(2) of the Interpretation Act 1978 [UK], the form of which has also been generally adopted, provides that where a power is conferred on the holder of a public office, the power may be exercised by the holder for the time being of that office.

When instructed that subordinate legislation is to be made under a sub-delegated power, it is the responsibility of the drafter to make sure of the efficacy of the sub-delegation.[2]

Statutory provision, such as the following section from the Interpretation and General Clauses Ordinance [HK], may permit an officer to signify the exercise of a power by some other officer.

> 62. (1) Where any Ordinance confers a power or imposes a duty upon the Governor or the Governor in Council to make any subsidiary legislation or appointment, give any directions, issue any order, authorise any thing or matter to be done, grant any exemption, remit any fee or penalty, or exercise any other power or perform any other duty, the exercise of such power or the performance of such duty may be signified—
>
> (a) in the case of the Governor, under the hand of any public officer specified in Schedule 6;
>
> (b) in the case of the Governor in Council, under the hand of the Clerk of Councils.
>
> (2) Notwithstanding the provisions of subsection (1), proclamations shall be made or issued only under the hand of the Governor himself.
>
> (3) The Governor may, by order published in the Gazette, amend Schedule 6.

This kind of provision is useful, but it may on occasion be necessary for the drafter to remind the instructing officer that such a power is limited to the signification of the exercise of the power by another. It is not a delegation. The decision must be taken by the person authorised; that person's decision may be *signified* by the signature of the lesser being ordained for the purpose.

Thirdly, care must be taken to avoid formal defects in the manner of the exercise of the power by the person or authority to whom it is delegated. Defects of this kind include the failure to comply with statutory requirements concerning

- consultation,
- approval, consent or confirmation,
- laying before the legislature and any resolution of the legislature which may be required,
- printing and publication.

2 As to the sub-delegation of legislative power, see p332.

The enabling provision may contain special requirements, but it is usual for laws of general application to regulate laying before the legislature and printing and publication.[3] Defects of this kind are often not the primary responsibility of the drafter. In practice, they usually occur when the drafter's task has been completed and he or she is not at the time aware of the circumstances. Nevertheless, the drafter may have a role to educate and remind.[4]

Where a formal defect does occur, the question arises whether the contravened provision was mandatory and therefore essential to the validity of the legislation, or directory only and thus inessential.[5]

ULTRA VIRES SUBORDINATE LEGISLATION

An attack on the content of subordinate legislation alleges that the legislation is ultra vires and therefore void because it does not fall within the scope of what is authorised by the enabling power. It is essential that the drafter of every piece of subordinate legislation should

- refer to the source of the power
- give it a reasonable and fair construction
- ask himself or herself whether the provisions which the instructions require to be drafted fall within the power.

It would be absurd to pretend that this question may always be answered with confidence. There is no infallible method of determining which side of the line a doubtful provision will be adjudged to fall. It is a matter of judgment. Powers of a substantive nature which interfere with personal rights and freedom will obviously be scrutinised much more rigorously than those of a procedural nature. More than 60 years ago, a New Zealand judge described the function of the courts in this way:

> The principles upon which the court determines the validity of regulations made by Order in Council are well settled... . The courts have no concern with the reasonableness of the regulation; they have no concern with its policy or that of the Government responsible for its promulgation. They merely construe the Act under which the regulation purports to be made giving the statute ... such fair, large and liberal interpretation as will best attain its objects. Then they look at the regulation complained of. If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is ultra vires and void ... [6]

The ultra vires doctrine must be treated with healthy respect by drafters but not permitted to assume the appearance of a spectre.

The few paragraphs above present a superficial picture. However, what has been said should be at least sufficient to remind drafters of their responsibilities. Although the performance of statutory conditions is not usually a matter for

3 As to the parliamentary supervision of subordinate legislation, see p337.

4 The drafter can help to prevent oversight of a procedural nature if particular statutory requirements are taken into account in the design of the instrument and recited either in a heading in the enacting formula or otherwise in or beneath the body of the instrument. As to the enacting provision, see p433. As to approvals etc, see p436.

5 As to mandatory and directory functions, see p226.

6 Ostler J in *Carroll v A-G for New Zealand* [1933] NZLR 1461 at 1478, CA.

drafters, it is their duty to be sure that those who instruct them comprehend the requirements of the law in this regard. As for the possibility of subordinate legislation being ultra vires, consideration of this aspect is fairly and squarely the drafter's duty.

Construction of subordinate legislation

Subordinate legislation is necessarily construed in the light of the enabling provision and it is therefore necessary to have a thorough understanding and knowledge of the whole of the enabling statute. An appreciation of the purpose of the statute is particularly important. The aim must be to achieve consistency in language and content with the enabling statute and any other statutes in pari materia.

Interpretation legislation generally contains a provision similar to that contained in s11 of the Interpretation Act 1978 [UK] to the effect that expressions in subordinate legislation are to have the same meanings as they have in the principal legislation, unless the contrary intention appears. It is preferable that a contrary intention should not appear or at least should appear as rarely as possible. The use of similar words and expressions to signify different meanings may lead to semantic ambiguity and is an avoidable source of confusion.

Many of the difficulties which occur in the construction of subordinate legislation are the result of apparent incompatibility with the principal legislation. The most likely cause of difficulties of this nature is a failure of the drafter to study adequately the principal legislation as a whole.

DRAFTING SUBORDINATE LEGISLATION

Much of the content of the preceding chapters applies to the drafting of subordinate legislation to the same extent as it does to the drafting of principal legislation. The most significant differences are the necessity of observing the restrictions mentioned above. Other differences are comparatively minor and, more often than not, of a formal or technical nature. The remainder of this chapter will be concerned with some of these.

Paragraphing

The advantages of clearer presentation attainable by careful but restrained paragraphing are just as great in relation to subordinate as they are in relation to principal legislation. Good practice as to the numbering and lettering of paragraphed units is the same in each case and the only question to be resolved is one of nomenclature; that is, the names to be given to the various paragraphed units used in the various forms of subordinate legislation.

So far as principal legislation is concerned, division into sections, subsections, paragraphs and subparagraphs is standard practice. However, a glance at the subordinate legislation of Commonwealth countries reveals a startling diversity of practice. The nomenclature varies not only from country to country but also variation exists in many cases within particular countries according to the formal nature of the legislative instrument (ie whether it is an order, notice, regulation, rule etc).

Variations from country to country are of no great practical consequence, but variations within a country constitute a considerable hurdle to easy communication if a term is used to denote different units in different forms of subordinate legislation. The example set out in the following table illustrates this type of situation. The entries opposite each item refer to equivalent units.

Acts	Regulations	Orders
Section	Regulation	Paragraph
Subsection	Paragraph	Subparagraph
Paragraph	Subparagraph	Sub-subparagraph
Subparagraph	Sub-subparagraph	

Three undesirable features are seen in this table.

- The use of the awkward expression 'sub-subparagraph'.
- The lack of an available term in the case of orders to describe the unit equivalent to a subparagraph in an Act.
- Finally, and this is the really important feature, the expressions 'paragraph' and 'subparagraph' are used to denote different kinds of unit in each column. The signification differs according to whether the terms are used in an Act, regulations or an order.

It does seem to place an unreasonable burden on readers of legislation to expect them to puzzle out that what is referred to as a paragraph in an Act is referred to as a subparagraph in regulations and as a sub-subparagraph in an order; and also that the word paragraph itself means something different in each case when it is used in an Act, regulations or an order.[7] Burdensome and unnecessary though they may be, practices of this kind are often stoutly entrenched behind the rust-encrusted bulwarks of custom and professional acceptance. Nevertheless, the minimum reform which is necessary is consistency in signification for every term.

The best solution is to use the terms section, subsection, paragraph and subparagraph in subordinate legislation in the same manner as is customary in principal legislation.[8] Such usage is simple, consistent and logical. To the reader accustomed to other practices, this suggestion must surely seem a little strange, but this strangeness must soon wear off as the new usage becomes familiar. It has considerable advantages.

The following less radical pattern is suggested as a second-best alternative:

Acts	Regulations	Rules	Orders, Notices, etc
section	regulation	rule	section
subsection	subregulation	subrule	subsection
paragraph	paragraph	paragraph	paragraph
subparagraph	subparagraph	subparagraph	subparagraph

7 Practice in the United Kingdom is even more diverse. The section-equivalent in the case of an order is named an article while that of a scheme is named a paragraph. New Zealand practice is remarkable for the mystifying use of the term subclause for a subsection equivalent in a regulation.

8 This is the present practice in Queensland.

Practice differs considerably in different jurisdictions as to the role played by hyphens in those words having 'sub' as a prefix, such as subsection, subparagraph etc. It is a sound principle that no mark of punctuation should be used unless it serves a purpose. There is no good reason for sub-section, sub-regulation, sub-paragraph and the hyphen should be omitted.

Definitions

Expressions in subordinate legislation bear the same meanings as in the relevant principal legislation unless the contrary intention appears.[9] It is therefore not legally necessary, nor in general desirable, to repeat in subordinate legislation definitions that appear in the principal legislation. Nevertheless, instances may occur in which it is helpful to do so, for example where the subordinate legislation is of such a substantial nature that it is likely in practice to stand alone and be used without recourse to the enabling legislation by interested members of the public. A code of building bye-laws or regulations might be such an instance.

Although it is highly desirable that the use of language in subordinate legislation should accord with that in the enabling legislation, exceptional circumstances may render it necessary and appropriate to attach a different meaning to a word or an expression in subordinate legislation. It is essential in such cases, in order to avoid uncertainty, to insert in the subordinate legislation a definition stipulating the new meaning for the purposes of the subordinate legislation, or perhaps for purposes limited to a specified part of the subordinate legislation.

Headings

The introductory headings and the enacting provision of subordinate legislation must not present a cluttered appearance.

There is a need to be simple and to avoid unnecessary material. The purpose of the introductory headings is to present at a glance as clearly as possible information useful to the reader.

It is suggested that the headings should specify the following:

- the number allotted to the instrument
- the identity of the principal legislation under which the instrument is made
- the short title by which the instrument may be cited.

For example

Legal Notice No. 77 of 1995

ANIMAL REMEDIES ACT 1969
ANIMAL REMEDIES (CONTROL OF IMPORTS) REGULATIONS 1995

In the United Kingdom, the initial heading is brief and descriptive of the general topic with which the legislation is concerned. In some instances it is followed by a more particular subheading. For example

9 See s11, Interpretation Act 1978 [UK].

FOOD AND DRUGS
FOOD HYGIENE
The Imported Food (Scotland) Regulations 1978.

It is suggested that it is more helpful to present the short title of the enabling Act as the initial heading rather than a generalised description of the topic.

In the United Kingdom, s4 of the Statutory Instruments Act 1946 requires that a statutory instrument shall include a statement showing the date of commencement and a statement showing the date on which copies were laid before Parliament or stating that copies are to be laid. These statements are presented beneath the introductory headings and above the enacting provision in the following form:

Made 1st August 1986
Laid before Parliament 13th August 1986
Coming into operation 14th August 1986

Enacting provision

The enacting provision usually follows directly the introductory headings, although in some countries it precedes the statement of the short title of the subordinate legislation.

In drafting a standard form of enacting provision, it is important to exclude redundant material which tends to obscure the purpose of the provision, namely an indication of who has made the instrument and under what power. The following is adequate:

> The Minister for Natural Resources, in exercise of the powers conferred by section 27 of the Animal Remedies Act 1979, makes the following regulations:

An acceptable alternative is

> The Minister for Natural Resources, under section 27 of the Animal Remedies Act 1979, makes the following regulations:

or more simply

> Made under section 27 of the Animal Remedies Act 1979 by the Minister for Natural Resources.

The following form contains a lot of useless verbiage (shown in italics):

> *It is hereby notified that* in exercise of the powers conferred *upon him* by section 3 of the Animal Remedies Act 1979 *(No 17 of 1979) and all other powers him thereunto enabling, John William Brown*, the Minister for Natural Resources *has been pleased to make and doth hereby* make the following regulations, *that is to say*:

Where the legislation is to be made after consultation, or with the approval of some person or authority, or after the performance of some other statutory condition, it is usual to recite the performance of the condition in the enacting provision. Such a practice may help to avoid inadvertent failure to observe statutory requirements. For example

> In exercise of the powers conferred by section 28 of the Animals Act 1967, the Minister of Agriculture, after consulting the National Wildlife Council, makes the following regulations:
>
> In exercise of the power conferred by section 14 of the Pensions Act, the Minister of Finance, with the prior approval of the National Assembly, makes the following regulations:

Unless there is some special statutory or constitutional provision, the enacting provision need take no particular form. In fact there need be no recitation of enactment although a reference to the enabling provision will be helpful to users of the instrument. A reluctance to identify an enabling provision, in case difficulties may arise from a failure to invoke other enabling provisions, is best overcome by ensuring that interpretation legislation includes provision to the following effect:

> Where any subordinate legislation purports to be made in exercise of a particular power or powers, it shall be taken also to be made in exercise of all powers under which it may be made.

Preambles and purpose provisions

If it will serve a useful purpose, a preamble may be introduced before the enacting provision. The desirability of a preamble may be assessed in accordance with the same principles as apply in the case of preambles to principal legislation.[10] A purpose provision will rarely be desirable or necessary. The purpose of subordinate legislation will be within the purpose of the principal legislation. Any variation from this purpose runs the risk of being held ultra vires.

Short title (citation)

Every instrument of subordinate legislation should be given a short title. This is a sound rule of practice which ought to be more widely followed for a short title is desirable to facilitate reference. A title is desirable even in cases where the instrument is such that it is unlikely to be amended or repealed; the instrument will certainly be referred to administratively or perhaps in court.

The short title of subordinate legislation fulfils the same basic function as it does in the case of principal legislation. It serves as a descriptive label and should be constructed according to the same general rules as have been earlier suggested for short titles of principal legislation.[11] It is helpful, but not always a practical proposition, if the short title of subordinate legislation is able to indicate the statute under which it is made as well as indicating the general content of the instrument itself. In many cases this may be done by beginning the short title of the subordinate legislation with the first word or two of the principal legislation. For example:

10 As to preambles to Acts, see p196.
11 As to short titles of Acts, see p200.

Principal Legislation	Subordinate Legislation
Civil Aviation Act	Civil Aviation (Charges for Air Navigation Services) Regulations 1995
Public Health Act	Public Health (Pharmaceutical Benefits) Regulations 1986
Price Control Act	Price Control (Meat) (Amendment) (No 2) Order 1986

The short title of the principal legislation is not always suitable for this kind of treatment, either because it is too long or because it is not usefully descriptive (eg Finance Act). In such cases the short title of the subordinate legislation must be content to do no more than act as a label for its own contents.

Commencement

It is appropriate that interpretation or other legislation of general application should make specific provision for the commencement of all legislation, both principal and subordinate.[12]

In the absence of such a general provision, it is desirable that a specific provision for commencement should be included in the legislation itself. In the absence of general or specific provision, subordinate legislation comes into operation only when it is made public.[13]

If particular provision as to commencement is to be made, this must be done by substantive provision, not a heading or a footnote.

Operation

Whether subordinate legislation may be made with retrospective effect depends on the scope of the enabling power.[14]

Similarly, whether subordinate legislation may bind the Crown also depends on the scope of the enabling power. However, if the enabling legislation does not itself bind the Crown, subordinate legislation made under it is incapable of doing so.[15]

Amendment and repeal

In this field much depends on the relevant interpretation legislation.

In the United Kingdom, it is provided by s14 of the Interpretation Act 1978 that where an Act confers power to make rules, regulations or bye-laws or other subordinate legislation it shall, unless the contrary intention appears, be construed

12 See p204.

13 See *Johnson v Sargant & Sons* [1918] 1 KB 101, 87 LJKB 122. As to the position in the United Kingdom, see *Halsbury's Statutory Instruments*, 9. See also D. J. Lanham, 'Delegated Legislation and Publication', 37 Modern Law Review 510; A. I. L. Campbell, 'The Publication of Delegated Legislation' [1982] Public Law 69 and D. J. Lanham, 'Publication of Delegated Legislation' [1983] Public Law 395.

14 See *Customs and Excise Comrs v Thorn Electrical Industries Ltd* [1975] 3 All ER 881; *DPP v Lamb* [1941] 2 KB 89 at 101; and *R v Oliver* [1944] KB 68, [1943] 2 All ER 800, CCA.

15 *Gorton Local Board v Prison Comrs* [1904] 2 KB 165n, 73 LJKB 114n.

as including a power, exercisable in the same manner and subject to the same conditions, to revoke, amend, or re-enact any instrument made under the power.

Where subordinate legislation is to contain repeal provisions, the necessity for savings and transitional provisions must be considered in the same way as if that legislation were principal legislation.

The same style and technique should be adopted for the amendment and repeal of subordinate legislation as for principal legislation. It is usual to 'revoke' rules and regulations and to 'cancel' notices and orders but the function is that of repeal and there seems no good reason why that word should not be used for subordinate as well as principal legislation.

Signature

The signature of the legislative authority should be at the foot of the legislation, and where the legislation contains schedules the signature should follow the schedules.[16] The date of signature should not be adorned with unnecessary flourishes. Regulations might therefore conclude

> W. Smith
> 31 July 1995 Minister of Agriculture

not

> In witness whereof the Minister for Agriculture has hereunto set his hand this 31st day of July 1995
>
> W. Smith
> Minister for Agriculture

Consents

Where the consent or approval or confirmation of some authority is required by the enabling provision this should be recited in simple terms at the foot of the instrument and signed. For example

> I consent.
> J. Brown
> Minister for Home Affairs.

Explanatory note

The practice followed generally in the United Kingdom of adding an explanatory note at the foot of subordinate legislation is of considerable benefit as an aid to efficient communication. Subordinate legislation is invariably supplementary to principal legislation which the reader may not have available, the content is often technical and detailed, and it may be amending in character. These factors positively cry out in favour of a descriptive explanatory note.

16 A schedule is as much part of the enactment as the text that precedes it. See p400.

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