Commonwealth Legislative Drafting Manual

Roger Rose

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COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL

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Foreword

The global Sustainable Development Goals agreed in 2015 boldly proclaim that the development aspirations of all people everywhere are intimately linked with promotion of the rule of law.

The laws of a country touch on almost all aspects of economic, social and environmental development; they regulate economic transactions and contracts, provide for legal identity, gender equality and access to justice, as well as protect natural resources, such as water, minerals and forests.

The rule of law, as a principle of governance, requires that all laws must promote equality, accountability, and fairness. In this regard, the *process* by which laws are made is determinative of their ultimate quality. National legislation must be made through transparent procedures, and be drafted so as to ensure legal certainty.

Good laws therefore depend on the abilities and capabilities of legislative drafters, who are called upon to translate policy into simple, concise and lucid Bills. Bills which have clarity as their essence make the work of Parliament easier and more effective.

Legislation passed by Parliament that is clear, comprehensive, concise, and consistent, in turn, aids the work of the judiciary and public servants. It enables private enterprises and individuals to know and understand the law. It ultimately contributes to realisation of the rule of law and the promotion of sustainable development.

For many small Commonwealth jurisdictions, legislative drafting presents a significant challenge. A small jurisdiction, with perhaps just one or two parliamentary counsel, has to produce laws across the whole range of subject matter that any larger jurisdiction would also deal with. International legal obligations and regional harmonisation initiatives, as well as the pace of developments in technology, financial services, and the sciences, have further increased the need for new and amended legislation in recent years.

The Commonwealth Secretariat has, for many years, been at the forefront of providing assistance to countries in the drafting of good laws. The placement of expert advisers through the support of the Commonwealth Fund for Technical Cooperation has assisted numerous small and developing Commonwealth countries in strengthening their legislative drafting capacity.

I warmly welcome this *Commonwealth Legislative Drafting Manual* as a landmark tool for promoting the rule of law and development. Drawing on our

shared heritage of the common law, the Manual brings together an abundance of Commonwealth experience in legislative drafting.

Alongside national drafting standards and guidelines, the Manual can act as a key knowledge tool for every Commonwealth legislative drafter. I commend its use to legislative drafting offices across the Commonwealth and salute the dedication of all involved in the preparation and promulgation of our laws. Together, I am confident that we will realise the full potential of legislation and the rule of law to contribute to our common growth and development.

The Rt Hon Patricia Scotland QC
Secretary-General of the Commonwealth

Preface

In 1975, at the instance of the Hon. Mr Justice Kutlu Fuad, the then Director of the Legal Division of the Commonwealth Secretariat, the four Directors of the Commonwealth Secretariat Legislative Drafting Scheme at the time contributed to a Legislative Drafting Manual as part of the measures undertaken at the request of Commonwealth member countries to help overcome the shortage of experienced legislative counsel. The original Manual was published in 1976 and further revised in 1978.

At their meeting in Edinburgh in 2008, Commonwealth Law Ministers examined the continuing challenges faced by small Commonwealth countries and acknowledged that it was not enough to focus solely on training legislative drafters. They recognised that different strategies in areas such as institutional strengthening, recruitment and retention of drafters, and capacity building were required. To that end, they welcomed the development of legislative drafting and style manuals and guidelines on the legislative process.

In 2013, the Hon. Justice V.C.R.A.C. Crabbe was assigned the task of producing a manual on legislative drafting, by revising the text of the original Manual. At their meeting in 2014, Commonwealth Law Ministers welcomed the production of this Manual as a valuable resource in legislative drafting across the Commonwealth and as a guide in encouraging member countries to devise their own local legislative drafting manuals, guidelines or handbooks. Ministers endorsed the proposal for the Manual to be a pan-Commonwealth legislative drafting manual and mandated the Secretariat to finalise the draft.

The present publication was extensively rewritten and updated in 2016 and 2017 by Mr Roger Rose, to reflect contemporary style and practice across the Commonwealth. The draft Manual was sent to Offices of Attorneys General in all Commonwealth member countries for review and comment, and has been enriched by input and expertise from across the Commonwealth.

The *Commonwealth Legislative Drafting Manual* is intended to be used as a practical tool to assist legislative counsel, in particular those in the early stages of their careers. Although hands-on practice and experience are critical for the development of skilled legislative drafters, a reference guide that sets out common drafting approaches offers a 'go-to' source for drafters requiring an overview of the craft, as well as suggested solutions to frequently encountered challenges. In this respect, the Manual is also a key resource for the design and delivery of legislative drafting training programmes.

As a Commonwealth product largely in the common law tradition, it is hoped that the Manual will stimulate further the interest of drafters in practising their skill, as well as providing a sense of the shared heritage in legislative drafting across the Commonwealth. The Manual provides general guidance, and must be read in each jurisdiction in the context of its own Constitution and law, and to some extent its own house style. It is intended to supplement existing textbooks and local and regional manuals. Some checklists are provided, but for more comprehensive ones reference to a standard textbook such as Thornton's *Legislative Drafting* is recommended.

Some general conventions are followed in the Manual:

- The expression 'legislative counsel' is used to refer to those who have the general task of drafting, although the term 'drafter' is occasionally used in relation to specific aspects of the skill, in recognition of the fact that others might also need from time to time to practise it.
- Although reference is made mainly to primary legislation, except where otherwise indicated the same principles apply to the drafting of subsidiary legislation.
- As the term 'subsidiary legislation' is more commonly used in the Commonwealth generally, it is used throughout rather than alternatives such as 'statutory instruments'.
- Although technically legislative counsel are drafting Bills and hence 'clauses', reference is made throughout, in most instances, to Acts, sections and subsections.
- Gender-neutral drafting is adopted in both the text and illustrations (unless the illustration is from old legislation). This style is further explained in Chapter 10.

Following modern Commonwealth drafting practice, except where an old provision is used or a draft is inserted to illustrate a point, if examples are given:

- the auxiliary 'must' is used to indicate the creation of an obligation, rather than the traditional 'shall' (the rationale for this is explained in Chapter 5); and
- provisos are dispensed with (explained in Chapter 7).

The Manual contains 20 chapters, which address all aspects of legislative drafting, from basic drafting elements and conventions to guidance on particular legislative forms, such as preliminary, final, and penal provisions, as well as specific legislation types, such as licensing and financial legislation. The Manual further places the legislative drafting process in context, through the inclusion of appendices on the preparation of Cabinet submissions,

the formulation of drafting instructions and suggested approaches to the translation of policy.

As the Manual is a living document, providing guidance in an ever-developing field, readers are warmly invited to contact the Commonwealth Secretariat with suggestions for corrections, amendments or updates accordingly.

Acknowledgements

An immense amount of work by various people and institutions, to whom the Commonwealth Secretariat is most grateful, has gone into the development of this publication. The Secretariat is greatly indebted to the Hon. Justice V.C.R.A. Crabbe who, as has already been indicated, was given the task of producing the original draft *Commonwealth Legislative Drafting Manual*.

The Secretariat's deep gratitude goes to Roger Rose, former First Parliamentary Counsel, Kenya, and Director of Studies for the RIPA Legislative Drafting Courses, London, and consultant, who worked tirelessly and selflessly to produce this publication. The Secretariat is most grateful to the CALC Working Group whose invaluable and insightful comments helped to enrich the publication. The Working Group comprised Peter Quiggin, the erstwhile President of CALC, and various CALC members: Theresa Johnson (Hong Kong), Adrian Hogarth (UK), and Brenda King of Northern Ireland who has just been elected as the new President of CALC.

The Secretariat is equally indebted to the following Governments of some of our member countries who also commented on the draft publication: Australia (through CALC), Botswana, Cameroon, Lesotho, Mauritius, Montserrat, The United Kingdom (also through CALC), and Zambia.

The support and apt contributions of Katalaina Sapolu, Director of the Rule of Law Division of the Secretariat, Steven Malby, Head of the Law and Development Section and Elizabeth Bakibinga-Gaswaga, Legal Adviser, Rule of Law Division, were invaluable in finalising this work, as were those of Segametsi Mothibatsela, Legal Adviser, Rule of Law Division, who worked closely with Roger Rose and managed the project. It would be remiss of the Secretariat to overlook the professional and timely advice of its publications and design team, particularly Alison Arnold, Manager, Design and Production, Hugh Gulland, Design and Production Officer, Sherry Dixon, Publications Manager, and Christina Woollatt, Publications Assistant.

The Secretariat apologises to anyone whom it has inadvertently omitted to mention, and wishes to convey its sincere gratitude for their invaluable contribution.

Contents

Chapter 1
What is Legislation and why is it Drafted the Way it is?

1.1 What is legislation?

If asked to define what is meant by 'legislation', most people would probably say that it is 'a set of written rules for the conduct of society'. That is of course correct in very general terms, but leaving aside the fact that rule-making authorities exist at different levels in society (national, state, municipal and other authorities such as those set up to manage airports and harbours, even down to local sports or social clubs of various kinds), the term 'legislation' is usually used to mean rules that are made by a body that has been given the power under the Constitution to make them. This body goes under a variety of names in different jurisdictions but it is typically referred to as 'Parliament'.

In view of the fact that Parliament often delegates the power to make subsidiary legislation in the form of regulations, by-laws, etc. (see Chapter 15), it could more accurately be said that legislation consists of 'written rules for the conduct of society made by or under the authority of Parliament'.

1.1.1 'Rules'

However, this definition still does not tell the whole story, for when reference is made to legislation it is to sets of rules, both mandatory and empowering, with which those who are affected must comply, or which set out the limits of powers or duties of corporations or of individuals who are charged with administering or enforcing the legislation. These rules typically contain, in modern writing, the words 'must' or 'may', and where they are mandatory there is usually a liability to some sort of penal sanction for failure to comply with them.

Texts that give guidance and advice on how to do certain things or how to conduct oneself in given situations (often made by subsidiary legislation and called guidelines or codes of practice), even though they might contain the words 'must' or 'may', and even though of considerable importance, do not normally qualify for inclusion in a definition of legislation. They do not **in themselves** directly lead to liability for penal sanctions, although in some

cases non-compliance with them might constitute evidence of contravention of a rule somewhere else. For example:

> A public official must refuse to accept any gift or hospitality which might place him or her under an improper obligation, or might reasonably appear to do so.

> A public prosecutor must not sanction a prosecution unless:
> (a) there is sufficient evidence to provide a realistic prospect of conviction; and
> (b) it is in the public interest that the case should be proceeded with.

Even though mandatory words are used, the first of these provisions, which is taken from guidelines on conflict of interest, contains matters that are tentative (as evidenced by the auxiliary 'might'). They require context and interpretation to be fully assessed. In the second example, quite clearly there are a range of professional judgements to be made. Although each direction is precise, breach would not directly involve a legal sanction. It is said that these texts are 'guiding' rather than 'binding'.

1.1.2 'For the conduct of society'

This phrase implies that rules are made for **everybody** in society, but in reality very little legislation applies to society as a whole. The body of general criminal law of course does, as do other general requirements for the regulation of society such as birth, marriage and death registration, electoral and census law, and liability to income tax; but far more often rules are made for **particular sections** of society. This can easily be illustrated by taking a random series of widely differing matters that would be the subject of Acts of Parliament in a typical jurisdiction:

- adoption of children
- banking and financial institutions
- factories
- firearms
- medical practitioners
- mining
- the police
- quarantine
- road transport
- stamp duties
- town planning
- wildlife.

So a working definition of legislation can now be created:

> **Rules for the conduct of society, or more usually particular sections of it, that are binding in their effect and made in written form by or under the authority of Parliament.**

For most general purposes that will do, although it can be noted in passing that legislation, besides laying down requirements with respect to conduct, also does other things:

- It provides mechanisms that enable legally enforceable relationships to be entered into (e.g. charities, civil marriages, companies, trustees) and regulates those relationships
- It regulates non-statutory relationships between people (e.g. buyers and sellers of goods, employers and employees, landlords and tenants)
- It establishes statutory corporations and defines their functions and powers.

A single piece of legislation will sometimes seek to incorporate more than one of these features.

Legislation does not of course form the whole body of law that applies to a given jurisdiction. In many areas the law has been developed from precedents in case law (i.e. judge-made law), especially in contract, tort and conflict of laws.

1.2 How is legislation created?

The body charged under the Constitution with executive power to oversee peace and good order in society is typically known under the Constitution as 'the Executive' but is usually referred to both in legislation and in general writing as 'the **Government**'.

A framework of legislation will of course be in place in any jurisdiction, but as societies develop and technology increases it will be necessary to make changes to it from time to time. To this extent the Government needs to take steps to create new, or amend existing, legislation. It cannot itself create that legislation, for this function is constitutionally the province of the legislature. As already noted, this body is usually referred to broadly as **Parliament**.[1]

1 Technically, in the Westminster model of government there is a difference as, following the UK (unwritten) constitution, 'Parliament' consists of **both** the Head of State **and** the legislature. However, it is convenient in this Manual to use this term.

Laws are therefore created by Parliament passing Bills that when enacted into legislation become known generally as Acts (in dependent territories, these are often known as Ordinances or Laws) or, more broadly, statutes. In jurisdictions that follow the Westminster style of governance these Bills are introduced into Parliament mainly by the Government, although some Commonwealth jurisdictions have made constitutional changes that require legislation to originate to a large extent in Parliament itself. The principles that apply to drafting, and which are examined in the subsequent chapters of this Manual, are however exactly the same.

In the common law system the role of the judiciary (i.e. **the courts and tribunals**) is restricted to interpretation and application of legislation. They will not add to, diminish, vary or qualify requirements laid down in legislation, unless in the course of declaring it to be in some way incompatible with the Constitution, or in the case of subsidiary legislation, the enabling legislation.

Appendices A and **B** set out in some detail typical outline procedure for the preparation of legislation.

1.3 Why is legislation drafted in the way it is?

The fundamental principle behind the common law is that everyone may do as he or she wishes unless the law provides otherwise.

Bills proposing legislation must therefore be drafted in sufficient detail to prescribe as precisely as possible the exact nature of the obligations, duties, rights, powers or privileges being imposed or given. They must set out fully and unambiguously what is required of those to be affected by the legislation, and thus must include not only the necessary rules themselves but any qualifications, exemptions or other matters relevant to their observance.

This is more difficult in practice than it sounds, and attainment of a high degree of proficiency in legislative drafting requires experience and skill. It is the function of this Manual to assist legislative counsel to attain the necessary degree of precision.

Chapter 2
The Role of Legislative Counsel

2.1 Analysis and understanding of what the policy-makers require

Although legislative counsel may have been consulted, or even involved, at the policy-making stage, the formal starting point in the process of translating policy into legislation should be the reception of drafting instructions (see **Appendix C** for recommended contents). Counsel should, in obtaining the necessary depth of understanding of the policy, be prepared to ask searching questions. He or she is, however, under a professional duty to look critically at the instructions and to point out where there seem to be aspects of the policy that might be in conflict with the Constitution or other legislation, or where aspects of the proposed legislation might for some reason be difficult to operate or enforce.

2.2 Effective communication of the intentions of the policy-makers

The task is then for counsel to do his or her utmost to effectively communicate the intentions of the policy-makers to those who will use or be affected by the legislation. In determining how a policy statement is to be translated into a legal rule, it is useful for counsel to bear in mind the following rhyme of Rudyard Kipling:

> I keep six honest serving men
> (They taught me all I knew);
> Their names are WHAT and WHY and WHEN
> And HOW and WHERE and WHO.

This will help to understand the full extent of the matters that the rule will need to cover. Naturally, some questions are fundamental:

- **Why** is it necessary to legislate as proposed?
- **Who** is to be affected by it?

although the answers to these questions may be obvious from the context. Others will be concerned more with matters of detail:

- **When, where and how** will the persons concerned be affected?
- **What** exactly is required of them?

It needs to be emphasised that, contrary to what many people believe, in legislative drafting **there is no need for special language**. Although there is occasionally a need to use a technical word or expression (e.g. *ex parte*, *mens rea*, *puisne judge*), in general the language of legislation is the same as that used in ordinary formal English, i.e. that of textbooks, newspaper leading articles, professional reports, articles and opinions, and professional and business letters generally.

Appendix D sets out some suggested approaches to the process of translating the relevant policy into workable legislative provisions.

2.3 Specific attributes of effective communication

There are nevertheless greater constraints on the use of language by legislative counsel, and in order to effectively communicate policy it is necessary for it to be:

- **CLEAR**
  using direct, modern modes of expression.

- **COMPREHENSIBLE**
  to those to whom the legislation is directed so that they can grasp its meaning as quickly as possible.

Aspects relevant to these two attributes will be considered in particular in Chapters 6 ('Plain language drafting') and 7 ('Structuring legislative drafts').

- **CONCISE**
  with no unnecessary or repetitious words or phrases.

  More than in any other kind of formal writing, it is necessary to write 'tight' prose. This means reducing the text to the minimum number of words needed in a sentence or series of sentences to explain their effect. Loosely drafted sentences incorporating more words than are needed to get a message across can be unduly complex or tiresome to read, and they increase the likelihood of inconsistent use of words and expressions, and hence ambiguity. Note for example the following turgid sentence:

  > A licensed dealer must always keep displayed in a place where it can easily be seen in the licensed premises the licence authorising him or her to undertake the relevant trade, profession or business.

  This can probably be reduced to no more than:

  > A dealer must display the licence in a prominent place in the licensed premises.

- **CONSISTENT**
  using as far as possible the same style throughout, and with the same words or expressions used to mean the same things.

  It is an important rule of drafting any type of legal document, and especially legislative rules, that the same words and expressions are used to mean the same things, as there is a presumption that the use of different ones is intentional and indicates a shift in meaning (see 'judicial approaches', section 2.4).

  The potential for confusion can easily be seen in the commonly required legislative provision for the giving of permission to do certain things in a certain way; it would for example be easy for the drafter to drift into unthinking use of different words to indicate permission – 'allow', 'permit', 'license', 'consent', 'let', 'sanction', 'recognise' – whether these words be verbs or, with any necessary modifications, nouns.

In practice, these last two attributes require rigorous consideration and reconsideration of drafted texts. Aspects relevant to them will be considered further in Chapter 5 ('Modern Commonwealth conventions in legislative drafting').

- **CERTAIN**
  without ambiguity, so that those to be affected are left in no doubt about the extent of their duties, obligations, powers, discretions or rights, or the procedures required to be followed in given circumstances.

- **COMPLETE**
  covering all reasonably foreseeable circumstances.

  Even more importantly than with other kinds of formal writing, legislative counsel is required to cover everything necessarily needed to be covered, so that the resulting rules are as complete as they reasonably can be and do not contain what drafters call 'loopholes'. At the same time, he or she must take care to ensure that the rules produced do not inadvertently apply to persons and situations to which they are not intended to apply.

In practice, these latter two attributes of legislation constitute by far the greatest challenge to counsel; but they are attributes relating essentially to analysis rather than use of language.

These '6 Cs' of communication are not necessarily in watertight compartments and there may be some overlap. For example, if **unclear** language is used, the

result may also be to an extent both **incomprehensible** and **uncertain** (for examples, see Chapter 6).

Appendix E sets out the suggested approach legislative counsel need to take to achieve these 6Cs.

2.4 Constraints on legislative counsel

Drafting legislation has been likened to steering a ship around a series of underground obstacles. Some of the main obstacles, or constraints, are:

- **The Constitution**
  There must be consistency with fundamental rights and freedoms, and the separation of powers.

  These will be considered further in Chapter 3.

- **The existing law**
  Inconsistencies in drafting can lead to potential duplication of provisions covering the same areas, and to difficulties with concepts such as dominant and subservient provisions or even implied repeal. These concepts will be considered in Chapters 7 ('Structuring legislative drafts') and 13 ('Final provisions').

- **Judicial approaches** to legislation, and judicial assumptions, including the rules of interpretation, the most fundamental of which are:
  - individual provisions are to be read in the context of the whole statute;
  - each word is to be given a meaning;
  - the same words or expressions are to be given the same meanings, different words or expressions are to be given different meanings;
  - a specific provision overrides a general one.

  The last two of these assumptions will be covered in Chapters 5 ('Modern Commonwealth conventions in legislative drafting') and 11 ('Principles governing the order of provisions').

- **Drafting instructions**

  Where these are deficient or poorly considered, there may be a greatly increased time taken in preparing legislation as attempts are made to clarify policy issues.

- **Local drafting house style**
  This may inhibit a more modern approach to aspects of drafting style, especially where legislation that has been on the statute book for some time is being amended.

- **Available parliamentary time**
  If there is a large amount of urgent legislation, and insufficient time for its preparation, there may be the need to attempt to squeeze largely unrelated matters into a single Bill.

Chapter 3
Background Legislation

The Constitution and the Interpretation Act are of fundamental importance to legislative counsel, who must be completely familiar with the detailed provisions of both.

3.1 The Constitution

3.1.1 General duty of legislative counsel

Legislation which is held to be inconsistent with the Constitution will be void to the extent of the inconsistency. Great care needs to be exercised to ensure that challenges on the ground of lack of constitutionality are kept to a minimum.

Counsel's duty is therefore to:

- identify constitutional issues that may arise
- alert Government to these
- ensure so far as possible that legislation is not open to constitutional challenge
- ensure compliance with any formal or procedural matters, for example with regard to money Bills (these will be considered in Chapter 20)
- be prepared to suggest alternatives where instructions are considered to be inconsistent with the Constitution.

The last of these calls for considerable ingenuity, tact and skill on the part of legislative counsel. Alternatives might include:

- modifying the proposal to permit conformity with the Constitution
- dropping the proposal
- proceeding with the proposal, while taking the risk of successful challenge in the courts
- or even, in an appropriate case, seeking to amend the Constitution.

3.1.2 Where constitutional issues are most likely to arise

Constitutional issues are most likely to arise in legislation concerned with or involving the types of matter considered below.

Separation of powers

The following are examples of cases in which the courts have found legislation to have offended against this principle:

- allocation to the executive of a discretion to decide the severity of punishment or to fix the penalty for persons convicted of criminal offences [a judicial function – *Hinds v R* [1976] 1 All ER 353 (Jamaica)]
- conferring power on the executive to nominate the judges who were to exercise judicial power in a particular case – *R v Liyanage* (1962) 64 CNLR 313 (Sri Lanka)
- reversal by the legislature of judicial decisions determining the rights of particular individuals or of their acquittal in a criminal case – *Mahboob v Government of Mauritius* [1983] 9 CLB 81
- reversing retrospectively a judicial interpretation of a statutory provision – *Diagoras Development Ltd v National Bank of Greece* [1987] 13 CLB 38 (Cyprus).

The rule of law

This requires that:

- interference with activities is permissible only in so far as authorised by law
- powers must not confer unfettered or arbitrary discretion
- powers given must be proportionate to the problems they address (so that they go no further than is reasonably required in order to achieve the desired goals)
- powers should be subject to judicial review.

Exceptional powers

For example to hold suspects for extended periods without charge or (even more exceptionally) to detain them indefinitely without trial.

Delegation of legislative powers

Powers must be **delegated, not transferred**, and a very wide power to make subsidiary legislation might be held to offend against this. This is considered in Chapter 15.

Curtailment of fundamental rights and freedoms

There is a growing body of internationally recognised case law on this subject. Certain of these are typically absolute (no slavery, torture or inhuman or degrading punishment) while others (e.g. freedom of expression

or association; non-discrimination) are qualified to the extent that legislative restrictions to them may typically be allowed where they are:

> reasonably required in the interest of [defence], [public order], [public morality], [public health] or for the purpose of protecting the rights and freedoms of others, and except so far as [the measure] is shown not to be justifiable in a democratic society.

3.1.3 Particular constitutional constraints

Legislative counsel need to ask questions about, and be aware of, the following principal matters likely to affect the laws:

On legislative functions

- Is there restriction on retrospective operation of criminal law and penalties?
- Are there requirements with regard to methods of introduction of particular forms of legislation (e.g. money Bills, private members' Bills; private or local Bills), and must some Bills be introduced into the lower House?
- What is the procedure where there is deadlock (e.g. between Houses or after use of a power of veto)?

On judicial functions

- Are there provisions to the effect that hearings must be by an independent and impartial tribunal, and within a reasonable time?
- Is the jurisdiction of inferior courts stipulated or is this left to be prescribed by an Act of Parliament?
- Is an ouster of judicial review prohibited?

On executive functions

- How is the assignment of responsibility to Ministers to be carried out (e.g. by formal instrument)?

3.2 The Interpretation Act

3.2.1 General

An Interpretation Act is a fundamental aid to drafting legislation. Short titles for this legislation vary somewhat in Commonwealth jurisdictions (e.g. Interpretation and General Provisions Act; General Provisions Act), but 'Interpretation Act' is the most common. As its title implies, it contains a number of basic rules relating to the construction of legislation, but also

many more relating to more fundamental things such as application and commencement and, typically, a number of definitions of common words in general legislative use (e.g. 'contravene', 'document', 'land', 'person', 'prescribed', 'vessel').

The Act will be expressed to apply to all legislation (except for the Constitution, unless the Constitution itself expressly otherwise states) 'unless a contrary intention appears' (see below).

3.2.2 Basic questions answered by the Interpretation Act

Typically an Interpretation Act will provide answers to the following questions:

- What are the basic terms used to refer to legislation (e.g. 'Act', 'enactment', 'subsidiary legislation', 'written law') and how are these defined?
- When does primary legislation (i.e. Acts) and subsidiary legislation come into force?
- When legislation is amended, how does this affect references to it in other legislation?
- What consequences flow from repealing legislation?
- What are the normal incidents of statutory powers and duties (e.g. performance from time to time as occasion requires; incidental implied powers; power to act by a simple majority)?
- How is time to be reckoned?
- What general provisions apply to penalties?
- Do written laws bind the Government? (See further, Chapter 17.)

3.2.3 The importance of an Interpretation Act

Standardisation of legislative expression

The following are the general definitions typically provided by an Interpretation Act:

- official authorities and officers – 'Minister', 'police officer', 'public office'
- words and expressions which have no clear-cut meaning but which are to be given a settled one for legislative purposes – 'financial year', 'prescribed'
- words which have a usual meaning but which are to carry an extended meaning in legislation – 'act' (extended to include an

omission), 'oath' (to include an affirmation), 'person' (to include a body of persons), 'sell' (to include offer for sale)

- definitions that are intended to give precision to commonly used words or expressions that are indeterminate or capable of more than one meaning – 'land', 'writing'
- convenient shorthand expressions – 'contravene', 'prescribed'.

Consistency in legislative style and reduction of repetition

- references within written laws and provisions in them (e.g. a reference to a section in an Act means a reference to a section of the Act in which the reference occurs, thus eliminating the need to refer to 'section 6 **of this Act**', unless ambiguity might arise)
- imposition of penalties (see Chapter 14, 'Penal provisions')
- exercise of power before written law comes into force (to allow for, e.g., the appointment of a Board or supervising authority).

3.2.4 'Unless a contrary intention appears' and similar phrases

A contrary intention can be indicated:

- expressly, by redefining a word or expression (e.g. 'land', 'writing')
- by clear evidence of a contrary intention to that expressed in the Interpretation Act rule (as by requiring a stated percentage of votes required to act, displacing a rule about action on a majority vote)
- by placing the matter in a context in which sense can be made of the provision only if a contrary meaning is given, as by displacement of a definition that 'person' includes a body corporate in the case of offences capable of being committed only by individuals (e.g. sexual offences or those involving physical violence to the person).

3.2.5 How well do others know the Interpretation Act?

Even though background rules are provided in the Act, consideration needs to be given to the desirability of repeating some of them in certain types of legislation in order to give a complete picture, for example in legislation setting up statutory corporations (see Chapter 18).

Chapter 4
The Basic Elements of a Legislative Sentence

In the early part of the nineteenth century, George Coode formulated basic principles concerning the aim of legislation and the basic composition of a legislative sentence that are relevant today. He found that legislation aims to regulate relationships between persons by **securing a benefit** to a person or class of persons. It does this:

- **directly**, by conferring a right, privilege or power on a person or persons or
- **indirectly**, by imposing an obligation or liability on others.

It follows that a legislative sentence must therefore prescribe the limits of the right, privilege, power, obligation or liability, and designate the circumstances in which it arises. All grammatical sentences must have a subject (the person or thing to be affected by the sentence) and a predicate (what is said about the subject). Some refinement to this simple proposition is necessary in a legislative sentence and in practice such a sentence must have:

- a subject (Coode referred to the 'legal subject')
- a predicate (Coode called this the 'legal action') and
- (in most cases, and unless the sentence would be too long as a result) a context.

4.1 Legal subject

This is a convenient term by which to refer to the precise person or categories of person to be affected. As will be seen in Chapter 5, where the rule applies to persons generally, the convention used is to state 'a person'; although the kind of person affected may be stated directly, for example 'a police officer', 'an inspector', 'a licensee'. The legal subject should normally be placed in a prominent position in the sentence:

> A person must not enter an infected area.
>
> A police officer may arrest a person trading in a street without a licence.

A **person** (i.e. an individual or group of persons, or a juridical person such as a company, corporation or partnership) **should normally be made the**

grammatical subject, although occasionally it will be useful to make use of an inanimate subject.

> A contract entered into in contravention of this Act is void.

This may be done so long as the actual person or persons affected by the rule are clear (obviously here they are the parties to a relevant contract). In this way, the drafting is made more concise, for to make a person the legal subject would involve restructuring the words into a much longer sentence:

> A person who enters into a contract that is in contravention of this Act may not rely on its provisions, which are void.

However, there is always a danger, when making something other than a person the legal subject, that sight will be lost of the actual person or persons to whom the rule is intended to apply:

> Cattle must be confined or tethered in an infected area.
>
> Notice of transfer must be given to the licensing authority within 14 days.

On whom exactly is the duty to confine, or to give notice, placed? The problem lies in the use of the passive voice. While it is not suggested that this never be used (it is sometimes convenient), care needs to be taken to check that it is clear who the person being addressed is. See Chapter 6 for further details.

In practice, the legal subject is usually **modified** to confine the rule to particular persons or things or classes of persons or things (see also the second example above):

> A person who is a passenger on a bus...
>
> An advocate qualified under this Part...
>
> A licensee who contravenes subsection (1)...
>
> A certificate of a motor vehicle examiner...
>
> A contract of hire purchase...

Occasionally, more than one legal subject may be contained in the same sentence:

> A police officer may require the driver of a motor vehicle to stop where indicated, and the driver must then stop accordingly and switch off the engine of the vehicle.

4.2 Legal action

'Legal action' is Coode's technical expression (for what is sometimes called the predicate of a sentence). Coode used it to indicate the way in which the legal

subject is to be affected. This is done by use of a verb auxiliary ('must' or 'may' as shown in the examples below – these and other auxiliaries are considered further in Chapter 5). Usually the legal action takes one of two forms:

(a) the precise terms of the act or omission required or permitted:

> A person must not enter an infected area.
>
> A police officer may arrest a person trading in a street without a licence

or

(b) the consequences for a person of things done or omitted to be done:

> A person who contravenes subsection (1) commits an offence
>
> A convicted person is disqualified from standing for election...
>
> A contract of hire purchase entered into in contravention of this Act is void.

Note in particular that:

- the technical term 'legal action' should not be confused with 'activity'
- where an act or omission is required or permitted, the verb should contain the appropriate auxiliary to indicate the nature of the rule
- the present, not the future, tense is used when describing a state of affairs or legal consequence, so that in the above examples 'commits' is correct, not 'shall commit'; 'is disqualified', not 'shall be disqualified'; 'is void', not 'shall be void'
- more than one legal action may be contained in a sentence

> A police officer may require a motor vehicle to stop **and**, if the officer suspects that the driver has consumed alcohol or drugs, require the driver to submit to a breath test.
>
> A person who contravenes subsection (1) commits an offence **and** is liable to a fine of...

4.3 Context

This is a statement of the circumstances in which the rule is to operate. It is typically done by the use of a context clause:

> When an area has been declared an infected area, a person must not enter or leave it.
>
> If the accused is under 14 years of age, the court may direct that the proceedings are to be held in closed court.

> A police officer may require a motor vehicle to stop and, if the officer suspects that the driver has consumed alcohol or drugs, require the driver to submit to a breath test.

Note (from the first two examples above) that the subject of the context clause need not be the same as the legal subject of the sentence. Words like 'where', 'when' and 'if' commonly introduce this kind of context.

Sometimes the context involves the setting out of special conditions or exemptions which are to apply:

> When an area has been declared an infected area, a person must not enter or leave it, unless authorised to do so by the District Veterinary Officer.

> A police officer who suspects that a driver has consumed alcohol or drugs may require the driver to submit to a breath test, unless it appears to the officer that the driver is by reason of injury or otherwise incapable of so doing.

The word 'unless' commonly introduces this kind of context. Where the context is complex and contains a large number of qualifications, it is often better to place it, or the detailed provisions of it, in a separate sentence:

> (1) The report of a medical practitioner may be adduced in evidence of the matters contained in it without the need to call the practitioner as a witness if the conditions specified in subsection (2) apply.
>
> (2) The conditions referred to in subsection (1) are that:
> (a) the report relates to a person, substance or thing sent or submitted for examination and finding;
> (b) it is signed by the practitioner making it;
> (c) a copy of the report has been served on the defence at least seven days before the hearing; and
> (d) it is produced to the court by the police officer in charge of the case.

4.4 Prominence for the legal subject

Modern Commonwealth drafting styles tend to give prominence in a legislative sentence to the legal subject, and this often leads to expressing the context as a modification of the legal subject (see above). Thus, instead of giving prominence to the context clause:

> If an investigator has reason to suspect the commission of an offence against this Act, he or she may seize any relevant documents.

Today, this proposition would probably more commonly be drafted as:

> An investigator who has reason to suspect the commission of an offence against this Act may seize any relevant documents.

It must be stressed, however, that both have the same meaning in the context and neither is necessarily correct or incorrect. The question for counsel is, as always, 'how well have I communicated the policy?'

One of the most common examples of a legal action that expresses the consequences following an act or omission is in the drafting of offence provisions. In these cases, it is usually better to express the context as a modification of the subject:

> A person who makes a false declaration under this section commits an offence.

as the more traditional way of drafting would create a clumsy sentence:

> If a person makes a false declaration under this section, that person commits an offence.

4.5 Prominence for the legal action

If it facilitates better understanding, it is often desirable to give prominence to the legal action as well. In the above example this would lead to the following:

> An investigator may seize any relevant documents where there is reason to suspect the commission of an offence against this Act.

A very common example of the desirability of this kind of prominence is in the drafting of multiple offence provisions. Instead of:

> If a person:
> (a) ...;
> (b) ...;
> (c) ...; or
> (d) ...,
> that person commits an offence and is liable to...

or

> A person who:
> (a) ...;
> (b) ...;
> (c) ...; or
> (d) ...,
> commits an offence and is liable to...

it would often be better drafting (because it communicates the meaning in the clearest possible way) to state:

> A person commits an offence if [he or she] [that person]:
> (a) ...;
> (b) ...:
> (c) ...; or
> (d) ...,
> and is liable to...

Chapter 5
Modern Commonwealth Conventions in Legislative Drafting

5.1 The need for consistency and conciseness

As has already been noted in Chapter 2 ('judicial approaches' in section 2.4), it is an important rule of drafting legislative rules that the same words and expressions are used to mean the same things, as there is a presumption that the use of a different word or expression within the same item of legislation is intentional and indicates a shift in meaning. As has already been noted (see section on 'consistency', Chapter 2.3) the potential for unthinking use of different words to indicate permission cannot be overemphasised:

> "allow", "authorise", "permit", "license", "consent", "let", "sanction", "recognise".

But there are other important areas where there are a range of possible words meaning the same or similar things. These can most conveniently be examined by looking in turn at the most common elements of legislative sentences:

- **Who is affected by the rule?**
- **What are they required to do or refrain from doing, or permitted to do?**

There is also a third very common element ('what is the consequence of failing to comply with the rule?'), but this relates to the drafting of penal provisions and will be considered in Chapter 14.

5.2 Who is affected by the rule?

A legislative rule usually states that those to whom the rule applies are required to do, or refrain from doing, something or (particularly in the case of administrators or enforcers) have a power or discretion to do or not to do something. As has already been seen (Chapter 4.1), when drafting the requisite rules, the first thing legislative counsel needs to do is to refer to the persons affected.

Bearing in mind that legislation is conventionally drafted in the third person, there are in English a number of possible ways of doing this. If it is necessary to refer to persons generally, any of the following could be written:

"anyone…", "anybody…", "everybody…", "people…", "persons…", "any person…", "every person…", "a person…"

or even the old-fashioned forms 'whoever' or 'whosoever'.

Depending on the shape of the sentence to be drafted, most of these can easily be expressed as negatives: 'no-one…', 'no person…', etc. However, for the sake of consistency it is necessary to choose a particular form and stick to it, and because it best represents plain language and avoids unnecessary use of words of emphasis, modern drafting convention in the Commonwealth when referring to persons generally is to use the form '**a person**'.

Note that the ordinary indefinite article 'a' is used, rather than a more emphatic word such as 'any'. As will be seen in Chapter 10, the use of emphatic words 'any', 'each', 'all' and 'every' needs to be reserved for where a contrast needs to be drawn.

For drafting convenience, the meaning of 'person' is normally extended in an Interpretation Act or equivalent to include not only a natural person but also a body of persons, whether incorporated or unincorporated. In addition, as discussed in Chapter 4, it is often convenient to refer directly to the kind of person affected (for example a police officer, a driver, an investigator).

5.3 What is required or permitted?

When referring to what is required, forbidden or permitted, there are also numerous possible drafting alternatives available:

Imposing an obligation to do something
A person has a responsibility to…/has a duty to…/is compelled to…/is required to…/is obliged/obligated to…/is bound to…/has to…/shall…/must…

Imposing an obligation to refrain from doing something
A person is not allowed to…/is required not to…/is not permitted to…/is compelled not to…/is forbidden from…/is constrained not to…/shall not…/must not…/may not…/cannot…

Giving a discretion to do something
A person is allowed to…/is permitted to…/is entitled to…/is authorised to…/is empowered to…/has a discretion to…/may…/is able to…/can…

This can also be done by using a slightly different form relating to permitted or forbidden conduct that was often favoured in the past and is still sometimes seen:

It shall be lawful/unlawful/shall not be lawful/for a person to…

It shall be an offence for a person to…

Again, the need for **consistency**, as well as **conciseness**, has led to conventional uses of the shortest of these forms to the exclusion of the others. Traditionally 'shall' (and 'shall not') have been used to indicate obligation and 'may' to indicate discretion. These are known as verb auxiliaries, or merely 'auxiliaries'. However, for reasons stated below, the conventional uses in modern Commonwealth drafting are:

> A person must/must not/may/may not...

5.3.1 Problems with 'shall', and suggested alternatives

Indicating an obligation

The first problem is that, even in formal writing, the use of the auxiliary 'shall' to indicate obligation is slightly archaic. A century or more ago it was common when doing so, either in speech or writing, to state:

> You shall proceed as directed.
>
> He shall do as he is told.

In modern English these statements sound slightly awkward. Today 'will' tends to be substituted in each case, and indeed in conversational usage the two words have become, to an extent, interchangeable:

> You will proceed as directed
>
> He will do as he is told.

In view of the interchangeability of these auxiliaries, there is in both pairs of statements a potential problem of understanding. Do they indicate obligations or are they merely explaining what is going to happen (i.e. the future tense[1])? Often, particularly in spoken English, the intended meaning will be clear from the context. Nevertheless, if it is intended to indicate obligation, whether in spoken or written, formal or informal, English, the auxiliary '**must**' is usually used. As is noted in Chapter 6, the language used in legislation needs to conform as far as possible to that in ordinary use. So in drafting a legislative rule roughly corresponding to the above statements the following would be modern conventional drafting:

> A person involved in a road traffic accident must follow the instructions of a police officer called to the scene.
>
> A driver of a heavy goods vehicle must proceed through a weighbridge as directed by...

1 For an example of where the future tense is used to explain what is expected to happen, see the typical procedure for legislation set out in Appendix A.

Indicating a consequence or explanation

Often when the auxiliary 'shall' has been used in the past, it has not in fact imposed an obligation:

> If an application complies with section 3, subsection (1) of this section shall not apply.
>
> A person who contravenes this section shall be guilty of an offence.
>
> In relation to a citizen by naturalisation, section 5 shall have effect as if the reference...
>
> Subsection (3) shall not apply where the court gives leave to make a further application, but such leave shall not be given unless...

Except in the words following 'but' in the last example, each of these rules is merely stating a consequence or giving an explanation, i.e., a state of affairs brought about by, or consequence flowing from, the rule.

In the last example, the negative auxiliary 'shall not' is clearly used in two different senses in the same sentence (something counsel should avoid in order to preserve **consistency**). The intention in the second part of the sentence is to state what the duties of the court are in the relevant circumstances.

Use of the present tense to indicate states of affairs or consequences

The modern convention when expressing a state of affairs or consequence is to use the **present** tense. Besides being better style, this neatly gives effect to the maxim of construction 'a statute is always speaking'. Thus, in modern drafting, the following would take the place of the above examples:

> If the application complies with section 3, subsection (1) of this section does not apply.
>
> A person who contravenes this section is guilty of [*or, probably better,* commits] an offence.
>
> In relation to a citizen by naturalisation, section 5 has effect as if the reference...
>
> Subsection (3) does not apply where the court gives leave to make a further application, but...

A simple test to determine the way in which 'shall' is used is to ask whether 'must' can meaningfully be inserted in its place. If so, then the modern convention is to do so; if not, then the present tense or some other mode of expression is needed.

Setting out functions and duties

There are further potential problems with the overworked 'shall'. In many cases, it is desired to set out what somebody, usually a Minister, a court or a

specified official or body, is required to do. More often than not, the thrust of the provision is not so much to create an obligation or series of obligations (for the operation of the legislation concerned is usually predicated on the doing of the relevant things), but simply to state or list the powers or duties of the person concerned:

> The National Heritage Trust shall:
> (a) ...;
> (b) ...
>
> The objects of the Law Society shall be:
> (a) to...;
> (b) to...
>
> The Minister shall appoint the Chairman of the Board

or, referring back to one of the original examples noted under the previous heading:

> Subsection (3) does not apply where the court gives leave to make a further application, but leave [to make a further application] shall not be given unless...

Use of the present tense to indicate lists of functions or duties

In these kinds of cases, it usually better expresses the sense of the provision to use the present tense in the form 'is to', or 'are to':

> The duties of the National Heritage Trust are:
> (a) to...;
> (b) to...
>
> The objects of the Law Society are:
> (a) to...;
> (b) to...
>
> The Minister is to appoint the Chairman of the Board
>
> ...but leave [to make a further application] is not to be given unless...

Establishing an office, corporation or other thing

The overworked 'shall' has been used here too:

> There shall be a Registrar of Antiquities.
>
> The Harbours Authority shall be a body corporate with perpetual succession and a common seal...
>
> A tax, to be known as "land transaction tax", shall be charged and collected...

In these cases, as with those examined in the paragraph above on use of the present tense, the troublesome auxiliary is better replaced by 'is to' or, in the second example, by replacing 'shall be' with 'is'.

Explaining provisions

Recourse has also sometimes been made to 'shall' for an explanatory purpose:

> An interim order shall not be deemed to be an adoption order within the meaning of this Act.
>
> The Board shall be lawfully constituted if there are no less than 7 elected members present.

In fact 'be deemed to be' in the first example is a slightly archaic form hardly ever used even in formal language outside legislation (in modern writing, the equivalent would be 'be treated as', 'be regarded as' or 'be taken to be'), and so applying the conventions already discussed, one would write:

> An interim order is not to be regarded as an adoption order within the meaning of this Act.

although, applying principles of **conciseness**, use in this context of the words 'deemed to be' is arguably redundant, and the better draft would be:

> An interim order is not an adoption order within the meaning of this Act.

In the second example, all that is needed is '…is lawfully constituted if…'

5.3.2 Potential problems with 'may'

The use of 'can'

As has been seen, from the variety of words and expressions that could be used to indicate discretion, 'may' is the one usually chosen. Of course in informal spoken language another verb auxiliary 'can' is often used in the same sense:

> You can call me by my first name or my nickname.
>
> He can do whatever he thinks is right in the circumstances.

In formal English, however, it is not correct to do this. 'Can' in its correct use is synonymous with 'is able to' and should be reserved for referring to physical or mental ability to do something, rather than having permission to do it. What is needed is a word indicating permission or discretion. Legislative equivalents of the above examples might be:

> An Act may be referred to by its short title or chapter number.
>
> The Authority may direct a course of action that it considers appropriate in the circumstances.

The use of 'may not'

At first sight the negative form 'may not' seems to have the same meaning as the negative obligation form 'must not', and indeed in spoken language any of the following might be stated interchangeably:

> You must not smoke in here.
>
> You may not smoke in here.

or even:

> You cannot smoke in here.

The third version has already been considered, but there is also a fine but important distinction between the first two. In legislative rules, 'must not' is used to create **an obligation not to do something**; 'may not', on the other hand, is reserved for cases in which it is required to emphasise **a lack of authority to do something** (without necessarily incurring a penalty for contravention):

> A licensee may not apply to renew a licence more than 30 days before it is due to expire.
>
> A court may not convict a person of an offence under this section if that person has paid the relevant fixed penalty.

In these cases, the sense is not so much to forbid a person from doing something as to indicate or explain the lack of a right or discretion. A licensee who failed to comply would presumably simply be told to reapply at the correct time and, in the unlikely event that a person were actually to be convicted of the specified offence in the circumstances mentioned, he or she would have an unanswerable appeal.

Contrast, however, the more usual type of case:

> A person must not carry on the business of a hawker unless he or she holds a hawker's licence of the appropriate class.

This clearly creates an important negative obligation, and there would undoubtedly have to be a provision following it making anybody who failed to comply liable to penal sanctions.

Other meanings of 'may'

Finally, there is sometimes inconsistent use of 'may' in the sense of 'is' (or 'are') and 'might':

> In sections 3 to 9 of this Act a reference to adoption is to adoption of an infant wherever the infant may be habitually resident.

Although there would not in practice be any difficulty in understanding this provision, it would be better from the point of view of consistency to use 'is' instead of 'may be'.

Furthermore, an ambiguity could possibly arise with inconsistent use, particularly if the auxiliary is capable of meaning 'might':

> The Minister may not make an order if the circumstances set out in subsection (3) apply.
>
> The application of this Act may be subject to such modifications as are prescribed.

The first could be construed either as a lack of power in the specified circumstances or (if 'may' is understood in the sense of 'might') as an explanation of the way in which that power could be expected to be exercised in a particular case. In addition, the question arises with regard to the second example as to whether the sentence confers a power to make modifications or (as in the first example) is an explanation of what might happen. Although legislation is construed as creating rules rather than giving explanations, it would nevertheless be better to redraft the above provisions:

> The Minister [is not to] [must not] make an order if the circumstances set out in subsection (3) apply.
>
> The application of this Act is subject to such modifications as are prescribed.

Chapter 6
Plain Language Drafting

6.1 Introduction

The general Commonwealth trend has been to move away from the traditional drafting styles of the past involving the use of largely unfamiliar words and expressions and lengthy sentences, which were thought to be necessary in the interests of conveying precise meaning.

Recent changes in perception have recognised that legal writing generally, and legislation in particular, should be able as far as possible to be readily understood by those to be affected by it. It has come to be seen as a waste of resources for legal documents to have to be 'translated' into everyday language by lawyers. It has also come to be recognised that the former styles (sometimes mockingly known as 'legalese') can take on a life of their own, so that drafters using them can fall into patterns of both thought and writing that may cause a failure to adequately address the drafting problems.

There are still many people who remain unconvinced by some of these changes (including the move away from the auxiliary 'shall', discussed in Chapter 5), especially in more conservative jurisdictions and especially among some MPs and members of the legal profession. It may thus not be a matter of individuals (unless in very senior positions) being able to take it upon themselves to change things in the ways proposed. The introduction of new drafting practices is thus an issue that may require tact and perseverance.

6.2 Reasons why legislation may fail to communicate clearly

The most obvious of these is that legislative provisions are imprecise or difficult to understand because the thinking behind them is unclear:

> (2) A person shall be deemed to deposit or dump waste under this Act if he deposits or dumps the waste, whether solid, semi-solid or liquid, in such circumstances, or for such period that he may be deemed:
> (a) to have abandoned it where it is deposited or dumped; or
> (b) to have brought it to the place where it is so deposited or dumped for the purpose of its being disposed of or abandoned whether by him or any other person.

See further the examples in section 6.4 relating to the passive voice and modifiers.

However, even though the thinking behind them is probably clear and the language attempts to be precise, they may still for various reasons be difficult to read and understand (see the other examples in section 6.4).

6.3 General objective of plain English in drafting legislation

To communicate more effectively with those to whom a document is addressed, and in doing so to:

- use language that is simple, direct, economical and familiar
- omit unnecessary or repetitious words or phrases
- use sentence structures that avoid ambiguity or undue complexity
- organise and present sentences in a way that enables their meaning to be grasped as quickly as possible.

6.4 The most common specific problems that need to be addressed

6.4.1 Excessively long sentences

Sentences that exceed 20 to 30 words present problems of understanding unless the text is broken up (see Chapter 7).

> No action, suit, prosecution or other proceeding whatsoever shall lie or be brought, instituted or maintained in any court or before any other authority against the Government, a State Government, the Central Bank, any officer or employee of any such Government or of the Central Bank, either personally or in his official capacity, or any person lawfully acting on behalf of any such Government or the Central Bank, or on behalf of any such officer or employee, either personally or in his capacity as a person acting on such behalf, for or on account of, or in respect of, any act done or statement made, or omitted to be done or made, or purporting to be done or made or omitted to be done or made, in pursuance or in execution of, or intended pursuance of, this Act, or any order in writing, direction, instruction, notice or other thing whatsoever issued under this Act.

Difficulty in reading and understanding this sentence arises because it is not concise and contains too many detailed and confusing references to persons and complex context conditions.

6.4.2 Legislative sentences do not follow standard English usage

Complex verb constructions or inconsistencies with modern grammatical practice make for difficulty in understanding, for example, different uses of the auxiliary 'shall' (see further Chapter 5); use of deeming provisions; and use of provisos:

> A person who shall have received a fee for advising another person in relation to an investment shall be deemed to have advised that person in the course of business:
>
> Provided that he shall not be deemed to have done so in the course of business if he shall prove that...

Rather state:

> A person who receives a fee for advising another person about an investment is to be regarded as having done so in the course of business, unless the person advising proves that...

The word 'deem' in provisions that create a legal fiction or (as here) a rule of interpretation is slightly archaic and needs to be replaced by a modern equivalent such as that used in the example above (or others such as 'be treated as'). Discouragement of the use of provisos will be considered further in Chapter 7 ('Structuring legislative drafts', section on grouping provisions). Note also that the redrafted version is in gender-neutral language (see further Chapter 10).

6.4.3 Use of archaic or pretentious words and expressions

Avoid meaningless or cumbersome words and expressions of reference or stress such as 'aforesaid', 'hereby', 'hereinbefore mentioned' and 'whatsoever'. See further examples in the list at the end of this chapter.

Elements of the following hypothetical, and, by modern standards, slightly preposterous archaic writing, can still sometimes be seen:

> **15.** (1) Whosoever[1] shall be[2] seised of[3] chattels real[4] to which the immediately preceding section of this Act[5] relates[6], shall not[7] utilise[8] the said chattels[9] for the purposes of[10] hire, reward[11] or sale before the expiration of[12] the hereinafter in this section mentioned[13] relevant period of time.

1 Modern use would be 'A person (who)…'.
2 This is the future tense. The present tense should be used.
3 Archaic word for 'possess' in relation to leasehold property.
4 Archaic word for interests in land less than freehold (it usually refers to leaseholds).
5 A pretentious (and potentially confusing) reference, which should be to the relevant section number, and there is normally no need to use 'of this Act'.
6 'Refer' is a more modern word.
7 'Must' and 'must not' are the auxiliaries in everyday use indicating obligation.
8 A pretentious form of 'use'. Even that word can be avoided here.
9 'The said' is an archaic and unnecessary expression of reference.
10 'For the purposes of' means no more than 'for'.
11 'Hire or reward' is a stock lawyer's phrase. Consideration should be given to more apt or precise terms if possible.
12 A pretentious (and often used) alternative to 'expiry of' or 'end of'.
13 Pretentious, clumsy and archaic style. In this context, it is apparent that the specification will be made later in section 15.

Rather, the proposition ought to be stated thus:

> **15.** (1) A person in possession of leasehold premises referred to in section 14 must not offer them for subletting, mortgage or sale until the specified time period has ended.

6.4.4 Careless use of the passive voice

The potential danger caused by this has already been noted in Chapter 4 (section 4.1 on 'Legal subject'). It is not suggested that this form of expression should be avoided altogether, but unthinking use can cause problems of understanding. The following example is from a Narcotic Drugs Act:

> **27.** Where a medical practitioner is convicted of an offence under this Act, he shall be liable to have his name removed from the register of those licensed or registered to practice as a medical practitioner.

Here the drafter has not addressed his or her mind to who is to do the removing. Is it the registrar (no mention of whom is made in this particular Act), or is it the court? See further Chapter 14 ('Penal provisions').

On the other hand, the use of the passive would be convenient in the following example:

> If a vessel is wrecked, stranded or in distress on or near the coast, any cargo or other article belonging to or separated from the vessel which is washed on shore or otherwise lost or taken from the vessel must be delivered to the receiver.

Here it is perfectly clear who is addressed by the rule (i.e. anyone finding cargo, etc., from a wreck, etc.) and to draft in the active voice would require many more words (58 as against 45):

> If a vessel is wrecked, stranded or in distress on or near the coast, a person who comes into possession of the cargo or any part of it, or any other article belonging to or separated from the vessel which is washed on shore or otherwise lost or taken from the vessel must deliver it to the receiver.

6.4.5 Careless use of dangling modifiers

A potential danger in drafting legislation is that modifiers (adjectival and adverbial words, phrases and clauses) are left 'dangling', so that it is unclear to which word or set of words they attach. Extreme care needs to be taken to ensure that this does not happen:

> The Board may make annual grants to persons from its general fund or from any of its other funds with the approval of the Minister.

The underlined adverbial phrase dangles because it is possible to read the underlined words either as modifying only grants from 'other funds' or

as modifying 'general fund' as well. This can be clarified by correct use of punctuation, or by changing the word order, or both. Thus:

> The Board may make annual grants to persons from its general fund or, with the approval of the Minister, from any of its other funds.

or, depending on the policy:

> The Board may, with the approval of the Minister, make annual grants to persons from its general fund or from any of its other funds.

Where a dangling modifier appears in the middle of a sentence and is capable of applying equally to words or groups of words which precede or follow, it is said to 'squint'. Thus:

> The Commissioner may order an importer within seven days of importation of the goods to file an affidavit stating...

It is not clear whether the underlined adverbial phrase modifies 'may order' or 'file an affidavit'. Again, the ambiguity is avoided by punctuating correctly and placing the underlined phrase in the correct position in the sentence:

> The Commissioner may, within seven days of importation of the goods, order an importer to file an affidavit stating...

or, depending on the policy:

> The Commissioner may order an importer to file, within seven days of importation of goods, an affidavit stating...

6.4.6 Excessive use of cross-referencing

Reliance on other provisions, in the same or other legislation, while it has a limited place in legislation, often calls for searching in other pieces of legislation that may not be available to the user, and sometimes (e.g. where *mutatis mutandis* or a similar expression is used) for statutory construction of the other provisions.

> Subject to the provisions of the Evidence Act, and to any rules made under section 356(1)(f) of this Act, the record of a confession made in accordance with this section is admissible in evidence against the person who made it.

> In this Act "bank" has the meaning given in Part II of the Banking Act, and "financial institution" has the meaning given by section 3 of the Financial Institutions Act.

> "interest in a share" is to be construed as provided under section 225(2) to (10) of the Companies Act, read with the following modifications:
> (a) the substitution of "including" for "otherwise than" in subsection (6)(d); and
> (b) the deletion of subsection (9)(b).

6.5 The aims of plain English in legislation

- To limit the ideas expressed in a legislative sentence
- Not to allow sentences to get too long so as to interfere with communication of the central message of the provision
- Where necessary, to break up the format of sentences into paragraphs (see Chapter 7)
- To follow the standard usage and styles of modern English
- To use words in common use rather than elaborate or obscure ones (see the lists below)
- To eliminate unnecessary words and expressions
- To avoid cumbersome and unnecessary words of reference or emphasis
- To avoid archaic words and expressions
- To avoid Latin and French words or expressions as far as possible (see the lists below)
- To use the active rather than the passive form as a general rule
- To avoid dangling modifiers
- As far as possible, to limit the use of cross-referencing to other parts of the legislation and, even more so, to other legislation.

6.6 Words and phrases to avoid or use with care

Archaic words to avoid or replace	Replace with
aforesaid, said	the, that
hereby	*[omit]*
hereinafter/before	in section(s)... etc.
lessee	tenant
lessor	landlord
provided that	but, however
servant	employee
such (pronoun: 'if such was the case')	it, that, they
thereafter (-in, -under, etc.)	after (in, under) it
thereupon	then
the same (pronoun: 'if the same has been declared unfit...')	it, they

Words and phrases to avoid or use sparingly	**Corresponding words to be preferred**
as a consequence of	because of
by means of	by
by virtue of	by, under
despite the fact that	although
endeavour	try
expiration of	end of, expiry of
for the purpose of	to
in accordance with	as, under
in pursuance of	as, under
in relation to	about, concerning
in the event that	if
notwithstanding	despite
prior to	before
purchase	buy
subsequent to	after
such (adjective: 'such persons who...')	the, that, those
until such time as	until
with a view to	to
with reference to	about, concerning
with regard to	about, concerning
with respect to	on, about
Pairs of words meaning the same thing	
due and payable	due, payable
fit and proper	fit, suitable
just and equitable	just, equitable, reasonable, fair
null and void	void, of no effect
save and except	except, unless
unless and until	unless, until
Latin phrases to avoid or use sparingly	**English equivalents [or literal translations]**
ab initio	from the outset, ...beginning
ad valorem	related to the value
bona fide	in good faith
de facto/jure	in fact/law
de novo	again, re-...
doli incapax	incapable of (committing) crime
ex parte	without notice to the other party
in camera	in closed court
in extremis	on the point of death

Latin phrases to avoid or use sparingly	**English equivalents [or literal translations]**
in loco parentis	in place of a parent
in pari materia	analogous with
inter alia	among(st) other things
inter alios	among(st) other persons
mutatis mutandis	with the necessary changes
per se	in itself
pro rata	proportionately
sine die	with no fixed date, indefinitely
sui generis	of its own kind, in its own category
sui juris	under no legal disability
But note that the following Latin expressions have gained common acceptance as technical legal ones that do not easily translate into a convenient plain English equivalent	
certiorari	[to be more carefully informed]
ex gratia	as a matter of favour, without legal obligation
ex officio	by virtue of appointment/post/office
habeas corpus	[you have the body]
intra/ultra vires	[within/beyond the powers]
mandamus	[we command]
mens rea	[guilty mind]
nolle prosequi	[unwilling to prosecute]
post mortem	[after death]
prima facie	[at first glance]
pro forma	[for form's sake]

Chapter 7
Structuring Legislative Drafts

7.1 Sentences

Each distinct legal proposition should be comprised in a single sentence. In legislative terms this means a **section or subsection**. If a legal proposition is contained in more than one subsection, each should have a close enough relationship to provide a unity of purpose. The following example would not comply with this convention:

> **Appointment and duties of film censors**
> 5. (1) The Minister may appoint as many film censors as the Minister considers necessary.
> (2) The film censors are to perform the duties assigned to them in accordance with general directions given to them by the Minister.
> (3) No film is to be shown unless there is in force in respect of it a certificate of censorship granted by a film censor under section 8.

As can quickly be seen, subsection (3) introduces a quite different subject matter.

The length of a sentence needs to be dictated by the following considerations:

- readers cannot normally digest more than 4 to 5 lines of unbroken text without re-reading (see the first example in section 6.4); and
- sentences over that size need to be broken into paragraphs.

On the other hand:

- several short sentences (of less than 2 lines) may be difficult to relate together; and
- extensive linking may get in the way of understanding the content (see section 7.4).

7.2 Paragraphs

7.2.1 Particular uses

(a) Tabulations, listing a series of attributes, contents, duties, etc.:

> A dealer must maintain a register in which is recorded:
> (a) the prescribed particulars of goods acquired;
> (b) the name, address and business of the person from whom the goods are acquired; and
> (c) the date and time of acquisition.

(b) Developing an underlying theme in an orderly way (in the following case, duties of the dealer with regard to goods acquired):

> A dealer who, except from another licensed dealer, acquires goods specified in the Second Schedule:
> (a) must retain possession of the goods for at least 30 days;
> (b) must not alter the condition or appearance of the goods during that time; and
> (c) in the case of precious stones removed from jewellery after 30 days and sold, must record the weight and description of each stone that is over the prescribed size.

(c) Reducing repetition (in the following example preventing the repetition of 'A dealer must display'):

> A dealer must display:
> (a) in a conspicuous place at the dealer's premises, a copy of the licence; and
> (b) at the entrance to those premises, a prescribed sign.

(d) Reducing ambiguity (e.g. where an unstructured sentence leaves a dangling modifier – see Chapter 6):

> The Minister may make grants to public or charitable:
> (a) hospitals;
> (b) schools; or
> (c) research institutions.

(e) Making context clauses more readable:

> If:
> (a) the complainant does not appear at the time and place appointed for the hearing of a charge; and
> (b) the court is satisfied that the complainant had notice of that time and place,
> the court must acquit the accused unless, for reasons to be recorded, it decides to adjourn the case.

However, care needs to be taken not to over-paragraph and **to ensure that introducing or concluding words apply to each of the paragraphs in a sequence**. Each paragraph must be able to be read as flowing grammatically from the introducing words. Likewise, any concluding words must flow grammatically from each paragraph.

In some jurisdictions it is regarded as bad style to draft concluding words after a paragraph series, so that the paragraphs become 'sandwiched' between other words of the sentence, but there seems no good reason to avoid this format unless it can be seen to cause possible difficulty in understanding.

7.2.2 Misuse of paragraphs

The following are common examples of misuse:

(a) breaking the grammatical structure:

> A person using the library:
> (a) must not damage a book in any way, and if the person does so he or she is liable for the cost of its repair;
> (b) must return a book borrowed within the specified period.

(b) including in one paragraph words intended to apply also to some or all of the other paragraphs:

> A dealer must display:
> (a) in a conspicuous place at the entrance to his premises, a copy of his or her licence;
> (b) a prescribed signboard.

(c) the introductory words do not apply to each of the paragraphs that follow:

> Nothing in this section authorises the Minister to delegate:
> (a) a power to issue warrants;
> (b) to make proclamations; or
> (c) any function, the delegation of which is expressly forbidden by law.

(d) words following the final paragraph do not apply to each of the paragraphs:

> If a person:
> (a) other than from a licensed dealer obtains; or
> (b) other than to a licensed agent disposes;
> of goods specified in the Second Schedule, that person commits an offence.

(e) lack of a vital linking word:

> A person who:
> (a) comes into possession of;
> (b) disposes of,
> stolen goods commits an offence.

7.3 Grouping provisions in an Act

For the conventional arrangement of an Act, see Figure 7.1 at the end of this chapter. This will need to be modified or adapted according to the type of Act being drafted. For example, an amending Act would be unlikely to have most of the preliminary provisions and not all legislation will need all of the miscellaneous and final provisions.

7.3.1 Devices for grouping provisions in an Act

For convenience reference is made to 'an Act', but exactly the same considerations apply to subsidiary legislation:

(a) Divisions larger than a section (the use of these devices is not standardised in Commonwealth drafting, and variations sometimes apply in different jurisdictions, and even to statutes drafted in different decades within the same jurisdiction):

> **Chapters**:
> Typically found in the Constitution and very long pieces of legislation such as a Criminal Procedure Act or Companies Act;
>
> **Parts**:
> Standard devices for referring to groups of sections dealing with the same theme;
>
> **Divisions**:
> Used in longer legislation as sub-groupings either of Chapters or of Parts; and
>
> **Headings or sub-divisions**:
> Sub-groupings within Parts.

When grouping provisions within an Act, legislative counsel needs to consider the length and complexity of the legislation. Clearly the longer the legislation the more likely will be the need for divisions greater than a section; there is no point in so dividing a short Act whose effect is clear.

(b) Sections and divisions of sections (the following are conventional Commonwealth designations):

> **Sections** [designated as 1. 2. 3. etc.] each containing a separate legal proposition;
>
> **Subsections** [designated as (1), (2), (3), etc.] each having a unity of purpose with others in that section;
>
> **Paragraphs** [designated (a), (b), (c), etc.] each of which constitutes an element of the proposition advanced in a section or subsection;
>
> **Subparagraphs** [designated as (i), (ii), (iii), etc.] each of which constitutes an element of the proposition advanced in a paragraph; and
>
> **Sub-subparagraphs** [usually designated as (A), (B), (C), etc.] a lower level still which should be needed only exceptionally.

7.3.2 Headings and section notes

In most jurisdictions these are treated as editorial rather than legislative (i.e. they do not form part of the formal text for the purposes of construction). They should be brief (a single word will often suffice) and accurate

summaries of the contents of a section or group of sections. Exceptionally, the abbreviation 'etc.' (which should never be used in the body of the text of rules) may be used. Thus, rather than:

> Duty of the Commission to keep accounts
>
> Persons may not object to supplying information, documents or things to the Commission

It would be better to draft, respectively:

> Accounts
>
> Supply of information, etc.

7.4 Linking devices

7.4.1 Linking within a sentence

This is to indicate a connection with persons or things already referred to:

> If a person has instituted proceedings under this Act, nothing in this section prevents the withdrawing of those (note, not "such") proceedings by or at the instance of that person.

In some jurisdictions 'the' would be substituted for each of the underlined words.

7.4.2 Linking between one sentence (i.e. section or subsection) and another

Often the relationship indicated by the linking expression is clear and direct:

> Section 6 does not apply to the proprietor of a newspaper who has a policy of insurance in respect of damages that may be awarded...
>
> The persons referred to in subsection (1) are not eligible for re-election if...
>
> A function of the Board set out in section 4...
>
> A licence granted under this Part...

However, confusion sometimes exists between two very common expressions that indicate a relationship between sentences:

'**subject to**' and

'**notwithstanding**' (or its more modern equivalent '**despite**').

The difference between them needs to be clearly understood:

> 5. Subject to section 4, the Authority may grant a licence to a person who...

This indicates that **the provision referred to is the dominant one**, i.e., to some extent section 4 overrides section 5. In practice, this usually means that section 5 constitutes an explanation, extension or refinement of the rule in section 4.

On the other hand:

> 5. Despite section 4, the Authority may not grant a licence to a person who...

indicates that **the provision in which this expression appears (i.e. section 5) is the dominant one**. This usually means that it constitutes an exception to, or exemption from, the provision referred to.

7.4.3 Provisos

A device, much used in the past, has been the creation of a **proviso** or provisos ('provided that…' or the even more cumbersome 'provided always that…') to a section or subsection.

The device has been used mainly for cases where an exception or qualification to a general proposition is to be created. However, it is often used in other senses, for example to explain or elaborate on a proposition:

> A legal practitioner must pay an annual fee according to the scale set out in the Schedule:
> Provided that this section does not apply to a practitioner who is not in actual practice.
>
> Neither the Corporation nor an officer of the Corporation is liable for damages on account of an act done or statement made under this Act:
> Provided that the act or statement was done or made in good faith.

Because of its slightly archaic structure (provisos are rarely if ever used outside legislation or legal documents generally), and its inconsistent usage, the use of this device is discouraged. Alternatives to provisos can **always** be created by using words or expressions such as 'but', 'however', 'nevertheless' or 'except', or by restructuring the sentence. The two examples above would be better written:

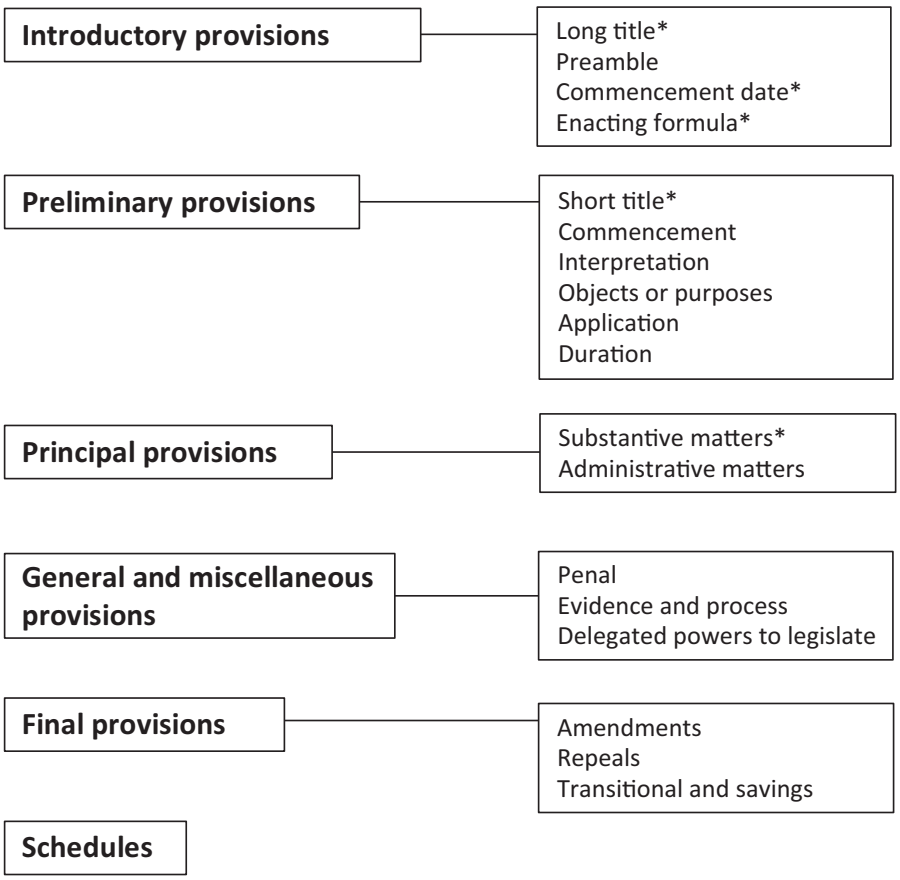
> A legal practitioner must pay an annual fee according to the scale set out in the Schedule; [but] [however] this section does not apply to a practitioner who is not in actual practice.

or

> A legal practitioner other than one who is not in actual practice must pay an annual fee...
>
> Neither the Corporation nor an officer of the Corporation is liable for damages on account of an act done or statement made in good faith under this Act:

Where inclusion of the required information would make the sentence too long or complex, then the information should be drafted as a new sentence (usually a further subsection or the equivalent in subsidiary legislation).

Figure 7.1 Conventional Commonwealth Arrangement of a Bill



Only those provisions marked with an asterisk will be required as standard ones in any Bill.

In some jurisdictions (e.g. the UK, Nigeria and South Africa), some or all of the above preliminary provisions (short title, commencement and interpretation) are placed with the final provisions.

This arrangement also applies, from preliminary provisions on, to major subsidiary legislation (i.e. Regulations and Rules so called; see Chapter 15), except that there the short title is usually known as the 'citation'.

Chapter 8
Punctuation (and Capitalisation)

The function of punctuation in legislation is, as in any type of writing, to facilitate comprehension and hence aid interpretation. Each of the punctuation marks used in legislation is examined, with commas (those that are in practice the most difficult) left to last.

8.1 Full stop

A full stop is used to indicate the end of a sentence (it should not appear in the middle of a section or subsection, as each of these divisions should constitute a single sentence on its own). It is also used:

- to indicate an abbreviation (rarely used in legislation);
- after the section number (1., 2., etc.) but **at the beginning of a section** only.

8.2 Colon

A colon is used to introduce something that follows. This mark is now more widely used than a dash as an introducer because of the possibility of an 'orphaned' dash in word processing (i.e. where the dash stands alone at the beginning of the line below the text to which it attaches).

In some jurisdictions, use of a colon after introducing words, as opposed to a dash, indicates that what follows is **a list** which **does not** depend grammatically on them:

> The following constitute members of the Board of the Commission:
> (a) a chairman to be appointed by the Minister;
> (b) the Director-General *ex officio*;
> (c) four members elected by the…….

8.3 Dash

A dash is an alternative to a colon, but now less often used for reasons already described. In some jurisdictions, use of this mark, as distinguished from a colon, indicates that what follows **does** depend grammatically on the introducing words:

A member of the Board must vacate his or her office if –
(a) incapacitated by physical or mental illness;
(b) his or her estate is sequestrated; or
(c) nominated as a candidate for election to Parliament or a provincial legislature.

8.4 Semi-colon

A semi-colon indicates a pause that is longer than indicated by a comma and shorter than a full stop. It is used:

- Grammatically, to indicate linked clauses of equal importance:

  An inspector may enter relevant premises at any reasonable time; but the inspector must show his or her authority to enter if required to do so.

- Technically (normally only in legislation, and text following a legislative layout) to indicate the end of a paragraph within a section or subsection, or a subparagraph within a paragraph. However, in some jurisdictions a comma replaces a semi-colon in this use.

Somewhat confusingly, some house styles require a comma to be placed at the end of the last paragraph or subparagraph in a sequence:

A person at a public gathering commits an offence if that person:
(a) behaves in a noisy or disorderly manner;
(b) incites another person to commit a breach of the peace; or
(c) uses or distributes a document containing threatening, abusive or insulting words,
and is liable to imprisonment for 12 months.

It is suggested that it would be better to maintain consistency by using either semi-colons or commas throughout.

8.5 Quotation marks (or inverted commas)

These marks are used to indicate a definition term, i.e., a word or series of words being defined (see Chapter 9):

"dealer" means a person licensed under this Act to deal in...

The Utopian Reinsurance Corporation ("the Corporation") is established as a body corporate...

See also the examples below under **brackets**.

They are also used in amending legislation (see Chapter 16) to indicate a word, series of words or block of text to be deleted or inserted. The following example demonstrates both this and the use referred to above:

> Section 4 of the Insurance Act, in this Act called "the principal Act", is amended by deleting "subject to the approval of the Minister" and inserting "unless the Minister otherwise directs".

However, in some jurisdictions alternative devices to quotation marks are used to indicate a definition term (e.g. by printing it in bold italics) or to amend text (e.g. by the use of bold or underlined text, or a combination of both).

8.6 Brackets

Brackets are sometimes used, following the practice of private legal documents, to indicate the creation of a definition:

> An application may be made to a court by or on behalf of a person for whose benefit a maintenance order has been made ("the applicant")...

> A person ("the seller") who sells fuel to a licensed retailer may not recover the part of the sale price representing the subsidy for the sale except under this section.

They are used in short titles of Acts to indicate a refinement of the subject matter (see Chapter 12), and they are occasionally also used in amending legislation to provide clarification or explanation not forming part of the official text:

> Section 64 of the principal Act (*which provides for appeals to the Minister*) is amended by deleting subsection (4).

8.7 Hyphen

A hyphen is used as required by grammatical convention to indicate paired words:

> by-law, cross-reference, loud-speaker, polling-booth, two-fifths, Attorney-General.

It is also used to indicate a word-break at the end of a line of printed text (although this use is now rare in legislative texts).

Note that technically a hyphen is shorter than a dash.

8.8 Apostrophe

An apostrophe is used:

- To indicate the possessive (the magistrate's court, licensed dealers' premises). Note that in the plural the apostrophe follows the final letter[1]; and

1 The rules concerning the possessive are sometimes complicated and reference is recommended to a style manual such as *New Hart's Rules*, Oxford University Press, 2005.

- For contracted words (doesn't, cat o' nine tails); little used in legislation except possibly in o'clock (on the clock); fo'c's'le (forecastle, or forward part of the lower deck of a ship).

8.9 Comma

This very important punctuation mark is often misused. Its correct uses are various, but basically it indicates a notional split-second pause in the reading of the sentence concerned, usually (but not always) because of its grammatical structure. Specifically, it is used:

- to separate items in a sequence (and so prevent having to repeat 'or' or 'and' between the various words):

> "educational establishment" means a university, polytechnic, institute of adult education, school, kindergarten or other place where instruction of persons is undertaken;

- to mark off separate grammatical clauses in a sentence:

> Unless otherwise provided by this section, or unless the Minister grants an exemption under section 46, a log book must be kept in every ship.

- to divide a compound sentence:

> The Minister may approve or refuse to approve the scheme submitted, but on refusal to do so must inform the applicant within 7 days.

- to prevent repetition:

> If the skipper of, or a seaman employed in, a fishing vessel is, while on board the vessel, under the influence of drink or a drug...

These commas save having to state 'a fishing vessel' twice.

- To indicate a **commenting**, as opposed to a **defining**, modifier in a sentence:

> If the seat of a member of the Council becomes vacant, the member, if qualified under this Act to offer him or herself for re-election, may seek re-election.

The commas in this sentence create a pause in the flow of information; the underlined words are said to create a **commenting** modifier. They give, in a sort of aside, general information about the member. Compare:

> If the seat of a member of the Council who is qualified under this Act to offer him or herself for re-election becomes vacant, that member may seek re-election.

In this last example, there is an unbroken continuity of the sense provided by the underlined words creating a **defining** modifier. This adds very specific information about the member. Often, as here, sentences written in these slightly different ways actually mean the same thing, but a problem of ambiguity can arise as shown below.

- To facilitate understanding (but commas should not be overused):

> A person who, without lawful authority, exports from Utopia, or puts on board a ship, aircraft or vehicle for the purpose of being so exported, a false or counterfeit coin, commits an offence.

The first and second commas in this sentence indicate a commenting modifier ('without lawful authority'). The third and fifth enclose a second modifying clause ('or [a person who] puts on board…'). The fourth simply indicates a sequence. However, the sixth and last comma in the sentence is inserted to enable the reader notionally to 'pause for breath', rather than because rules in any of the other paragraphs require it.

8.9.1 Problems with the use of commas

A number of problems can arise over incorrect or unthinking use of commas. This can even change the meaning of a sentence and is most likely to happen in the two types of case examined below.

8.9.1.1 When using commas to indicate commenting (as opposed to defining) modifiers

Note how the introduction of a comma can change the meaning of a sentence:

> 1. A driver involved in a road accident involving personal injury must remain at the scene until a police officer arrives.

> 2. A driver involved in a road accident involving personal injury must remain at the scene, until a police officer arrives.

The continuity of the sense provided by the **defining** modifier in example 1 adds very specific information about the duty to remain. By contrast, the comma in example 2 creates a pause in the flow of the sentence to indicate a **commenting** modifier. This seems at first sight to imply an ending of the duty to remain:

> 1. *The driver must wait to be interviewed by the police at the scene.*

> 2. *The driver is free to leave the scene when the police arrive.*

In a further example:

> 3. A building inspector may order the demolition of the listed premises which were declared to be substandard under the repealed Regulations.

4. A building inspector may order the demolition of the listed premises, which were declared to be substandard under the repealed Regulations.

A similar potential difference in meaning can be seen:

3. *Some of the premises were previously declared substandard.*

4. *All of the premises were previously declared substandard.*

8.9.1.2 By inadvertently changing the nature of the words that follow

1. Eats shoots and leaves.

2. Eats, shoots and leaves.

In this well-known example, the addition of a comma converts 'shoots and leaves' from nouns (so that the words are a comment on what giant pandas usually do), to verbs (with a completely different meaning).

This problem too can carry over into legislative provisions:

1. A disabled person must have worked for at least two years for a scheduled employer to claim the benefit.

2. A disabled person must have worked for at least two years, for a scheduled employer to claim the benefit.

1. *The disabled person has the right to claim the benefit.*

2. *The employer has the right to claim the benefit.*

The comma here converts the word 'for' from a preposition ('with', 'under') to a conjunction ('in order for').

8.10 Capital letters

These are used at the beginning of words or in acronyms. They are required:

- at the beginning of the first word in a sentence
- to indicate a proper noun (e.g. name of a person or place)
- to indicate the title to a specific office or institution
- for days of the week, months and specific public holidays
- for certain legislative terms ('Bill', 'Act', 'Part', 'Schedule' and the short title; but note, not in 'section', 'subsection', 'paragraph', 'clause', etc.)
- usually, when a labelling definition is used in legislation ('the Corporation', 'the Director'); this is considered further in Chapter 9
- for initialled titles and acronyms – in both cases, all the letters will be capitalised (EU, OECD, UNESCO, NATO).

Chapter 9
Definitions and Interpretation Provisions

9.1 Introduction

It is important to remember that, in general, words in legislation carry their ordinary dictionary meanings and do not need to be expressly defined.

However, sometimes it is necessary to restrict or enlarge that ordinary meaning (as commonly with, e.g., 'person', 'document'), and many words are capable of carrying different meanings that can vary with the context in which they are used (e.g. 'oil', 'theatre'). Sometimes a word is inherently vague or imprecise (words denoting means of transportation are common examples: 'vehicle', 'aircraft', 'vessel'). It is in these cases that it becomes necessary to clarify the meaning for the purposes of legislation.

9.2 Definitions and other interpretation provisions generally

A definition contains two elements:

- **the definition term:** the word or words to be given a specific meaning

  "driver"

- **the definition:** the meaning that is given to the definition term

  means a person who drives a motor vehicle, or who is in a position to set the vehicle in motion even though it is stationary.

This is a typical enlarging definition that **extends** the ordinary meaning (see further section 9.3.2). Note, however, that exactly the same concept can be presented in an alternative way, as a general interpretation provision:

> For the purposes of this Act, a person is to be treated as driving a motor vehicle, even though the vehicle is stationary, if that person is in a position to set the vehicle in motion.

The device of a definition is the more commonly used, but a general interpretation provision might be more useful where the concepts are more complex:

> In a provision of this Act relating to the surrender, or the loss or destruction, of a certificate of insurance, a reference to that certificate is to be construed:
> (a) in relation to a policy under which more than one certificate is issued, as a reference to all certificates; and
> (b) where a copy has been issued of a certificate, as including a reference to that copy.

9.3 Different kinds of interpretation provisions and definitions

The following examples are of **definitions only**, but the categories apply equally to interpretation provisions:

9.3.1 Labelling (i.e. using a short term in place of a longer one)

"Authority" means the Electricity Authority established under section 3;

"Commissioner" means the Commissioner of Banking appointed under section 12;

"Convention" means the Convention on International Trade in Endangered Species 1970.

9.3.2 Stipulating (i.e. giving a specific meaning to a term)

- Comprehensive (giving a fixed meaning to an otherwise indeterminate term):

  "aircraft" means a powered heavier than air machine designed for flight and capable of carrying at least one person;

  "financial year" means the period of 12 months ending on 31 March;

  "senior police officer" means a police officer of or above the rank of Chief Inspector.

- Restricting (confining the term as indicated within a potentially wider one):

  "animal" means a farmed or domesticated mammal;

  "motor vehicle" does not include an invalid carriage or a powered motor mower;

  "oil" means crude petroleum in an unrefined state.

- Enlarging (extending the meaning beyond that which it normally carries):

  "theatre" includes a cinema and a concert hall or other similar place of entertainment;

  "oath", in the case of a person allowed by law to affirm or declare instead of swear, includes an affirmation or declaration;

- Clarifying (explaining a term about which some doubt might otherwise exist):

  "function" includes a power, duty, responsibility or jurisdiction;

"household" includes members of a taxpayer's family, domestic staff and paying guests;

"personal injury" includes damage to an artificial joint or limb;

- Referential (borrowing a definition from somewhere else without altering it):

"bank" has the same meaning as in section 2 of the Banking Act;

"land" means "agricultural land" as defined in section 21 of the Land Tribunals Act.

9.3.3 Labelling and stipulating

The following examples show a combination of both attributes:

"accused person" means a person who has been charged under this Act with an offence.

"witness statement" means a statement made by a witness for the prosecution in accordance with section 246.

These definitions are labelling ones in the sense that they avoid constant repetition of the words in them, but also stipulating in that:

- the former gives a special technical meaning to 'accused', in that the word is not used merely in the general sense of 'blamed for wrongdoing', but it specifically imports the status of a person after a formal charging process; and
- the latter confines the meaning to a formal statement made under specified provisions, not, for example, an oral statement made in the course of an investigation.

9.4 Writing definitions

9.4.1 Words within a definition introducing the given meaning

- 'Means' defines the definition term for the purposes of the legislation
- 'Includes' and 'does not include' either clarify the dictionary definition of the definition term for the purposes of the legislation, or elaborate on the definition itself.

Combinations of these words may be used:

"vessel" means a ship, boat or other floating craft designed for transport by water, and includes a hovercraft or other aircushion vehicle capable of use over water;

> "petroleum processing" means the extraction, production, separation or treatment of crude petroleum, but does not include petroleum refining.

However, note that a combination in the rolled up form 'means and includes' in a single expression, sometimes formerly encountered in bad drafting, is confusing, if not meaningless. Neither that nor the following form should be used:

> "vessel" means, but is not limited to...

This last form severely curtails, if not nullifies, the effect of the definition by providing in effect that it is setting out mere examples of the use of the term. Assuming the definition is not to be a comprehensive one in this case, it would be better to use 'includes' to refer specifically to kinds of watercraft over which there might be some doubt.

9.4.2 Words in the relevant section introducing definitions

It is the practice in some jurisdictions to introduce a definition or series of definitions with the formula:

> In this Act, unless the context otherwise requires:

However, the words underlined introduce an unacceptable degree of uncertainty, as what is in effect stated is that the words and phrases defined might not mean what they are stated to mean (although no clue is given as to whether or not that is actually the case).

Secondly, if there is indeed a context that 'otherwise requires', normal rules of statutory interpretation will require proper effect to be given to it anyway. Consider the following example from an interpretation section of an Insurance (Motor Vehicles) Act:

> (1) In this Act...
> "insured person" means a person insured against third party risks under section 6;...
>
> (2) Section 45 of the Insurance Act, in so far as it applies to an insured person under a life assurance policy, applies to this Act for the purposes of construing terms in a contract of insurance which are void.

There could be no difficulty in holding that the underlined words in subsection (2) are used in a different context from that envisaged in the definition in subsection (1), and a court would undoubtedly so hold.

If there is a possibility of doubt as to whether or not the context does "otherwise require", then that difficulty must be addressed by the drafter, for example:

> "insured person" means, except in sections 14 and 15, a person...

However, a drafter should **not** normally define the same word in different ways in the same piece of legislation.

It is also important to be **concise** in the introductory words:

> "In this Act:..."

should normally suffice. In any event, it is necessary in the interests of plain language to avoid wordy and somewhat pretentious formulae such as:

> In this Act the following words and expressions have the meanings hereby assigned to them, that is to say:

9.5 Where particular care is needed in definitions

- The defined term is not actually used in the legislation! This can easily arise when legislative counsel has redrafted provisions and forgotten to delete a now unused definition.
- Unnecessary (e.g. dictionary) and confusing definitions:

> "bird" includes a bird which is biologically incapable of flight;
>
> "church" means a building designed for Christian worship;
>
> "forest" means an area containing trees.

- Incomplete definitions that introduce uncertainty:

> "cattle" includes sheep, horses, buffaloes and camels;
>
> "knife" means an instrument consisting of a blade inserted into a handle.

In the first of these examples, the question is raised as to whether, for example, goats and donkeys are also included. But it is anyway unsatisfactory to artificially stretch the normal meaning of 'cattle' in this way (see further the category discussed in the point below). In the second example, it is unclear whether axes, machetes or even swords are included.

- Artificially stretched definitions:

> "educational institution" includes a hospital;
>
> "motor vehicle" includes a cycle rickshaw;
>
> "place" includes a house, building, tent and any means of transport, whether by land, sea or air.

The first of these can at least be understood when it is realised that hospitals are often recognised teaching institutions; and the third when it

is understood that it is taken from a Motion Pictures Act. But it is usually unsatisfactory to artificially stretch the normal meaning of a word.

- Definitions should not contain legal rules:

> "entry permit" means a permit which the officer in charge may issue to enable the permit holder to enter the restricted premises named in it;
>
> "exempt vehicle" means a vehicle that is the subject of an exemption that the Minister may grant by notice in the *Gazette*.

In these two examples, the **definition** seemingly purports to give the officer or Minister the power to issue a document or to make subsidiary legislation. This must be done in the substantive provisions. Compare:

> "entry permit" means a permit issued under section 6 enabling the permit holder to enter the restricted premises named in it;
>
> "exempt vehicle" means an vehicle exempted by the Minister under section 24;

Occasionally, the inclusion of a legal rule in a definition may result in a significant loophole:

> "parking space" means a space, no smaller than 3 metres by 6 metres, for off-street parking of a motor vehicle;

Here the definition seemingly contains a rule about the size of a parking space (which ought to be in a substantive provision). However, it could be argued that as a definition cannot lay down a substantive rule (as opposed to a rule of interpretation), there would be nothing to stop the provision of smaller parking spaces. If so, any such smaller space would not be a 'parking space' within the meaning of the definition, and hence not covered by any rule that applies to those spaces (e.g. that a minimum number must be provided).

If it is needed at all, the definition should omit the underlined words.

9.6 Where do interpretation provisions go?

- In an interpretation section of an Act or appropriate division of subsidiary legislation, usually placed immediately after the section providing for the short title (and commencement provisions, if any)
- In an interpretation section of a Part of an Act or subsidiary legislation
- In an interpretation provision within a section, or the appropriate division of subsidiary legislation
- Especially in cases of unusually numerous, or complex technical definitions, in a Schedule.

Chapter 10
Words to use with Special Care (and Other Drafting Problems)

10.1 Introduction

As has been noted (see Chapter 2), the drafting of legislation requires very precise language. Unfortunately some of the commonest words in the English language are capable of being used loosely, leading to potential ambiguity or lack of clarity of expression. Other related matters: singular and plural, elliptical writing, indeterminate terms, gender-neutral drafting and expressions relating to time, will be examined in turn in this chapter.

10.2 'And' and 'Or'

In theory, these conjunctions should present no difficulty; the first indicates a joining together (it is said to be 'conjunctive'), while the second indicates a pushing apart ('disjunctive') or at least the presence of one or more alternatives. It is convenient to refer to these words in their obviously different meanings as 'strong' conjunctions.

> An applicant must lodge the completed application form and the prescribed fee...

> A passenger must pay the appropriate fare or show the appropriate season ticket for the journey.

10.2.1 Careless use of 'and' and 'or'

In spite of this, careless use of the conjunctions is often made in practice, and this can easily produce a meaning that is not intended:

> A director of a company found guilty of an offence under this Act does not personally commit that offence if the director proves that he or she:
> (a) did not know of its commission; and
> (b) took all reasonable steps to prevent its commission.

Common sense suggests that these defences are meant to be alternative rather than cumulative (see further Chapter 14.3.1, on 'parties to offences') and that 'or' should be written at the end of paragraph (a). In a further example of careless use:

> The Corporation commits an offence if it neglects to cause a street opened or broken up by works to be fenced, guarded or lighted by night.

The duties imposed are almost certainly intended to be "fenced **or** guarded, **and** lighted by night".

10.2.2 Weakened conjunctions

There are, however, instances in which each of the conjunctions is significantly weakened to the point where one becomes virtually substitutable for the other. One of the most common of these situations is when it is used with permissive words:

> The Minister may make regulations prescribing:
> (a) forms and fees required under this Act;
> (b) the procedure to be followed on application for a licence;
> (c) the kinds of security required under section 32;
> (d) other matters necessary to carry out the purposes of this Act.

The reality in this context is that if either 'and' or 'or' were to be inserted after paragraph (c) they would mean virtually the same thing.

Actually what this provision is doing is merely setting out a list, in this case of delegated powers. In these circumstances it is best to omit the conjunction altogether. In addition, use can be made, in the introductory words, of the expression 'any of the following':

> The Minister may make regulations prescribing any of the following:
> (a) forms and fees required under this Act;
> (b) ...;
> (c) ...;
> (d) ...

The problem of weakened conjunctions can also arise where mandatory words are used:

> Where an auditor considers that this section applies, he or she must report the matter:
> (a) in the case of a member company, to the stock exchange, the Commission and the Registrar; or
> (b) in any other case, to the Commission and the Registrar.
>
> The Central Bank must not discriminate between commercial banks when directing:
> (a) the policy to be followed in granting advances or allowing credit facilities; and
> (b) the rates of interest payable to or by them.

In both these examples the conjunctions are actually interchangeable, and the same comments apply as above to the omission of either of the conjunctions and consideration of the use of 'any of the following'.

The form 'and/or' should not be used, as it potentially gives rise to a query about which is actually intended.

10.2.3 Unacceptable combinations of conjunctions

In a paragraphing sequence, either 'and' or 'or' should be used but never a combination of both:

> A person who is:
> (a) resident in Utopia and
> (b) married; or
> (c) over the age of 60; and
> (d) in receipt of a pension; or
> (e) physically handicapped,
> is entitled to the allowance.

A tabulation of this sort is ambiguous as well as being extremely difficult to understand. It could be restructured as either of the following:

> A person who is:
> (a) resident in Utopia and married;
> (b) over the age of 60 and in receipt of a pension; or
> (c) physically handicapped,
> is entitled to the allowance.

or

> A person who is resident in Utopia and:
> (a) married *or* over the age of 60; and
> (b) in receipt of a pension or physically handicapped,
> is entitled to the allowance.

In exactly the same way, different conjunctions in the same untabulated proposition cause problems:

> The returning officer must notify the candidate or the candidate's election agent and the candidate's political party.

This can be interpreted as either:

> The returning officer must notify:
> the candidate; or
> the candidate's election agent and the candidate's political party.

or

> The returning officer must notify:
> the candidate or the candidate's election agent; and
> the candidate's political party.

Note however that so long as the paragraphs in the same sequence (e.g. (a), (b), and (c)) are linked by the same conjunction, the rule need not apply to subparagraphs within any of those paragraphs:

> A dealer must maintain a register in which is recorded:
> (a) the prescribed particulars of goods acquired either:
> (i) from a trade source, including a public auction; or
> (ii) directly from a member of the public;
> (b) the name, address and business of the person from whom the goods are acquired; and
> (c) the date and time of acquisition.

10.3 'Which' and 'that'

Care needs to be exercised here too, as these words can be used in different senses.

'Which' can be used in the ways previously examined when looking at the use of commas (Chapter 8) to introduce:

- a defining modifying clause:

> A police officer may seize any goods suspected to be stolen which he or she finds in premises named in the warrant.

- a commenting (or expanding) modifying clause:

> A police officer may search for stolen goods in premises named in the warrant, which he or she may then seize.

In the first, but not the second of these examples, 'that' could be substituted for 'which' (technically this is because in the former use 'which' is an adjective, whereas in the second it is a conjunction). There is in fact a danger of inconsistently using the word 'which' in its slightly different meanings in the same sentence:

> A police officer may search anything which he or she reasonably believes may contain stolen goods, which goods the officer may then seize.

Modern style tends to favour 'that' where it can be used instead of 'which', and grammar/style features of word-processing programmes endorse this.

But 'that' can also be similarly used in yet a different sense, i.e., attaching to a verb ('think that', 'consider that' or 'appear that'):

> Where it appears to the Accountant General that a local authority has funds that have not been applied during the relevant year and that it is unwilling to invest in Government stocks...

could mean:

> Where it appears to the Accountant General that:
> (a) a local authority has funds that have not been applied during the relevant year; and
> (b) it is unwilling to invest in Government stocks...

or:

> Where it appears to the Accountant General that a local authority has funds that:
> (a) have not been applied during the relevant year; and
> (b) it is unwilling to invest in Government stocks...

In the first version, because the third 'that' is read as attaching to the verb 'appears', the unwillingness relates to **investing in Government stocks as a**

general principle. In the second, 'that' is read as attaching to the noun 'funds' (and thus does not have to be repeated if paragraphed in the way indicated), and consequently the unwillingness relates only to **investing the unapplied funds in that way**. It would be better to substitute the second 'that' with 'which' in each of the above examples.

10.4 'All', 'any', 'each' and 'every'

'A' or 'an' should be used unless there is reason to emphasise or draw a distinction:

> A shareholder who holds at least 100 shares may nominate a person for election to the Board, but any shareholder may vote on a subsequent resolution to elect that person.

> A special resolution is passed if assented to by a two-thirds majority of all the shareholders entitled to vote, whether present or not.

or unless grammar dictates otherwise:

> In the application of these rules to a farm building, any farm equipment, an animal used for transporting goods or any cattle, the following modifications apply...

In this last example, 'equipment' and 'cattle' are so-called non-countable nouns that cannot grammatically take 'a' or 'an' (other examples are machinery, meat, money, sand).

'Any' may also be used where the sense is 'any that there may be':

> An appointed officer may require a licensee to supply any document in the licensee's possession relating to the offence.

10.5 'Such'

There are many different uses of this word. It can be an **adjective** meaning 'of a kind already mentioned' or equally 'of a kind about to be mentioned':

> At least two days' notice of such intended visit must be given...

> The registrar must notify such persons as apply for the grant of a licence...

or to mean 'of so great a kind':

> The procedure where a load is of such volume and weight as to exceed the normal operating capacity of a weighbridge may be provided for in regulations under...

'Such' can also be used as a **pronoun**:

> A local authority need not provide waste disposal facilities as such, but must...

There is thus clearly a danger that the word may be used in different senses in the same sentence:

> If such is not the case [i.e. *where there is no provision for written representations*], the Board must hear such oral representations as may be made by such of the members present at such meeting.

Most of the uses of 'such' are tiresome or archaic, or both. The word can usually (although, it needs to be stressed, not always) more conveniently be replaced by 'a', 'any', 'the', 'that', etc., or by simply omitting it:

> If that is not the case, the Board must hear any oral representations made by the members present at the meeting.

10.6 Singular and plural

Generally, drafting should be in the **singular**, unless there is reason to refer to habitual usage. Compare:

> A person who sells motor cars.

(the emphasis is on a course of behaviour, namely by a dealer) with

> A person who sells a motor car.

(the emphasis is on an isolated action, namely by somebody in possession of the car).

Use of the plural can lead to ambiguity:

> The Law Society is to issue certificates to students who have passed the required number of subjects in its intermediate examinations.

Here the question is left open as to whether one certificate in total is required, or one certificate for each subject passed.

10.7 Elliptical writing (omission of words which are to be implied)

This arises in two situations:

By operation of law:

> A person who contravenes this section commits an offence and is liable [on conviction of that offence][by a court of competent jurisdiction] to imprisonment for [a term not exceeding] 6 months, or a fine [not exceeding the maximum] at level 5 on the standard scale, or to both [such imprisonment and fine].

Here the bracketed words will be understood by the application of background rules in the Constitution, and criminal procedure and interpretation legislation. They do not need to be constantly and tiresomely repeated. In fact by the

application of enabling rules in many Interpretation Acts the text can be shortened to:

> ... to imprisonment for 6 months and a fine [of ... . .] [at level 5 on the standard scale].

See further Chapter 14.

By implication from the words used:

> A person in charge of a dog must not permit it to enter a restaurant.
>
> The licensing authority must keep a register of licences in the prescribed form.

The first implies a **duty to remove** a dog which has entered, and the second the **duty to keep the register up to date**, without having to so state in terms.

10.8 Indeterminate terms

It is important to bear in mind the need for clarity and certainty in legislative rules (see Chapter 2), and this involves rejecting words that are unnecessarily vague or relative, particularly when applied to such things as time, speed and size:

> often/sometimes; fast/slow; large/small.

But note that some of these words could be used if they are precisely defined:

> "often occurring" means occurring more than three times in a year;
>
> "slow train" means a train that stops at every station on a particular route;
>
> "large investment" means an investment in money or money's worth to the value of $1 million or more.

On the other hand, because of the infinite scope of variation in human behaviour, it is often necessary to use modifiers that are deliberately vague, and that in the absence of consensus would need to be construed by a court:

> fair/just/equitable; fit/suitable; fraudulent; reckless; satisfied; as soon as possible; un/necessary; un/reasonable.

Many nouns in necessarily common use in legislation have an inherent degree of imprecision, and they will therefore probably need defining:

> child/parent/family/relatives; land/building; [motor] vehicle/vessel/aircraft; possession.

Finally, there are words and expressions whose meanings may vary in time, and in different places:

> cruel; fit for human habitation; indecent; malicious; poverty.

This phenomenon gives rise to the *noscitur a sociis* rule (words to be construed according to the context in which they are written):

> No person shall behave in a riotous, violent or indecent manner in a place of religious worship.

In this 19th century example, the underlined word has its then contemporary meaning 'disrespectful', rather than the modern one 'obscene'.

10.9 Gender-Neutral Drafting

Interpretation provisions, usually contained in the Interpretation Act or equivalent, state that use of the masculine gender in legislation includes the feminine. However, the point is taken in many jurisdictions that it is undesirable to draft in a way that seems to address only males, and although it is not necessary from a strictly legal point of view to draft in a gender-neutral style, increasingly it is becoming the practice to do so. There are various devices for doing this.

- **Use of Gender-Neutral Words, for example:**

legislative counsel or counsel:	not draftsman
head teacher or head:	not headmaster
supervisor or charge-hand:	not foreman
police officer or police:	not policeman/men
chairperson or chair:	not chairman
fire-fighter:	not fireman

- **Repetition of the noun to avoid a gender-specific pronoun:**

> The Minister may delegate, by notice signed by or on behalf of the Minister [rather than "him"] to another person the performance of any functions vested in the Minister by this Act.

- **Use of 'he or she', or 'it':** in the previous example, this double pronoun could have been used in either or both places where the noun is repeated. Note that 'he or she' is unsuitable where the person referred to is likely to be a corporation or other impersonal body, and the rolled up 'he, she or it' is generally thought to be too cumbersome.
- **Omission of the possessive pronoun:**

> The Registrar must enter in the register, in relation to every dentist:
> (a) the date of registration [rather than "his registration"]; and
> (b) particulars of the qualification in respect of which registration was granted.

- **Substitution of a definite or indefinite article for the possessive pronoun:** in the example above, '**the** registration' might be better in paragraph (b).

- **Use of the passive form:**

  Instead of, for example:

  > Where a lessor has prepared a statement of the grounds of complaint, he must send it to the lessee within 7 days.

  state in the legal action part of the sentence:

  > ...it must be sent to the lessee...

- **Restructuring the sentence:** this would be a routine matter for those habitually drafting gender neutrally. Rather than:

  > The Minister must consider the report and after ... he must lay it before Parliament

  state:

  > After considering the report and ... the Minister must lay it before Parliament.

Style will probably dictate that a combination of these devices should be used, as overuse of any one leads to tedious repetition:

> A person aggrieved by the failure of the Board to grant him or her a licence, or to renew his or her licence, may appeal in writing to the Tribunal; and if his or her business to which the licence relates employs more than 5 persons, he or she may appear before the tribunal at the appeal or be represented there by his or her legal representative.

This can be better expressed:

> A person aggrieved by the failure of the Board to grant him or her a licence, or to renew a licence, may appeal in writing to the Tribunal; and, if the business to which the licence relates employs more than 5 persons, the appellant may appear before the tribunal at the hearing or be represented there by a legal representative.

10.10 Expressing time

10.10.1 Expressing time generally

Often there is no time expressed within which something in legislation is required to be, or may be, done. Basic provisions are typically made in an Interpretation Act by a rule which states that, in the absence of a fixed time requirement, it must or may be done with reasonable speed and as often as the occasion arises. The courts will, if necessary, construe what constitutes 'reasonable speed' from the context of the particular rule.

Often the fixing of a precise time limit would be impractical. However, a sense of urgency can be written into rules by using deliberately elastic expressions,

such as 'without delay', 'as soon as possible' or 'with all reasonable speed', expressions which likewise have to be construed according to the context:

> A police officer, after arresting a person, must admit that person to bail or take the person before a magistrate [as soon as possible] [with all reasonable speed].

10.10.2 Expressing dates and time

Again, the Interpretation Act will dictate how time is, in general, to be calculated (usually, by international agreement, by reference to Greenwich Mean Time or its more modern equivalent Universal Time Coordinated). In expressing dates and time, practice varies but the following are recommended:

> 10 June 2016

rather than:

> 10th June 2016, 10.6. 2016,

or the archaic form:

> the tenth day of June 2016

> 9 am, 10.30 pm, 12 noon, 12 midnight

rather than:

> 9 o'clock in the morning, 0900hrs, 22.30hrs.

In the case of a period of months or a year, reckoning must normally be made from the starting date to the corresponding date less one. Thus, the period of six months beginning on 6 March ends at the end of 5 September. The period of one year beginning on 1 March ends on 28 (or 29) February of the following year.

10.10.3 Fixing a beginning or an ending

Most Interpretation Acts contain provisions to the effect that periods of time expressed to begin or end on a particular day include the stated days, and some are more comprehensive still, but it is nevertheless important to bear in mind the following:

- When fixing a beginning, it is best not to state 'from 1 January', as this may still give rise to the question of whether 1 January is included or excluded. Rather state:

  > Beginning on 1 January; on or after 1 January; not earlier than 1 January

  depending on the emphasis desired to be given.

- Likewise, when fixing an ending, it is best not to state 'before 31 January' or 'by 5 April', as these may give rise to the question of whether the date mentioned is included or excluded. Rather state:

  Ending on 31 January; on or before 5 April; not later than 5 April

  depending on the emphasis desired to be given.

- If both dates are to be set, the preferred expression would be:

  The period beginning on 1 November and ending on 31 December...

  A drafter should be careful not to write 'between 1 November and 31 December', as it will be unclear whether the two end dates are included, although with times in a day, or the happening of specific events, this may safely be done, as there can then be no ambiguity:

  ...between 8am and 6pm daily;

  ...between the despatch of a notice and its receipt

10.10.4 Periods fixed by reference to a specific date or event

When referring to a period, it is sometimes necessary to add the word 'immediately' before the words 'before', 'after' or 'following' to make it clear that the period must be calculated by direct reference to a date or event:

A person resident in Utopia for 3 months immediately before his or her death.

This might otherwise be thought to refer to any period, or even an aggregate period, before death.

In the 3 days immediately following the happening of the accident

This would save any argument about whether weekend days were or were not to be counted.

10.11 Expressing numbers

The practice in expressing numbers varies in different jurisdictions. A broad rule in some is to express numbers up to and including ten in words and those greater than ten in figures. However, it is convenient to write penalties using figures:

...is liable to imprisonment for 6 months and a fine of $5,000.

Whatever the general rule, words rather than figures tend to be used in the following instances:

- where the number is technical modifier:

  a third-party, a document written in the second person, a one-off permit

- where two separate numerical references appear together at the start of a section or subsection, or paragraph in a Schedule:

  2. Twelve members constitute a quorum if...

- where confusion might otherwise result:

  5 two-wheeled vehicles (or five 2-wheeled vehicles)

- where fractions are expressed:

  one half; one quarter; one third

  but note the conventional use of a hyphen in a multiple fraction:

  three-quarters; two-thirds; five-sixteenths

Chapter 11
The Legislative Scheme: Principles Governing the Type of Legislation Required and the Ordering of Its Provisions

11.1 Fundamental questions to be answered

These are not always adequately addressed by those giving instructions to legislative counsel, and it is the latter's responsibility to establish fundamental matters at the outset.

11.1.1 Matters relating to the type of legislation required

- Can the required policy be implemented by amending existing legislation?
- Is the new legislation to be self-contained or is more than one piece of legislation required?
- Is it going to need amplification by subsidiary legislation, and if so how far? (see further Chapter 15).

11.1.2 Matters relating to the legal mechanisms to be employed

A clear idea is also needed as to what the fundamental nature of the legislation is, so that a basic view can be taken with regard to its shape. Is it, for example, criminal in nature, revenue collecting or administrative? Typical further basic questions would be:

- Are rights and duties under the civil law to be extended or limited?
- Is licensing or registration the principal purpose?
- Is a new authority to be created and how central to the legislation will it be?
- Is the legislation of a 'portmanteau' type (i.e. dealing with a wide range of sometimes unrelated matters, such as miscellaneous minor amendments)?

11.2 A logical structure to legislation

A logical structure to legislation is needed so that its meaning can be communicated as quickly and easily as possible. The need exists both at the level of a whole Act and, as will be seen in section 11.3, within each single section.

Having decided on the type of legislation required, the next questions relate to how the items for inclusion are to be arranged so that the layout is logical and facilitates communication and use. The basic conventional Commonwealth structure of an Act can be seen in Figure 7.1, but attention now needs to be focussed on what are called the substantive and administrative provisions.

Except in the case of a short enactment of less than about 12–14 sections, there needs to be a selection of criteria for dividing groups of sections into Parts (in long enactments, the same applies to groupings larger than Parts, for example Chapters, Divisions). An intelligible pattern needs to be provided so that provisions are not scattered randomly through the enactment; themes therefore need to be identified that suggest combinations of sections with an obvious connection:

- in an Act setting up a new authority, these would be concerned with establishment and composition of the Authority; its functions and powers; procedures in its meetings; finance and audit requirements; appeals; and offences (see further Chapter 18)
- in an Act setting up a licensing regime, they would concern where the need for a licence arises, what qualifications are needed, how it is to be applied for, the duties of a licence holder, offences, etc. (see further Chapter 19).

All the relevant sections should then be gathered into the Parts decided on.

11.3 The logical sequence of sections within a Part

This must then be worked out, using the following rules:

- the general precedes the particular
- the important precedes the secondary
- the basic theme precedes the development of it
- the standard case precedes the exceptions
- the rules likely to be frequently applied precede those likely to be less frequently applied

- the permanent precedes the temporary
- where successive steps are to be taken, the earlier precedes the later.

Exactly the same principles apply to the grouping of subsections within a section.

A simple example of the misapplication of these rules can be seen in the following section:

> **Warrants in respect of undercover operations**
> (1) A warrant under this section must be signed by the Minister.
>
> (2) Unless previously terminated, a warrant ceases to have effect:
> (a) on completion of the undercover operation to which it relates; or
> (b) at the end of six months from its date of issue,
> whichever is sooner.
>
> (3) The Minister may issue a warrant directed to the Commissioner of Police authorising the undertaking of a controlled undercover operation.

By application of the above rules, in particular the first three and the last, it can quickly be seen that the giving of the power must precede provisions on detail, and that there is a need to recognise the chronology, so that matters concerning the form of a warrant precede those relating to its termination. Thus the subsections would in practice need to be re-ordered:

> (1) The Minister may issue a warrant directed to the Commissioner of Police authorising the undertaking of a controlled undercover operation.
>
> (2) A warrant under this section must be signed by the Minister.
>
> (3) Unless previously terminated, a warrant ceases to have effect:
> (a) on completion of the undercover operation to which it relates; or
> (b) at the end of six months from its date of issue,
> whichever is sooner.

Chapter 12
Introductory and Preliminary Provisions

Reference to the Figure 7.1 (on p.45) is recommended for the conventional order of these provisions.

12.1 Introductory Provisions

12.1.1 Long title

This is a brief statement giving **a short summary of the principal way or ways in which the statute will affect the law** by indicating the central legal mechanisms it employs. Before short titles became conventional (only in the latter part of the 19th century) the long title was the only title (statutes were conventionally more usually referred to by reference to the year or years of the reign of the monarch in which they were enacted), and it was a device for limiting the scope of parliamentary debate. The length of the long title is not necessarily related to the length of the statute itself.

The form used typically involves introductory words:

> An Act to [provide for] [authorise] [establish] [regulate] [prohibit] [impose a tax on] [amend].....

and, at the end, words showing incidental purposes (typically administrative, offence and evidence provisions):

> .....and for [related matters] [connected purposes] NOT e.g. .....purposes connected therewith

And so a typical long title might read:

> An Act [of Parliament] to provide for the licensing of dealers in motor vehicles; and for connected purposes.

However, with an amending Act, whose sole purpose is to make a series of unconnected amendments to another Act, the long title usually states simply:

> An Act to amend the Second-hand Dealers Act.

But it might be otherwise if the amending Act had a single specific purpose:

> An Act to amend the Criminal Procedure Act to abolish preliminary enquiries and establish a new procedure for committals for trial.

The long title is part of the Act and may be used in interpreting its provisions.

12.1.2 Preamble

In most Commonwealth jurisdictions this is now an obsolescent device. It explains the background to the statute and hence **the reasons why it has become necessary to legislate**. Its use thus tends to invite detailed debate in the legislature on basic questions of policy over and above those that might be raised during the second reading, something governments tend not to want to encourage.

It is still occasionally used, however, in the following cases:

- Constitutions and Acts of constitutional importance
- legislation giving effect to international agreements (citing dates of adoption, etc.)
- legislation of a formal or ceremonial character
- private Acts of Parliament
- decrees of military regimes.

There is a tendency to continue to use a somewhat archaic form for drafting preambles:

> Whereas...
> And whereas...
> Now therefore be it enacted by the Parliament of Utopia as follows...

More modern means of expression would be on the following lines:

> It is desirable that the...language should be given equal prominence to English in the conduct of official or public business in Western Utopia.
> It is also desirable that the...language should be able to be used by those who wish to do so in legal proceedings in Western Utopia.
> It is therefore enacted by the Parliament of Utopia...
>
> A Treaty entitled...was signed on behalf of Utopia at...on...
> Under the Treaty Utopia undertook to...and to give legal effect to Articles...
> It is therefore enacted...

12.1.3 Enacting formula

This is a formal statement to the effect that the legislating authority has agreed to the measures specified. It will be a set formula in each jurisdiction, often provided for in the Constitution, which may vary slightly within a jurisdiction, for example for Bills which amend the Constitution itself.

12.2 Preliminary provisions

12.2.1 Short title

This is a convenient label by which the statute is known and usually cited, and by which it can be easily indexed. What follows applies also to subsidiary legislation (where the feature is conventionally known as a 'citation'), although particular matters relevant to subsidiary legislation are also considered below. Its necessary characteristics are that it is:

- **Accurate,** giving as close an idea as possible of the contents of the legislation; some skill may be needed in finding an accurate title for legislation that makes a series of related, but essentially different provisions. Each of the following examples, all concerned with tobacco, suggests a slightly different emphasis in its contents:

Tobacco Act	
Tobacco Industry Act	
Tobacco Processing Act	
Tobacco Products Act	Tobacco Products (Control) Act
Tobacco Advertising Act	Tobacco Advertising (Prohibition) Act
Tobacco Smoking Act	Tobacco Smoking (Regulation) Act

  The use of brackets in the short title is considered below.

- **Short and succinct:** it is a **label** more than a description; bad short titles would be:

  Prevention of Activities in Relation to Money-laundering Act
  [*Money-laundering Act* would be better]

  Offences in Relation to Patterns of Racketeering Activities Act
  [*Racketeering Act* would be better]

  Promotion of Harmony in Industrial and Trade Relations Act
  [*Industrial Relations Act* would be better]

- **Distinctive and unique,** so that it cannot be confused with, for example, other legislation on a similar topic. Where there might be a danger of confusion, one of three devices can be used:
  - use of a bracketed word or words (see below)
  - use of a year (a device in practice needed normally only where an indirect amending system is in operation – see Chapter 16):

    Hire Purchase Act 2010
    Hire Purchase Act 2014

  - where more than one piece of legislation on the same subject matter is made in the same year (a situation in practice much more common with subsidiary than primary legislation):

Finance (No. 2) Act 2014
Building (No. 3) Regulations 2016
Customs and Excise (Remission) (No. 15) Order 2013.

- **Easy to say aloud:** bad short titles from this point of view (as well as that of lack of brevity) would be:

  Seaside Sale of Seashore Shells Act
  Specifications for Shops and Supermarkets (Shelving) Regulations.

Conventionally, the short title contains also the year of introduction into Parliament in the case of a Bill, or of enactment in the case of an Act. One or two words (accompanied by the word 'Act' and the year) should usually be enough:

Road Traffic Act 1999
Companies Act 2007
Money-laundering Act 2009
Second-hand Dealers Act 2016.

If a running law revision system is in operation then, in some jurisdictions, when the Act is reprinted for inclusion in the volumes of the laws, the year will be dropped from the title and a chapter number will be allocated to it. The exact form this takes will depend on the style adopted in the law revision process. Examples might be:

Insurance Act, Cap. 312
Companies Act, Cap. 30.01.

The abbreviation 'Cap.' (from the Latin word *caput* – chapter) is usually used.

A device very widely used in short titles is that of adding **explanatory words in brackets**. This is appropriate in various cases:

(a) If there are different statutes on related topics and some deal with only a specific aspect of it:

Evidence Act 1988
Evidence (Civil Proceedings) Act 2001
Evidence (Computerised Records) Act 2011
Evidence (Forensic Examinations) Act 2015

(b) If the Act is limited in geographical area in its application:

Road Traffic (Scotland) Act 2001
Land Use (Zanzibar) Act 2004
Housing (Northern Province) Act 2016

It should be noted that this device should be limited as indicated and that its **general** use (so that **all** legislation in a jurisdiction contains the bracketed name of that jurisdiction) is both tiresome and pointless; see further under "Application provisions" below. For these reasons the following forms should be avoided:

Road Traffic (Utopia) Act 2001
Land Use (Utopia) Act 2004
Housing (Northern Province) (Utopia) Act 2016

But, assuming that Western Utopia is a state or province within Utopia, and a different regime is to apply there, compare the correct form:

Land Use (Western Utopia) Act

(c) In order to give prominence to the **key word** in the title so that indexing and general referencing may be more helpfully accomplished:

Debts (Summary Recovery) Act 2001
rather than Summary Recovery of Debts Act

Trustees (Perpetual Succession) Act 2006
rather than Perpetual Succession of Trustees Act

or even

Corruption (Independent Commission on) Act 2010
rather than Independent Commission on Corruption Act

If the drafter were to begin these short titles with the first word in the brackets, the resulting title would be very unhelpful to anyone not acquainted with the statute book looking in an index for the law in that particular area.

(d) In amending statutes (note that this can lead to double brackets):

Road Traffic (Amendment) Act 2016
Housing (Northern Province) (Amendment) Act 2016

But note that most jurisdictions do **not** employ the style that inserts the word 'Act' twice:

Road Traffic Act (Amendment) Act 1996
Housing (Northern Province) Act (Amendment) Act 1998

Brackets, especially in the cases referred to in paragraph (a) above, also help to preserve the **uniqueness** of the short title.

Exactly the same considerations apply to subsidiary legislation, although as already noted, for technical reasons this usually does not have a 'short title' (as there is no long title) but rather a 'citation'. The usual practice in drafting a citation is to follow the wording of the parent Act:

Insurance Act	Insurance Regulations
Civil Procedure Act	Civil Procedure Rules
Customs & Excise Act	Customs & Excise (Remission) Order

However, a combination of the different uses discussed above could sometimes lead to a very unwieldy short title or citation, especially the latter, as subsidiary legislation is likely to be amended much more often:

> Housing (Local Authorities) (Northern Province) (Amendment) (No. 2) Regulations 2010.

In such a case, it would be better, instead of following the title of the parent Act – in this case the Housing (Local Authorities) Act – to adopt a citation for the principal regulations that is less likely to lead to problems, for example:

> Council Housing (Northern Province) Regulations 2010.

Or even, so long as there is no danger of a duplication of citations of legislation relating to different geographical areas (i.e. so that each one remains **unique**), leaving the area concerned to be designated by an application provision (see section 12.2.5 and Chapter 17 for notes on application provisions) in the text of the regulations, and reducing the citation merely to:

> Council Housing Regulations 2010

so that the previous unwieldy example could thus be reduced to:

> Council Housing (Amendment) (No. 2) Regulations 2010.

It is recognised, however, that in failing to follow the wording of the short title of the enabling Act, there might, in the absence of a comprehensive database, be some difficulty in locating the subsidiary legislation in question.

12.2.2 Commencement

Rules for when statutes and subsidiary legislation come into force are usually contained in an Interpretation Act. Typically these will be that an Act comes into force on the date that it is published in the *Gazette*, or alternatively on the date it receives the assent of the Head of State. However, for various reasons it is often desirable to delay the coming into force of an Act for one or more of the following reasons:

- more time is needed to set up administrative arrangements
- subsidiary legislation, on which the working of the Act depends, has to be made
- explanatory material needs to be prepared for the guidance of those affected.

It can sometimes be necessary to give an Act **retrospective** effect (e.g. when validating other legislation, or providing for backdated salary increases for

constitutional offices; see further Chapter 17). If a different **prospective** date from that in the general Interpretation Act rule is required, it can be done by:

- empowering someone (usually the Minister) to declare a date, or different dates, of commencement
- providing for commencement on a specified future date, or at the end of a specified period after enactment
- providing that the Act is to come into force on the happening of some event (e.g. the ratification of a treaty).

Often a power to bring an Act into operation needs to be accompanied by a power (if it does not already exist as a background rule in the Interpretation Act) to bring different provisions into operation at different times.

12.2.3 Interpretation Provisions

These exist mainly to avoid uncertainties and ambiguities, and to avoid tedious repetition. They are dealt with in Chapter 9.

12.2.4 Objects/purpose provisions

These have been favoured in some jurisdictions as context indicators and aids to interpretation. If used, they should set out what it is that the Act **intends to achieve**.

This is different from a **long title** (which states **the way in which the Act affects or changes the law**) and a **preamble** (which states **why it has been necessary to legislate**).

Objects provisions are of use particularly in legislation which is complex or wide-ranging, or which makes innovatory changes to the law. They are not of value where the legislation:

- has narrow or obvious aims
- is short (i.e. where its policy objectives are easily seen)
- amends other legislation
- makes a number of unconnected changes to the law.

Arguments against the use of objects provisions include the following:

- they focus parliamentary debate on matters which governments might like to have concluded on second reading of a Bill
- they are no substitute for properly structured legislation
- they can be used as a manifesto for purely political objectives

- the matters covered by them can be more appropriately dealt with by means of explanatory notes to an Act.

Objects provisions are drafted as clauses in a Bill using the same precise and concise terms used elsewhere in legislation and should focus on the results intended to be achieved rather than the means of achieving them. An objects clause in a new Bill to introduce scientific testing of breath or blood samples to determine alcohol levels and hence fitness to drive might be drafted:

> The objects of this Act are:
> (a) to make those who drive motor vehicles after having consumed alcohol more aware of the risks they pose to themselves and others;
> (b) to reduce the number of accidents on the roads.

Grandiose claims in extravagant journalistic-type language should be avoided:

> The objects of this Act are:
> (a) to curb the menace drunken drivers cause to themselves and to innocent drivers, passengers and pedestrians;
> (b) to force drivers of motor vehicles suspected of consuming alcohol to submit to breath and blood tests;
> (c) to reduce the carnage on the roads caused by such drivers.

Care needs to be taken to see that objects provisions as originally drafted do not change by virtue of amendments made, either to the Bill in its passage through Parliament, or subsequently to the Act.

12.2.5 Application provisions

There is a presumption that, unless a contrary intention appears, all legislation applies to:

- the whole area of the jurisdiction (including the territorial waters, the air-space above and the land below the surface)
- all persons within the jurisdiction, whether natural persons (including non-citizens) or artificial legal persons
- all acts or omissions that take place (wholly or in part) within the jurisdiction.

and so specific application provisions are not normally needed. There are some general exceptions to this, both at common law and in statutes, in relation to persons:

- who are recognised as having special privileges (the Crown/Government/Republic; diplomats and those with similar status)
- with certain types of legal disabilities (minors; prisoners; aliens; the mentally ill; bankrupts).

However, these do not normally need to be expressly recognised in every Act; rather the laws providing for them will be understood as providing a background rule that applies in relevant cases only. Application provisions are, however, most commonly needed:

- to extend or restrict the geographical area of operation (see further Chapter 17):

  > This Act applies to Utopian citizens outside, as well as within, Utopia

- to restrict application to classes of persons or things:

  > This Act does not apply to second-hand goods of kinds set out in the First Schedule

- to restrict application to specific activities within a class:

  > Part IV does not apply to the preparation of food not intended for human consumption

- to apply to a specific time:

  > This Act applies to the estates of persons whose death occurred on or after 1 January 2017

- to bind the Crown/Government/Republic:

  > Parts 2 and 3 bind the Government

12.2.6 Duration provisions

These are **not** normally required, as the general rule is that legislation remains in force until such time as it is expressly repealed or revoked. It is, however, sometimes desirable to set a date on which legislation will cease to have effect (sometimes known as a 'sunset provision'). A typical duration provision might read:

> This Act expires on a date three years from its commencement [unless previously continued in force by resolution of] [the National Assembly] [both Houses of Parliament]

Use of these provisions is confined in practice to legislation that:

- is controversial or experimental in nature, where benefits are speculative or may lead to unpredictable consequences (e.g. decriminalisation of the possession of certain milder narcotics, abolition of the death penalty);
- deals with a short-term need (e.g. an amnesty in respect of firearms offences); or
- authorises the use of emergency powers.

Chapter 13
Final Provisions

Powers enabling the making of subsidiary legislation are sometimes considered to be final provisions and would normally precede the provisions covered here but they are dealt with as a separate topic, headed 'Delegated powers to legislate', in Chapter 15. This chapter examines repeals, transitional and savings provisions, and Schedules. The first three of these are very closely interrelated.

13.1 Repeals

13.1.1 General matters

As is the case with amendments, repeals should always be in **express terms**. The courts will, if driven to do so, construe an implied repeal of an earlier provision, but unless they are unable to escape the conclusion that the two sets of provisions are so inconsistent that both cannot have legal effect, they will attempt to distinguish the provisions by holding:

- the two supplement each other
- general provisions do not repeal earlier specific ones, or
- the repeal is only partial.

Confusingly, different words are used in relation to repeals:

- '**repeal**' (usually with respect to Acts or provisions in an Act down to and including a section)
- '**revoke**' (with respect to a piece of subsidiary legislation as a whole)
- '**rescind**' (usually applied to court orders, but also sometimes applied to legal notices applying the law)
- '**delete**' (when referring to provisions in an Act less than a section, or in subsidiary legislation)
- '**cancel**' (a general word sometimes applied to legal notices).

13.1.2 Kinds of repeal

Simple repeal, where legislation on the particular matter is no longer required. This might arise because:

- the legislation in question has become spent (e.g. a specific Government Loan Authorisation or Loan Guarantee Act)

- the need for regulation of some matter has ceased because, for example, exhaustion of natural resources has led to cessation of the activities concerned (e.g. a Tin or Gold Mining Act)
- a statutory corporation has been set up in the past for the administration of some matter the need for which has ceased for practical purposes to exist (e.g. a Regional Development Authority Act)
- Government has decided to discontinue some kind of institution or deregulate an activity previously regulated by legislation (a Public Libraries Act, a Post Office Savings Bank Act, a Price Control Act).

Repeal and re-enactment: where the new enactment **consolidates** the law previously contained in a number of enactments and which is to remain essentially unchanged. This process was common in the past in the UK but comparatively rare in Commonwealth jurisdictions generally. The process might, however, apply if it were desired to rationalise legislation by combining into one Act the provisions contained in a number of different ones (see the examples given in Chapter 12 relating to short titles, particularly those relating to Tobacco and Evidence Acts).

It can also apply where a statute that has been repeatedly amended over the years is re-enacted to rationalise it and get rid of complex section numbers (see chapter 16, section 16.7). This would apply in particular to an Income Tax or Corporation Tax Act.

The important thing to remember about this procedure is that the law itself remains unchanged; it is merely its **format** that is being altered.

Repeal and replacement: where existing legislation is being **reshaped** to meet new circumstances, or existing circumstances more effectively. This procedure might involve merely the repeal of an existing Act and its replacement by a new one bringing in a wider or more modern administrative regime (e.g. a new Insurance Act to replace the existing Insurance Act), or it might involve a new Act that is more comprehensive than the existing one and streamlines administration in a number of areas. Thus a new Public Health Act that widens the scope of administration and includes matters previously dealt with under other legislation, might require (as well as repeal of the existing Public Health Act) repeal of also e.g. an existing Human Tissues Act, Rabies Act and Malaria Prevention Act.

Of these different kinds the last, **repeal and replacement**, is in practice by far the most common situation.

13.1.3 Legal effects of repeal

The applicable rules are standard in most Commonwealth jurisdictions and are typically stated in an Interpretation Act:

> **39**(1) Where a written law repeals an Act or subsidiary legislation, or a provision in an Act or subsidiary legislation (in this section called "an enactment"), that repeal does not, unless the contrary intention appears:
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect;
>
> (b) affect the previous operation of the repealed enactment or anything duly done or suffered under that enactment;
>
> (c) affect a right, title, interest, status, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment prior to the repeal;
>
> (d) affect a penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;
>
> (e) affect an investigation, legal proceeding or remedy in respect of any such right, title, Interest, status, privilege, obligation or liability, or penalty or forfeiture.
>
> (2) An investigation, legal proceeding or remedy mentioned in subsection (1)(e) may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the enactment had not been repealed.

Sometimes the Interpretation Act goes further to provide specifically for when a repeal and replacement situation exists. If it does not, consideration needs to be given as to whether all or some of the following (transitional) provisions should be drafted into the replacing Act:

- offices and bodies constituted, and appointments made, under the repealed Act, and in existence at the commencement of the replacing Act, continue as if constituted or made under the replacing Act
- proceedings taken under the repealed Act are to be continued under and in conformity with the replacing Act, so far as is consistent with that Act
- subsidiary legislation made under the repealed Act, and in force or having effect at the commencement of the replacing Act, continues in force or to have effect as if made under the replacing Act, so far as is consistent with that Act
- other things done under the repealed Act, and having effect at the commencement of the replacing Act, continue to have effect as if done under the corresponding provision of the replacing Act, so far as is consistent with that Act.

13.1.4 Drafting repeal provisions

These should apply only to the **principal** Act or subsidiary legislation, or to specific provisions in either:

> The Engineers Act 1978 is repealed
> Parts IV and V of the Financial Institutions Act, Cap.327, are repealed
> The Road Traffic (Construction and Use) Regulations 1992 are revoked

Amending Acts or subsidiary legislation, or provisions in them, do not normally need to be expressly repealed, as they will have merged with the principal Act, etc. on coming into force (see further Chapter 16). However, technically, provisions in an amending Act containing the authority to cite by its short title (usually section 1) cannot merge and, unless there is a background rule in the Interpretation Act stating that they are to be treated as having become spent on commencement of the amending Act, theoretically remain on the statute book. In the absence of such a rule, the practice varies in different jurisdictions: in some they need to be expressly repealed, in others they are simply presumed to have become spent or ceased to exist.

Express repeal of an amending Act, or revocation of subsidiary amending legislation, or a provision in either, would therefore be required only in the rare instance that **it had not yet come into force** at the date of proposed repeal.

13.2 Transitional and savings provisions

13.2.1 General matters

These provisions are not required in every case. They will usually be consequent on a repeal and therefore in the arrangement of sections in an Act logically follow any repeal provisions.

13.2.2 Transitional provisions

Transitional provisions are necessary to enable a smooth transition to be made between the existing law and a new law; they tie up the loose ends that would otherwise be left in the air. Some have already been noted above (section 13.1.3); others might concern, for example:

- what happens to cases already in the pipeline when a new system of trial, or appeal, is instituted?
- even if there is no new system of trial, how are the civil or criminal actions that were begun under repealed legislation to be affected?

- how are licences granted under the old legislation to be affected by the new legislation?
- what happens to the assets and liabilities of a body corporate whose constitution is being changed from a private company to a statutory corporation?

13.2.3 Savings provisions

Savings provisions, many of which overlap in their functions with transitional provisions, keep in being laws, rights or obligations that might otherwise disappear when an existing law is repealed. As has been noted above, interpretation legislation normally deals expressly with the savings that are generally to be construed as applying when legislation is repealed.

Particular reference to savings provisions may be necessary where a rule is to be enacted on a subject matter previously governed by the common law. Consideration would need to be given to whether the new rules are to **replace** common law rules or to **supplement** them; and in the latter case it might be necessary expressly to save them in order to avoid confusion.

13.2.4 Particular commonly needed transitional provisions

- transfer of assets and liabilities where a change in structure of a statutory body is effected

  > At the commencement of this Act, all assets and liabilities of the Utopia Gas Board are transferred to the Utopia Public Utilities Corporation...

- pending proceedings

  > Where proceedings under the repealed Act had been instituted at the date of commencement of this Act, those proceedings may be continued as though this Act had not been passed.

- interim arrangements pending the setting up of a permanent management structure for a body

  > Pending the establishment of the Board under section 6, the Managing Council established under the repealed Act is to constitute an Interim Board, and may exercise all of the functions of the Board in relation to...

- issue of licences

  > Where a person who was operating a zoo immediately before the date of commencement of this Act applies in the prescribed manner for

a licence within 60 days of that date, the Board must issue that person with a licence, but the licence is subject to conditions imposed by this Act.

- registration

  Despite section 52 (*qualifications for registration*), a person registered as a chiropractor at the commencement of this Act is to be regarded as qualified for the purposes of that section if...

13.2.5 Particular commonly needed savings provisions

- preservation of obligations

  A duty imposed under this Act is in addition to, and does not detract from, other duties imposed by another written law, the common law or customary law.

- preservation of rights of appeal

  Despite section 15 (*transfer of jurisdiction*), where proceedings were concluded under the repealed Act but the time for appeal from those proceedings had not expired at the commencement of this Act, that right continues, and an appeal may be lodged, as though this Act had not been passed.

- saving of existing licences

  A licence issued under the repealed Act continues in force as though issued under, and is subject to the conditions specified in, this Act.

- continuance in being

  The revised edition of the Laws of Utopia established by the repealed Act continues in force.

- preservation of civil rights

  The prosecution of a person for an offence under this Act does not affect the right of a person to bring civil proceedings against the first-mentioned person arising out of the same facts.

See further Chapter 19.4 ('Licensing legislation').

13.3 Schedules

Schedules are a convenient device for setting out provisions of a detailed or specialist nature which would otherwise interrupt the flow of the main body of provisions in an Act or subsidiary legislation.

Although Schedules (note the conventional spelling, with an upper case S) form part of the legislation, they cannot stand on their own and must be

appended to a particular provision in the main body of the legislation. This is done by the use of what are called 'inducing words' in a section:

> The procedure of the Board is governed by the rules set out in Schedule 2.
>
> 'Class A drug' means a substance listed in Part I of the First Schedule;

Schedules are numbered, for example First Schedule, Second Schedule, etc., or, more commonly in modern drafting, Schedule 1, Schedule 2, etc., and should contain as part of their heading a reference to the section or division of subsidiary legislation in which the inducing words appear:

> **Schedule 3**
>
> (section 6(2))
>
> Rules of Procedure of the Engineers Registration Board

> **Second Schedule**
>
> (rule 4)
>
> Forms for Application for a Licence

Schedules are typically used for the following types of matter, but this list is by no means exhaustive:

- composition of a body established by the legislation
- procedure at meetings of such a body
- lists of persons, items or places to which the legislation applies or does not apply
- designations of traffic signs
- statements of boundaries or delimitations of areas
- formulae for calculating taxes
- tables setting out benefits or rates of taxes
- specification of forms (especially in subsidiary legislation)
- relevant articles or sections in a treaty or international agreement to be given the force of law
- repeals and amendments (especially if numerous)
- transitional and savings provisions (especially if numerous)
- interpretation provisions (especially if numerous).

Chapter 14
Penal Provisions

14.1 General formulae

The same care must be taken to draft penal provisions as any others. Legislative counsel must be prepared to ask why a particular format has been used in the past, and whether aspects of the style used are appropriate in modern drafting. The following over-elaborate provision brings this out:

> Any person who makes any false statement during the course of making an application for a licence shall be guilty of an offence and liable, on conviction by a court of competent jurisdiction, to imprisonment for a term not exceeding three months, or to a fine not exceeding five thousand dollars, or to both such fine and such imprisonment.

In most Commonwealth jurisdictions there are provisions in the Interpretation Act or Criminal Procedure Act (or equivalents) to the following effect:

> Where in a written law a penalty is specified in respect of an offence, unless otherwise stated that penalty is the maximum penalty that may be imposed for that offence.

Applying this rule, as well as rules on conciseness, elliptical writing (see Chapter 10.7) and plain language principles (including the writing of figures instead of words to represent numbers) to the text at the beginning, it will quickly be apparent that this can be reduced to:

> A person who makes a false statement when applying for a licence commits an offence and is liable to imprisonment for 3 months, or a fine of $5,000, or both.

There is often another important background rule in the Interpretation Act or Criminal Procedure Act:

> Where in a written law more than one penalty is specified in respect of an offence, the use of the word "and" between the respective penalties means that the penalties may be imposed in the alternative or cumulatively.

By using this, the penal provision stated above can be further reduced to:

> A person who makes a false statement when applying for a licence commits an offence and is liable to imprisonment for 3 months and a fine of $5,000.

Note that there are normally three elements of an offence provision:

- a statement of the prohibited act or omission ('a person who…'; 'a person must not…');

- a declaration that contravention of the prohibition is an offence ('commits an offence'); and
- specification of the maximum penalty ('and is liable to……').

However, the second element is sometimes omitted as being implied:

> A person who fails to deliver to the receiver an item recovered from a wrecked or stranded vessel is liable to imprisonment for 2 years.

The archaic or over-elaborate introductory words still seen in Penal Codes drafted a long time ago should not be used:

> Whosoever shall make any false statement... shall be guilty of an offence.
>
> It shall be unlawful for any person to make any false statement...

In this section and section 14.2 it is presumed that the stated penalties are maximum penalties. Sometimes it is desired to create fixed or minimum penalties, and these are considered under section 14.6.1 and 2.

14.2 Different types of penalties

14.2.1 First and subsequent offences

It is sometimes thought desirable to make a distinction between a first offender and a subsequent one in the penalty provided, particularly in the case of regulatory offences in which there might be strict liability (see section 14.4) and possibly a misunderstanding of the requirements of the law;

> A person who advertises a tobacco product contrary to the provisions of this Act commits an offence and is liable:
> (a) for a first offence, to a fine of $20,000;
> (b) for a second or subsequent offence, to imprisonment for 6 months and a fine of $50,000.

14.2.2 Continuing offences

In certain areas of the law it is desirable not only to subject an offender to a penalty, but also to discourage the person from continuing to offend. This is especially so in legislation requiring the filing of necessary information, or the payment of money owing:

> A person who fails to submit a return as provided by section 42 commits an offence and is liable to a fine of $2,500, and if the failure continues for more than 30 days after the last day for submission under that section, to a further fine of $25 for every day or part of a day during which the offence continues.

14.2.3 Serious offences

There are usually background rules (in e.g. the Criminal Procedure Act) allowing a court to sentence an offender to pay a fine or impose another non-custodial sentence as an alternative to imprisonment. If so, with offences that carry a potential sentence of imprisonment of more than 1 year, it is not necessary to provide for a maximum **financial** penalty. In these cases, the penalty may then be more simply expressed, for example:

> A person who assaults an inspector in the execution of his or her duty under this Act commits an offence and is liable to imprisonment for 2 years.

But it might be different if, for example, it were desired to provide for a maximum fine greater than that usually considered to be a corresponding alternative (see further section 14.6):

> A person who forges a licence, or falsely represents that he or she is licensed under this Act, commits an offence and is liable to imprisonment for 2 years and a fine of $5,000,000.

14.2.4 Sliding scales

These are especially useful in situations of inflation, where stated monetary penalties can quickly become absurdly small. By expressing these penalties in relation to a published scale, and giving the Minister the power to amend that scale (by subsidiary legislation) in accordance with variations in the value of money, the problem of having to amend individual penalties by statutory amendment is avoided. This is typically done in the following way:

> (1) There is established a scale of fines for offences, to be known as "the standard scale".
>
> (2) The standard scale is divided into 5 levels and the Minister may by order fix the maximum fine in each level.
>
> (3) Where an enactment, whether passed before or after the commencement of this Act:
> (a) provides that a person is liable to a fine; or
> (b) confers power by subsidiary legislation to make a person liable to a fine,
> by reference to a specified level on the standard scale, that enactment is to be construed as referring to the maximum fine for that level on the standard scale for the time being fixed under this section.

An example of a provision following the above rule would be:

> A person who commits an offence under this section is liable to a fine at level 3 on the standard scale.

14.2.5 Related penalties

These are useful in situations where the value of items (including licences) that are the subject of legislation is easily ascertainable:

> A person who fails to declare goods to Customs commits an offence and is liable to pay, in addition to the duty payable on the goods, a fine not exceeding five times the value of the goods as assessed under section 21.

14.3 Parties to offences

14.3.1 Particular offenders

Corporations

The following type of provision is used to clarify the fact that where a body of persons commits an offence, those who are responsible for running the affairs of the body also commit that offence:

> Where an offence is committed by a body corporate or by a society, association or body of persons, a person who at the time of the offence was concerned with, or acting in, the management of the affairs or activities of the body corporate, society, association or body of persons also commits that offence unless he or she proves:
>
> (a) that the offence was committed without his or her knowledge; or
> (b) that he or she took all reasonable steps to prevent the commission of the offence.

There are possible variations of this, so that the paragraphs above might instead provide (note the different conjunction between the paragraphs):

> (a) that the offence was committed without his or her consent; and
> (b) that he or she took all reasonable steps to prevent the commission of the offence.

Secondary offenders

General criminal provisions normally cover the criminal liability of those traditionally known as aiders and abetters without the need to set this out in individual provisions:

> A person who assists in the commission of an offence, or who arranges for, or advises or encourages, another person to commit an offence, also commits that offence and may be charged with having actually committed it.

14.3.2 Vicarious liability

This is generally a concept which applies in the civil rather than the criminal law, but sometimes the law does make a principal vicariously liable for an offence committed by an employee or agent, the rationale being that the former has a particularly high standard of responsibility for seeing that the legislative provisions are complied with. Areas of the criminal law in which

vicarious liability has been applied are protection of the environment, safety at work, responsibility for the acts of children and of animals, and minor traffic offences:

> Where a ship to which this section applies discharges oil into navigable waters, the owner as well as the master commits an offence.

> (1) Subject to subsection (2), the person who is the registered keeper of a motor vehicle in respect of which a parking offence is committed is guilty of that offence.
>
> (2) A registered keeper is not guilty under subsection (1) if:
> (a) a notice has been served on him or her under section 46 requiring information as to the person in charge of the vehicle, and within 7 days the keeper has:
> (i) given to the police the name and address of the person who was in charge of the vehicle at the relevant time; or
> (ii) satisfied the police that he or she did not know, and could not with reasonable diligence have found out, that name and address; or
> (b) in any other case the keeper satisfies the court that he or she did not know, and could not with reasonable diligence have found out, that name and address.

14.4 Strict liability in criminal law

There is a presumption in criminal law and procedure that proof of *mens rea* or guilty mind is required in order to establish guilt.

Strict liability is in general terms liability without fault, so that all that has to be proved against the accused is the *actus reus* of the offence, no proof of *mens rea* being required. In such cases it will not be a defence to say 'I did not mean to break the law'. In appropriate cases this can be specifically stated, for example:

> It is not a defence to a charge under this section that the accused person did not intend or foresee the consequences of his or her actions.

However, strict liability is not usually spelled out in this way, but is to be inferred where offences are of a regulatory nature, involving public health, welfare or safety, or involving such things as minor traffic violations, sale of impure food, violations of liquor laws, pollution of rivers and the environment generally, etc.

In some jurisdictions, a distinction is drawn between 'strict liability', where certain basic defences such as honest mistake of fact are available, and 'absolute liability', where no defence at all is available to the doing of the act which contravenes the provision (unless expressly provided in it). An example of an 'absolute offence':

> (1) A person commits an offence if he or she remains in Utopia after the expiry of a temporary residence permit and without having applied for and been granted an extension.

(2) An offence under subsection (1) is committed whether or not the person knows that:
(a) the permit has expired; or
(b) no application for an extension has been made on his or her behalf or granted.

14.5 Shifting the burden of proof

In general, the burden of proof, that is of proving each of the necessary elements constituting the offence, will lie on the prosecution, but the burden of proving a defence or exception to the general rule is often placed on the defence. This is generally where the offence concerns doing something without the authority of a licence or permit, or in circumstances where an explanation, which only the person accused could give, is absent:

A person who, without lawful authority or excuse, deposits anything on the highway, in consequence of which a person is injured or endangered, commits an offence.

A person who carries an offensive weapon in a public place without reasonable excuse, the burden of proving which lies on that person, commits an offence.

In these cases, once the prosecution have proved the basic facts and direct or inferential absence of any authority or excuse it is for the defence to establish on the balance of probabilities that this did in fact exist. The rationale is that the prosecution would almost certainly be unable to positively prove absence of reasonable excuse (as opposed to leaving such lack of excuse to be inferred from the circumstances). Note also the burden of establishing a defence of lack of consent, etc. in cases of a director, etc. of a company, etc. which has been found guilty of an offence, referred to in section 14.3.1.

14.6 General matters concerning offences and penalties

14.6.1 Fixed penalties

It is the constitutional duty of the courts in criminal cases to enquire into matters alleged against persons and, if they are found to have been proved, to do justice as appropriate.

It has already been noted (section 14.1) that in the absence of specific provision to the contrary, sentences provided for offences are to be read as the maximum sentences available. It is accepted that it is for Parliament to lay down the highest penalty available to a court, but subject to that to leave to the discretion of the court the actual sentence that is appropriate in each individual case.

Normally the only exception is the mandatory imposition of the death penalty by a court on those found guilty of the most serious offences (murder, and in some jurisdictions armed robbery and certain serious drugs offences). Even here, the imposition of the death penalty will be subject to certain exceptions (e.g. where the convicted person is under a certain age, or a pregnant woman) and to the possible exercise of the prerogative of mercy by the Head of State.

Apart from these cases, the imposition of fixed penalties is normally reserved for minor offences where the police or some other authority are empowered specifically to proceed in that way:

> (1) If a police officer of or above the rank of Inspector has reason to believe that a person has committed an offence specified in the Schedule, the officer may serve on that person a fixed penalty notice in the prescribed form that:
>
> (a) specifies the offence;
>
> (b) states that the person served may elect, as an alternative to having the matter tried by a court, to pay a fine of $... to a specified court within 30 days.
>
> (2) If the fine is so paid, no proceedings may be brought against the person served with the notice in respect of that offence.

14.6.2 Minimum sentences

A sentence of this type would typically be drafted:

> A person who commits an offence of handling stolen goods is liable to imprisonment for not less than 5 years.

While there is no constitutional reason why legislation should not provide for this kind of sentence, there are reasons why their provision in legislation should be discouraged:

- they could remove a court's discretion to do justice in a particular case
- courts dislike being constrained in this way and where they consider that imposition of a minimum sentence would work injustice they might seek:
  - ways of convicting an offender of an alternative offence (i.e. one where the sentence is at large, for example of theft instead of handling in the above case);
  - to acquit on a technicality.

14.6.3 Time limits on prosecutions

These apply normally only in cases of summary or minor offences (typically that an information must be laid before a magistrate within 6 months of the alleged offence taking place).

14.6.4 Written consent to prosecute

The express written consent of, for example, the Attorney General or the Director of Public Prosecutions is sometimes required, such as in politically sensitive cases, war crimes cases or cases with extra-territorial elements.

14.6.5 Fines as an alternative to imprisonment

Ideally, statutory or common law provisions will govern this, so that specific maximum alternative fines do not always have to be expressly provided. Where they are so provided, the relationship of maximum fine to maximum term of imprisonment should be reasonably consistent unless for special reasons (e.g. the financial nature of the offence itself; see also section 14.2.3) it is desired to provide a larger than usual financial penalty. The following would contravene this rule, as the maximum fine is small but the sentence of imprisonment comparatively severe:

> A person who commits an offence under this Act is liable to a fine of $500, or to imprisonment for 2 years, or both.

14.6.6 Unlimited fines

Where no express provision is made either in general or specific penalty provisions for a maximum fine, statutory or common law provisions will provide that the extent of a fine is unlimited but 'must not be excessive'. Clearly, the relevant sentence would in most circumstances be subject to appeal.

14.6.7 Imprisonment in default of payment of a fine

A statutory scale is often set out (typically in a Criminal Procedure Act), but if it is not the same considerations would apply as under unlimited fines.

14.6.8 Attempts to commit offences

The common law rule that an attempt to commit an offence is itself an offence has been codified into the penal codes or equivalents in most jurisdictions, together with relevant penalties (either directly stated, or expressed as a proportion of the penalty for the full offence) and normally does not need to be provided for. Occasionally, however, the nature of the offence may warrant the express inclusion of attempts by way of clarification (see the Wildlife Protection Act example in section 14.6.9).

14.6.9 Statutory defences

There are a range of defences at common law, most of which are **not** normally drafted into offence provisions as they will be understood to apply. Indeed in some jurisdictions these have been codified into a Penal Code or Criminal Procedure Act. Most are in practice quite limited in their application, and some will clearly apply only to some offences:

- claim of right (theft, burglary, trespass)
- self-defence (homicide, assault)
- mistake of fact
- all due care
- intoxication
- insanity
- duress
- necessity.

However, it is sometimes desirable to draft specific defences that might apply in particular cases; these are known as statutory defences. It has already been seen that 'all due care' is usually drafted into a statutory defence by officers of corporations (section 14.3). A defence to a regulatory type of offence of strict liability might be drafted as follows:

> It is a defence for a person charged to prove that the commission of the offence was due to a mistake or to an accident, or to some other cause beyond his or her control.

Sometimes explicit statutory defences are tailored to specific kinds of offence, as in the following example from a Wildlife Protection Act:

> (1) A person commits an offence if that person kills, injures or captures, or attempts to kill, injure or capture, a protected wild animal.
>
> (2) A person does not commit an offence under subsection (1) by reason only of:
> (a) unavoidably or accidentally killing or injuring the animal as an incidental result of a lawful action;
> (b) capturing or attempting to capture the animal where it has been injured, otherwise than by that person's illegal act, solely in order to tend it; or
> (c) killing or attempting to kill the animal where it appears to be so seriously injured, otherwise than by that person's illegal act, that to kill it would be an act of mercy.

14.6.10 Compounding of offences

Express powers need to be given for compounding of offences, as they will not be inferred. These powers are commonly included in legislation dealing with customs, banking and insurance, and traffic, and they are increasingly provided for regulatory offences (see section 14.4) and environmental offences.

They normally operate only where there has been an admission of guilt by the offender, and there should be an option for the offender to choose to appear before a court. There are obvious advantages for both enforcers and offenders. For the former, there is a quick and inexpensive alternative to prosecution; for the latter, the advantage of not having to go to court and not having the compounded offence recorded as a conviction in a criminal record. The devices are not appropriate for complex offences or where they are likely to be used as levers to induce admissions of guilt.

> (1) Subject to this section, the Commissioner for Customs and Excise may, if satisfied that a person has committed an offence under this Act in respect of which a penalty of a fine is provided, compound the offence and order that person to pay such sum of money as the Commissioner may think fit, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted of the offence.
>
> (2) The Commissioner may exercise the power under subsection (1) only if the person admits in writing that he or she has committed the offence and requests the Commissioner to deal with the offence accordingly.
>
> (3) Where the Commissioner makes an order under this section:
> (a) the order:
> (i) is to be in writing and have attached to it the request in writing of the person made under subsection (2);
> (ii) is to specify the offence committed by the person and the penalty imposed by the Commissioner;
> (b) a copy of the order must be given to the person if he or she so requests;
> (c) on payment of the sum of money specified in the order the person is not liable to prosecution in respect of the offence.
>
> (4) The compounding of an offence under this section does not affect the liability to forfeiture of anything in relation to which the offence was committed.

It will be seen that there is some similarity between the procedure for compounding offences and that for fixed penalties above. The consequences of each will depend on how the provisions are drafted, although usually the payment of a fixed penalty does not alter the fact that an offence has been committed, and consequences such as penalty points on a driving licence (see section 14.7) could well follow. On the other hand, where an offence is compounded, the effect is usually that an offence is not recorded as such against the person in respect of whom the compounding order is made.

The concept of compounding offences has been enlarged considerably in recent years (see further section 14.8).

14.7 Other matters consequent on conviction

Consideration often needs to be given to drafting rules for the following types of consequences of conviction of an offence:

- attachment of penalty points to a licence
- cancellation or suspension of a licence
- disqualification

  If **the court** is to have power to order these, explicit provisions to that effect need to be inserted into the relevant legislation. They would be likely only in cases where the matter is clear-cut (as with, for example, driving offences) and would **not** involve, for example, assessment of a person's professional fitness to hold a licence, etc. Cases involving such an assessment would be better dealt with under the disciplinary powers given to statutory bodies to oversee the conduct of professions.

- forfeiture

  > The court may order that any weapon or instrument in respect of which an offence has been proved is to be forfeited.

  This would normally apply to articles that are the subject of, or produced in evidence at, criminal trials in which the accused person is convicted of unauthorised or otherwise criminal possession. The Interpretation Act will often provide that anything ordered to be forfeited will be forfeited to the Government.

- seizure of assets

  Separate legislation authorising this would normally be needed.

- payment of compensation

  > Where a person is convicted of an offence, the court may order that person to pay compensation to a person who has suffered loss or damage as a result of the offence.

14.8 Administrative penalties

Administrative penalties are a mechanism for enforcing compliance with regulatory legislation, the use of which has significantly increased in recent years. They are monetary penalties assessed and imposed by a Minister or regulator without recourse to a court or administrative tribunal, and technically constitute a form of civil administrative, rather than criminal, proceedings.

An administrative penalty is a financial penalty that can be imposed on an individual or company that fails to comply with a particular provision of

legislation, or the terms of an authorisation such as a permit or licence. As an administrative (or civil) rather than criminal type of sanction, administrative penalties are calculated and imposed by a Minister or designated Government official instead of a court of law. They are intended to encourage regulatory compliance. The following is a simple example of such a provision:

> **23**(1) If the regulator is satisfied on a balance of probabilities that a person has:
> (a) contravened a provision of this Act or the regulations,
> (b) failed to comply with an order under this Act, or
> (c) failed to comply with a requirement of a licence, certificate or permit issued, or notice given, under this Act,
> the regulator may serve the person with a determination requiring the person to pay an administrative penalty in the amount specified in the determination.
>
> (2) A determination under subsection (1) must be in the prescribed form and contain the prescribed information.
>
> (3) Where a requirement to pay a penalty notice is issued under subsection (1), a prosecution for an offence under this Act in respect of the same contravention or failure may not be brought against the person.

A common instance of the use of this device has been in the area of benefit fraud:

> (1) This section applies where:
> (a) it appears to the Minister that there are grounds for instituting proceedings against a person for an offence under this Act relating to an act or omission on the part of that person in relation to a benefit; or
> (b) if an overpayment attributable to the act or omission had been made, the overpayment would have been recoverable from the person by, or due from the person to, the Treasury.
>
> (2) The Minister may give the person a written notice:
> (a) stating that the person may be invited to agree to pay a penalty and that, if he or she does so in the manner specified by the Minister, no proceedings referred to in subsection (1) will be instituted against him or her; and
> (b) containing such information relating to the operation of this section as may be prescribed.
>
> (3) If the person agrees in the specified manner to pay the penalty:
> (a) the amount of the penalty is recoverable by the same methods as those by which the overpayment is recoverable; and
> (b) no proceedings may be instituted against the person for an offence under this Act relating to the overpayment or to the act or omission referred to in subsection (1).

Chapter 15
Delegated Powers to Make Legislation

15.1 Why are powers to legislate delegated?

As has been seen (Chapter 1), constitutional power to legislate is expressly vested in the body generally known as 'Parliament'. Nevertheless, the power to legislate is often delegated by Parliament owing to:

- pressure on parliamentary time
- the difficulty of legislating in detail
- the technical nature of some legislation and its consequent unsuitability for parliamentary debate.

Legislation produced as a result of this delegation is called variously:

- subsidiary legislation
- subordinate legislation
- delegated legislation
- secondary legislation
- statutory instruments
- statutory rules.

Because it is the term most commonly used in Commonwealth jurisdictions, the first of these, subsidiary legislation, is used here.

Subsidiary legislation gives considerably greater flexibility as it is easier to amend than primary (i.e. statute) legislation, which under a democratic constitution is always subject to debate and the parliamentary timetable (and Parliament may not even be in session when urgent amendment is required). But Ministries tend to want to retain legislative power to themselves; the Attorney General needs to take care to ensure that the constitutional powers of the legislature are not misapplied in this way.

The enabling legislation (i.e. that giving the power to make subsidiary legislation) should itself contain **the principal substantive and administrative rules needed to give effect to the policy**, namely:

- matters involving significant effect on policy
- rules which will have a significant effect on individual rights and duties

- significant offences and penalties
- taxes and significant fees and charges
- procedural matters which go to the heart of the legislative scheme
- amendments and repeals to existing statutes or the common law.

On the other hand, subsidiary legislation might contain:

- detailed rules setting out norms and procedures required for the policy to be implemented
- features of the scheme that are likely to need frequent amendment
- technical rules in a specialist area
- procedural rules for regulating meetings of a body
- procedures for obtaining licences and permits
- ancillary fees or forms.

15.2 What form does subsidiary legislation take?

There are standard terms in the Commonwealth:

Regulations: the main form for substantial subsidiary legislation (e.g. Building Regulations, Customs & Excise Regulations, Immigration Regulations, etc.; also for emergency powers).

Rules: appropriate where it is desired to lay down successive steps needed to accomplish a particular result, for example rules of court; or for an appeal procedure; or to obtain a licence (e.g. Road Traffic (Licensing) Rules).

Orders: normally for short directions in respect of particular persons, or classes of persons or things, for example conferring of diplomatic immunities (e.g. Privileges and Immunities (Application) Order), institution of specified price controls (Price Control (Bread) Order), remissions of taxes or duties (Customs and Excise (Remission) Order).

By-laws: (this word is spelt in a number of different ways, such as 'bye laws', 'bylaws'). These are laws made by local authorities and other bodies which need to control specified activities (e.g. airport authorities, universities).

Standing Orders: rules of procedure for larger bodies (Parliament, local authorities, prisons).

Articles of Association: normally confined to rules of procedure for companies.

Although strictly speaking the last two categories are subsidiary legislation, they might not be formally so regarded in most jurisdictions; and in neither case would requirement of publication in the official *Gazette* be in practice required. And the precise categories (especially the first three) are not always followed. There are also many other instruments which are often considered to be subsidiary legislation, for example **proclamations**, and various types of declarations, specifications, exemptions and appointments, which have no generic name and are usually referred to as '**Government notices**', '***Gazette* notices**' or '**legal notices**'.

15.3 Questions about delegation which need to be considered by legislative counsel

WHAT power is being delegated? Does the Act enable the delegate to do the things proposed? This raises the important question of *intra* and *ultra vires* ("within" or "beyond" the powers delegated).

There are presumptions that power to make subsidiary legislation does **not** include power to do the following things **unless it is given expressly** either in general interpretation legislation or in the relevant Act itself:

- to amend provisions in an Act
- to impose a tax or fee
- to create penalties
- to enable subsidiary legislation to operate retrospectively
- to create exemptions or exceptions
- to bind the State
- to sub-delegate.

Powers may be given in general terms, or more specifically, or by a combination of these forms. There are usually background rules in an Interpretation Act to the effect that where powers are given for general purposes and also for specific ones, the recital of specific powers does not detract from the generality. If so, it would be unnecessary to draft as follows:

> The Minister may make regulations for the better carrying out of the purposes of this Act, and *without prejudice to the generality of that power* to:
> (a) specify the forms of licences granted under section 6;
> (b) ...

Very wide general powers, sometimes referred to as 'Henry VIII powers' (after one of England's monarchs, who exercised nearly absolute power), are

sometimes given in the interests of expediency. In practice they tend to be given in order to iron out inconsistencies or anomalies that may be found:

> The Minister may by order make such modifications to the provisions of this Act as may appear to the Minister to be necessary or expedient for the purposes of removing any difficulty occasioned by the coming into operation of this Act, but only as regards the performance of the functions and the exercise of the powers of the Council.

The provisions quoted are, however, limited in extent (in the example above they relate only to powers of the Council). These kinds of wide powers are also sometimes limited in time (e.g. with a limitation period of two years, after which the power lapses); even so, some commentators consider the giving of these general powers to be unconstitutional, in that they do not so much delegate power to legislate as **transfer** it.

Subsidiary legislation is capable of being declared *ultra vires* in two ways:

- it covers matters not authorised by the enabling Act

  or

- (in practice more usually) it is applied in a way not authorised or envisaged by the enabling Act[1].

WHEN can the power be exercised? There are normally general provisions in an Interpretation Act allowing exercise from time to time as the occasion requires.

WHEN does subsidiary legislation come into force? Again, normally in accordance with an Interpretation Act or an Act dealing expressly with subsidiary legislation such as a Subsidiary Legislation Act, on publication in the *Gazette*, unless otherwise provided in the instrument itself. The presumption against retrospective operation needs to be remembered.

BY WHOM is the power exercisable? Again, there are normally Interpretation Act or other Act provisions enabling exercise by the holder for the time being of an office, or a person acting in that office. It is important to know who is accountable to Parliament: the President, the Governor in Council, a Minister, the Treasury, etc.

If there is sub-delegation, for example to a statutory authority or corporation, clear authority to do this must be stated in the enabling provisions.

HOW is the power to be exercised? Directly; or after consultation with, with the approval of, or on the advice of, some specified person or body?

---

1 See *Raymond v Honey* [1982] 1 All ER 756; and *R v Secretary of State for Health, ex parte US Tobacco International Inc.* [1992] 1 All ER 212.

15.4 How does the legislature supervise the making of subsidiary legislation?

There will typically be contained in an Interpretation Act or other Act dealing expressly with subsidiary legislation provision for "positive" and "negative" resolution procedure in relation to subsidiary legislation.

Under **'Positive (or Affirmative) Resolution'** procedures, the subsidiary legislation either:

- cannot come into force until (depending on the relevant law) either
  - the subsidiary legislation as made or
  - a draft of the proposed subsidiary legislation

  has been laid before the legislature and a resolution passed authorising its coming into force (or making and coming into force);

  or
- can come into force for only a limited and specified period, following which its continuance in force will depend on a resolution of the legislature to that effect.

Under **'Negative Resolution'** procedures, the subsidiary legislation either:

- as made

  or
- as made and brought into force,

must be laid before the legislature within a specified time; and unless the legislature then passes a resolution, again within a specified period, that the subsidiary legislation is to be annulled or (depending on the power reserved) amended, it comes into force, or continues in force, at the end of that period.

Legislative counsel will need to be aware of the precise terms of the above procedures that apply in his or her jurisdiction, as failure on the part of a government department to abide by the relevant rules could nullify the subsidiary legislation concerned.

15.5 Drafting subsidiary legislation

15.5.1 General

Legislative counsel needs to be familiar with:

- the application of general rules (e.g. in an Interpretation Act or other Act dealing with subsidiary legislation)
- conventional features (see specimen lay-outs below)

- relationship with the parent Act (e.g. that words and expressions used in subsidiary legislation typically are to be given the same meaning as those used in the enabling Act).

15.5.2 Formal and general provisions in subsidiary legislation

Headings

Typically set out are:

- the legal notice or statutory instrument number
- the short title of the enabling legislation
- the citation of the subsidiary legislation, which can precede or follow the recital of the enabling powers (see below).

Enabling provisions

It is usual to recite the powers under which the subsidiary legislation is made and by whom (if appropriate also with a reference to any other person or body whose consent is required or with whom consultation, etc., has been required).

Preamble

Similar considerations apply with regard to preambles in statutes, although in practice this device is hardly ever used in subsidiary legislation except under military regimes.

Citation or title

This serves exactly the same purpose as a short title in a statute. It is not a 'short title', as there is no long title. If possible it should contain the wording of the short title of the enabling legislation, but not at the cost of clumsiness (see Chapter 12). It should be as far as possible an easily quotable title, although this is more difficult to apply, especially as subsidiary legislation citations more often contain bracketed references such as '(Amendment)' and '(No.2)', etc.

Signature

Conventions vary. All that is needed is the date of making the instrument (not to be confused with the date of commencement, although there could be provision for both to be the same) and the name and title of the maker.

15.6 Typical layouts of subsidiary legislation, and executive instruments that are in some jurisdictions treated as subsidiary legislation

[Legal Notice][Statutory Instrument] No. 355 of 2015

Agriculture Act 2013

(No. 16 of 2013)

[In exercise of the power conferred by section 51 of the [Agriculture] Act [2013], the Minister of Agriculture makes the following Regulations]
[Under section 51 of the Act]:

Agriculture (Land Husbandry) Regulations 2017

1. These Regulations [may be cited as the Agriculture (Land Husbandry) Regulations 2017 and] come into force on 1 December 2017:

2. .....

.....

SCHEDULE (r.12)

.....

30 September 2017

I. C. Fields
Minister of Agriculture

[Legal Notice][Statutory Instrument] [Executive Instrument] No. 356 of 2017

Meat Control Act

(Cap. 294)

Declaration of Approved Slaughterhouse

[Under] [In exercise of the power conferred by] section 3(1) of the Act, the Minister for Livestock Development declares the abattoir at ..... in ..... District to be an approved slaughterhouse for the purposes of the Act.

30 September 2017

A. Shepherd
Minister for Livestock Development

Chapter 16
Amending Legislation

The following principles regarding amendment are stated as they would apply to Acts of Parliament, but the same principles apply to amending subsidiary legislation.

16.1 How may statutes be amended?

In one of two ways:

- expressly, by an amending Act or, where so allowed by the legislation being amended, by subsidiary legislation
- impliedly, because of inconsistencies in different statutes that cannot stand together; but note that courts will attempt to interpret statutes, or provisions in them, so that both can remain in being, by, for example:
  - distinguishing their application; or
  - applying the maxim that general provisions do not repeal specific ones,

  and **do not** readily construe an implied amendment or repeal.

However, a drafter should never rely on implied amendment.

16.2 Direct (or textual) and indirect methods of amending

Under the '**direct**' or '**textual amendment**' system, the legislation to be amended (usually referred to as 'the principal Act/Regulations/Rules' etc.) is affected directly, so that its text is altered by instructions in the amending legislation:

- for the required treatment of certain of its provisions, with or without replacement text;
- for the insertion of new provisions into the existing text.

Note in the following example the conventional use of inverted commas both to designate a definition term and to indicate text to be considered, added, amended or deleted:

> Section 5 of the Children's Homes Act 1999, in this Act called "the principal Act", is amended:

(a) in subsection (1), by deleting "within 30 days" and inserting "within a reasonable time having regard to the particular circumstances of the case";
(b) by deleting subsection (2) and inserting:
"(2)...";
(c) in subsection (3), by adding immediately after "the Minister" where it first appears, "or the Director-General";
(d) by substituting for the definition of "working day" in subsection (5):
""working day" means a day other than a Saturday, a Sunday or a public holiday, except in relation to a person required by terms of his or her employment to work on one or more of those days.".

Note in paragraph (d) of this latter example the necessity for double inverted commas. This is avoided in some jurisdictions by using single ones for the first set:

(d) by substituting for the definition of "working day" in subsection (5):
'"working day" means a day other than a Saturday, a Sunday or a public holiday, except in relation to a person required by terms of his or her employment to work on one or more of those days.'.

Under the '**indirect**' system (more used in the past in the United Kingdom than elsewhere in the Commonwealth), new provisions are enacted or made which do not directly replace previous legislation but are intended to be read in tandem with it.

A reference in section 36 of this Act, or in section 25 the Housing Act 1997, to a grant for repairs or improvements includes a reference to a loan for the same purposes.

Although the direct system is the one in general use in Commonwealth jurisdictions, there are nevertheless still uses for indirect amending techniques, especially where general amendments are to be made to a large number of statutes (e.g. by altering designations or titles, or references to metric systems of weights or measures):

A reference in a written law to the Director of Public Prosecutions is to be construed as if it were a reference to the Chief Public Prosecutor.

A reference in a written law to a linear measurement in inches, feet, yards, miles, or other non-metric measurement, is, unless otherwise indicated, to be construed as a reference to the equivalent measurement in millimetres, centimetres, metres or kilometres according to the conversion tables set out in the Schedule.

In practice the second of these would be no more than a temporary measure, as many measurements would probably need to be replaced with metric measurements in round figures.

Most of the advantages of the alternative amending systems lie with the direct one (the law can then remain in one piece of legislation and consolidation becomes a running exercise) but the indirect system does tend to make the amending legislation easier to understand on its own.

16.3 Substantive and consequential amendments

Substantive amendments make the changes necessary to implement proposed changes in policy.

Consequential amendments make necessary changes (including grammatical changes) to the same and other provisions of the legislation being amended, or to other legislation, consequent on the substantive amendments. If sufficiently numerous, these can be gathered together and placed in a Schedule.

As an example, the following section needs to be amended:

> **5.** A person who, with the intention of causing or enabling another person's animal to trespass, interferes with the animal, or with an enclosure by which it is confined, commits an offence.

The amendment required is to delete the reference to intention and create a strict liability offence. A **substantive** amendment would thus be needed to delete the expression 'with the intention of causing or enabling' and replace it with 'causes or enables'. But if that alone is done the resulting sentence will not make sense:

> **5.** A person who, causes or enables another person's animal to trespass, interferes with the animal, or with an enclosure by which it is confined, commits an offence.

Consequential amendments are therefore needed to restructure the sentence to delete the comma after "who" and clarify the fact that there remains a link between the interference and the trespass:

> **5.** A person who interferes with another person's animal, or with an enclosure by which it is confined, and by that action causes or enables the animal to trespass, commits an offence.

Although applying principles of the order in which elements of a legislative sentence are presented (see Chapter 4), it might be better style to restructure the new provision to give prominence to the legal action:

> **5.** A person commits an offence if he or she interferes with:
> (a) another person's animal, or
> (b) an enclosure by which it is confined,
> and by that action causes or enables the animal to trespass.

16.4 Amendment, or repeal and replacement?

A decision sometimes has to be made, where there is a significant number of proposed amendments to legislation, as to whether it would be better to repeal the existing legislation and replace it. The latter course enables a fresh start to be made in an up-to-date drafting style, but it needs to be remembered that it can lead to the putting in issue in Parliament of provisions in legislation which are not being changed.

Where legislation is in constant use (e.g. Penal Code, Criminal Procedure Act, Income Tax Act, Companies Act) users would be likely to oppose the restructuring which replacement would almost certainly involve, as this course of action would necessitate a relearning process to identify exactly where constantly used provisions are to be found.

16.5 Retrospectivity of amendments

Generally amendments may, as with legislative provisions generally, be made to operate retrospectively, but subject to constitutional safeguards regarding, for example, offences and penalties, and vested rights. The use and extent of retrospective provisions is considered in Chapter 17.

16.6 Drafting textual amendments

The following general rules apply to direct textual amending:

- Use express provisions: amendments must not be left to implication
- Use a standard expression when referring to the statute being amended; this is usually 'the principal Act', but there are other possibilities, especially where the Act concerned has an essentially one-word short title (Companies Act; Insurance Act)
- Identify provisions being amended as simply as possible, by reference, for example, to '**section 36(1)(b)**' (this is to be preferred to a reference to '**paragraph 36(1)(b)**' for the same provision, a usage found in some Commonwealth jurisdictions) rather than 'paragraph (b) of subsection (1) of section 36'
- Place the reference to the section being amended at the beginning of the amending provision or as near as possible to it

  > Section 30(1) of the principal Act is (note, not "shall be") amended by...

  rather than:

  > The principal Act is further amended in section 30(1) by...

- Use precise and concise directions for amendment; do not use unnecessary or archaic words:

  > Section 16(2) of the principal Act shall be hereby amended by the addition thereto immediately after the words "calendar year" of the following comma and words, "if the Director so certifies".

  rather state:

  > Section 16(2) of the principal Act is amended by adding, "if the Director so certifies" after "calendar year".

- Maintain consistency of language for directions; typically these are given either by addressing the user in effect in the second person: 'add', 'insert', 'substitute', 'delete', etc.:

  In section 3(1) of the principal Act, delete "or other persons affected".

  or, more usually, by using the slightly longer passive form:

  Section 3(1) of the principal Act is amended by deleting "or other persons affected".

- It is unnecessary to give over-elaborate directions for amending; for example, where it is desired to add a new paragraph to a sequence, state simply:

  Section 5(2) of the principal Act is amended by adding:
  "(d) where the taxpayer is not ordinarily resident.".

  It is unnecessary and confusing to state what has literally to take place to effect the amendment:

  Section 5(2) of the principal Act is amended by:
  (a) deleting the word "or" at the end of paragraph (b);
  (b) deleting the full stop after paragraph (c) and inserting a semi colon and the word "or"; and
  (c) inserting a new paragraph as follows:
  "(d) where the taxpayer is not ordinarily resident.".

  and the instructions in (a) and (b) in this example may reasonably be left to be implied

- Although what follows is sometimes regarded as unduly pedantic, strictly speaking one cannot delete a provision and then substitute something for it (as after the deletion there is nothing to be substituted), so to be precise draft either:

  Delete paragraph (f) and insert
  "(f)...

  or

  Substitute for paragraph (f)
  "(f)...

  rather than

  Delete paragraph (f) and substitute...

- As a general rule, one section in amending legislation should not amend more than one section in the principal Act, although an exception to this might be where more than one section itself is to be deleted (and where this happens the house style sometimes requires divisions consisting of a section or more to be 'repealed'):

  Sections 4, 5 and 8 of the principal Act are repealed.

- Bear in mind the desirability of the use of parenthesis to describe the effect of a provision being amended:

  Section 46 of the principal Act (*service of documents*) is amended...

- Remember that the **long title** may need to be amended to stay in line with, and hence adequately reflect, new amendments.

16.7 Renumbering

It is not good practice to renumber provisions after others have been deleted or new ones have been inserted, as this causes confusion, especially in cross references outside the legislation being amended.

The problem is that where a statute is often amended (e.g. an Income Tax Act) over a long period of time, the designation of sections can become very complicated:

106	Deductions by Treasury
106A	Deductions by employer from wages
106B	Certificates of deduction
106BAA	Failure to make deductions
106BA	Rates of deduction
106BB	Employer to furnish statement
106C	Group employers

In such cases a repeal and re-enactment process could be instituted.

16.8 Punctuation

Note the two levels of punctuation: firstly in the provisions introducing amendments, and secondly within the new provisions themselves:

In section 26(1) of the principal Act, paragraph (b) is deleted and replaced by:
"(b) the Commissioner, or a person designated by the Commissioner;".

16.9 Indentation and spacing

Presentation, following the conventional layout for legislation, is very important as an aid to comprehension, especially as amending legislation tends to be difficult to read and understand by itself. This is all the more so where a number of insertions of different kinds (e.g. new sections, subsections or paragraphs) have to be made into the enactment being amended.

16.10 Style

When amending statutes that have been in existence a long time, the style of the original needs to be maintained. This will probably mean that some principles of good modern drafting have to be discarded in the interests of consistency.

Chapter 17
Specific Types of Application

17.1 Retrospective and retroactive provisions

17.1.1 Where do they arise?

Most commonly:

- in relation to transitional and savings provisions, where new provisions need to apply retrospectively to deal with past matters, for example:
  - to apply new conditions to a licence previously granted
  - to apply a new procedure to an outstanding case or matter
- where validation is required for some previously unlawful state of affairs.

17.1.2 Rules and presumptions against retrospectivity

Most constitutions contain basic rules making illegal the operation of a law which would:

- make an act or omission a criminal offence if it was not so at the time of its commission or
- make a person liable to a criminal penalty greater than that which existed at the time of the offence.

Apart from these situations, courts will make the following presumptions **unless clear words are used to rebut them**:

- that Parliament does not, without good reason, intend to alter the legal basis on which people have entered into lawful activities
- that statutes do not intend to change the law from some prior date so as to cause the rights of people to be different from what they were conceived to be when they were acquired or exercised
- in consequence of the above, prior cases are to be treated as not subject to the new law.

17.1.3 What is the difference between 'retrospective' and 'retroactive'?

Retrospective provisions, in the literal meaning of the word, **look back** to past events in order to apply the law **from the time the provisions come into force**.

Thus a provision which increases the time allowed for appeals to be lodged, and which applies not only to future cases **but also to cases already instituted** at the time the law comes into force is, in relation to the latter class of cases, **retrospective**.

Retroactive provisions, again in the literal meaning of the word, **act back** in the past, **by changing the law** not only from the present but also notionally **as it applied in a past time**.

Thus a provision which validates marriages solemnised in a particular district or place by a person subsequently discovered not to have been authorised to conduct marriage ceremonies, is **retroactive** in that it changes the legal consequences of the marriage **in the past** as well as the future.

17.1.4 When are retroactive provisions likely to be needed?

- To confer a backdated benefit generally or on a specific section of society

  > The provisions of this Act relating to increases in the salaries of constitutional officers are to be regarded as having come into force on 1 January 20...

- To bring in provisions backdated to the date when public notice was given of the proposals. This would be typically in the case of the enactment of a Finance Bill, whose provisions will have been given legal effect by a Provisional Collection of Taxes Order as from the date of the publication of **the Bill** (see chapter 20)

  > The provisions of this Act relating to rates of duty and tax in Part III are to be regarded as having come into force on [*the date of publication of the Finance Bill*].

- To validate some technical or unintended irregularity in legislation

  > A local authority constituted by order under section 10 of the Local Government Act is to be regarded as having been validly constituted from the date of publication of the relevant order despite the fact that the proportion of appointed councillors exceeds that laid down in section 13 of that Act.

- To remove legal disabilities from individuals which have arisen by previous operation of law

  > A marriage performed in Utopia according to the rites of the ... Church within the two years before registration of that church under the Marriage Act on ... is to be regarded as having been valid from the date of the ceremony.

  > Section 12(2)(d) of the Stock Exchange Act is deleted, and the minimum period specified in that provision for a member of the Stock Exchange Board to have served as a member of the Stock Exchange before appointment to the Board is to be regarded as having never applied.

However, the rule of law requires that there is the strictest supervision by the Attorney-General of the use of these provisions. In general, they should not be used to validate irregularities that were deliberate or known to the parties at the time they occurred.

For political reasons Indemnity Acts are sometimes passed to indemnify persons from the consequences of alleged criminal behaviour in the past. Normally, these are not true retroactive statutes in that they do not purport to change the law in the past (i.e. to make the past conduct lawful), but merely operate to prevent the usual consequences of that conduct (i.e. a criminal trial) from taking place.

17.1.5 When are retrospective provisions likely to be needed?

- (As with retroactive provisions) to confer a benefit generally or on a specific section of society

  > From the commencement of this Act a person who has been sentenced to a period of imprisonment of more than six months and not more than one year is no longer to be regarded as disqualified for election as a member of the Council if at least three years have elapsed since completion of the sentence.

- To make available new legal rights or remedies, or a reduction in existing duties or obligations, in addition to those acquired under the former law

  > A person previously granted a maintenance order in the Divorce Registry may as from 1 January 20.. apply to the Magistrate's Court for variation of that order.

  > A person who is the holder of a driving licence and is under the age of 70 is from the date of commencement of this Act no longer required to renew that licence unless the conditions specified in subsection (2) apply.

- To require a new procedure to be followed by those involved in some matter (even though it impinges on, or restricts, the rights or expectations of parties)

  > A person claiming to have been granted an exemption under the principal Act in proceedings against him or her for contravention of a licence must, as from the commencement of this Act, produce documentary evidence of that fact before the court in the form required by subsection (2), whether the proceedings were instituted before or after the commencement of this Act.

  > A person who is licensed to practice as a chiropractor or osteopath must, after six months from the commencement of this Act, as a condition of renewal of the licence provide evidence to the Licensing Board of the attainment of [*prescribed skills*].

In each of the foregoing examples, it can be seen that the new provision looks back (either wholly or partly) to a situation that has arisen before it came into force. Unlike in the case of **retroactive** provisions, however, they do not purport to change the law as from a time past, but apply only from the date the new provisions come into force.

17.1.6 Retrospective and prospective provisions

However, a statute is not retrospective merely because it refers to matters in existence when the new legislation comes into force. Thus:

- Legislation introducing a new licensing regime for second-hand dealers who are already in business is not retrospective, as it is merely regulating **prospectively** a present state of affairs.
- Similarly, a new law that imposes tax burdens on existing property owners for the coming year operates only **prospectively.**

17.2 Extra-territorial legislation

17.2.1 General legislative competence

A sovereign legislature has the power to make laws for the peace, order and good government over the area over which it has authority. As has already been seen in Chapter 12, this area is:

- the land mass and the internal waters;
- the territorial waters and the seabed beneath; and
- the airspace over both of the above.

However, some extensions to this area of jurisdiction, for example with regard to national ships, were recognised at common law (under the Admiralty jurisdiction of the courts).

By international agreement, states commonly claim further limited jurisdiction (regarding, for example, fishing and mineral rights) over part of the sea and the seabed outside the territorial waters (the 'Exclusive Economic Zone').

It follows that similar jurisdiction will be recognised in international law as held by other sovereign states. There is thus a **presumption** that laws made in one state do not extend to have effect abroad, that is, **against extra-territorial operation**.

17.2.2 Extra-territorial competence

Under the common law, **criminal** conduct outside a state's area of authority was quite simply without legal significance. There is no doubt that statute law can reverse this effect, but, in the absence of international agreement, the claim to exercise jurisdiction abroad is subject to legal and practical problems:

- the rules of sovereignty of states will normally nullify its effect in so far as it purports to apply to foreign nationals abroad
- any such law will be subject to practical difficulties in bringing persons affected by it within the jurisdiction.

Nevertheless it has been done, in respect of a state's own subjects, for many years. An early example is section 9 of the Offences Against the Person Act 1861 (UK):

> Where ... murder ... [is] committed on land out of the United Kingdom ... every offence committed by any subject of Her Majesty ... *shall amount to the offence of murder* ... [and] may be ... tried ... in any court ... in England ... in all respects as if such offence had been actually committed in that country.

Note the device used in the italicised words to give legal significance to a situation that would otherwise strictly speaking not have any.

The common law recognises that certain **civil** matters have to be dealt with according to a particular foreign law (e.g. the law governing immovable property where the property is situated, or the validity of a marriage contracted outside the jurisdiction). This is of course the realm of private international law.

17.2.3 Where is extra-territoriality claimed in practice?

To control the activities of persons on national transport outside the jurisdiction

Although jurisdiction is recognised by the common law in respect of things done on the high seas, in practice it is claimed by statute, both with respect to the sea (both on ships and on artificial installations such as oil rigs), and in the air outside the airspace of the jurisdiction. An example from a Merchant Shipping Act might be:

> Where a person commits an offence under this Act:
> (a) if the person is a Utopian citizen and commits the offence:
> (i) on board a Utopian ship on the high seas;
> (ii) in a foreign port; or
> (iii) on board a foreign ship to which he or she does not belong [*e.g. as a member of the crew*]
> (b) if the person is not a Utopian citizen and commits the offence on board a Utopian ship on the high seas,
> and he or she is present in Utopia, a Utopian court has jurisdiction to try the offence as if it had been committed in Utopia.

To control the activities of nationals, or their property, outside the jurisdiction

Jurisdiction over those working directly for the state outside the jurisdiction (e.g. diplomats, or armed forces) abroad is claimed by statute as a matter of course. Other cases where it might be claimed in respect of nationals relate to certain serious crimes and to taxation.

> This Act has effect in relation to a citizen of Utopia outside as well as inside Utopia, and where the citizen commits the offence outside Utopia he or she may be dealt with in respect of that offence as if it had been committed in Utopia.

The rationale for such a claim is often that it is to try to ensure that persons subject to legislation in the state cannot evade it by moving themselves or their property outside it, in order to commit offences there. Typically, offences concerned would be very serious ones such as murder, or those which might have a direct effect on the home jurisdiction (e.g. official corruption, currency offences, customs offences, evasion of tax, assisting illegal immigration) without necessarily affecting the jurisdiction in which the activity takes place.

To control foreign nationals outside the jurisdiction

It is here that the greatest possibility of a clash with other systems of law is likely to occur. Extra-territorial legislation would be most likely to apply to those foreign nationals operating abroad who are involved in crimes that specifically affect the home jurisdiction, such as the smuggling from abroad of goods or persons (**if** those offenders can be brought within the jurisdiction).

Otherwise, legislation is likely to be able to be applied only to individuals who are only temporarily abroad and have domicile or habitual residence within the jurisdiction, or to foreign companies who trade within the jurisdiction but whose major assets are outside.

However, there is also a growing body of international conventions and agreements under which jurisdiction is claimed over, *inter alia*, the activities of foreign nationals abroad (e.g. with regard to off-shore installations, air piracy, trafficking in endangered species of animal). Under these conventions, etc. States parties to them undertake to enact legislation expressly to take jurisdiction over (amongst others) foreign nationals.

For example:

> This Act extends to:
> (a) all offences under section 4 (*air piracy, etc.*) taking place outside Utopia, whether or not in or over a foreign country; and
> (b) to all persons irrespective of their nationality or citizenship.

As with the examples above, further provisions would be required to formally give the court's jurisdiction 'as though the offence had been committed within the jurisdiction'.

17.3 Binding the government

The common law rule is that a statute does not bind the Government (sometimes alternatively referred to as "the Crown" or "the Republic") unless it is expressed to do so or unless it appears that it must do so by necessary implication. Sometimes this rule has been enshrined in Interpretation Acts. A few Commonwealth jurisdictions have in fact reversed the rule by statute (some Canadian Provinces) or by judicial decision (India).

Thus, if the common law rule applies, it would be incorrect and confusing to purport to exempt institutions that are part of Government:

> **4.** The prohibition on tinted windows in motor vehicles in section 3 does not apply to:
> (a) a rear or side window of an ambulance or motor vehicle designed to be used solely for the purpose of securely transporting prisoners, or valuable articles;
> (b) a motor vehicle belonging to a Government department, the police or the armed forces.

In most jurisdictions, the rule simply would not apply to vehicles stated in paragraph (b) without the need to so state.

In practice steps are taken to expressly bind the Government for liability in tort (delict) by its employees where it operates as an employer of persons, and in such areas as public holidays, road traffic and occupier's liability. The Corporate Manslaughter and Corporate Homicide Act 2007 of the UK is an example of where a political decision was taken to bind institutions of the Crown in legislation that creates a complex duty of care on the part of bodies of persons.

Chapter 18
Statutory Corporations

18.1 Functions of statutory corporations

A number of different kinds of activity can be identified which might lead to the setting up of a statutory corporation to oversee them.

- To regulate certain types of activity
  - economic (e.g. banking or money-changing, securities, insurance broking, price control)
  - licensing and supervision of particular activities and persons involved in them (e.g. horse-racing, lotteries, nursing homes, estate agents)
  - supervision of professions (including admission, discipline, etc.)
- To provide centralised management for important industrial, commercial or other activities or services (e.g. mining, agricultural or milk marketing, meat production, charities, water resources)
- To bring a degree of independence to decision-making on matters in which the Government has an interest (law reform, national heritage matters)
- To provide and operate certain public facilities or services out of public funds (e.g. a rapid transport system, a postal system, public broadcasting)
- To provide an advisory or consultative input for Government decision-making (e.g. the arts, road transport, energy sources).

18.2 Terminology traditionally used

A large number of different terms are used, and it is important for legislative counsel to have a clear idea of where these might be appropriate:

Term	Typical Functions
Agency	a body acting on behalf of another or others
Authority	an expert body governing a specialist area
Board	a body of persons (some of whom may be drawn from government) performing a wide variety of functions
Commission	a body charged with a particular limited function, often including making recommendations

Corporation	a general name for a body undertaking a full range of functions with respect to a particular area of operation
Council	a body called together usually for advisory functions
Institute	a body set up to promote certain specific objects (e.g. research or education).

Other terms are also sometimes used: 'Association', 'Bureau', 'Committee' and 'Society'.

18.3 Corporate or non-corporate?

The important question relates to whether or not the body being set up needs to do things that require it to have the status of a legal person. In particular, whether or not the body, **in its own name**, needs to:

- hold property
- borrow or lend money
- enter into contracts
- conduct legal proceedings.

For example, where a body is to be advisory or deliberative in nature only, directly funded by Government and staffed with public officers, and does not need to hold property in its own right, there would be no need for incorporation. Incorporation does give a greater degree of independence from Government, particularly in the ability to make decisions on financial matters, and those charged with a particular function often prefer to be incorporated.

18.4 Features of a body corporate

The following status and powers are regarded as standard features:

- continuing legal personality independent of its members ('perpetual succession')
- power to hold and manage property and money in its own right
- power to enter into legal relations in its own right (and therefore to 'sue and be sued in its corporate name')
- signification of its assent, or intention to be bound, by means of a seal.

A body corporate will have other powers:

- expressly given to it
- necessarily and properly required for carrying out the purposes of the body corporate (which purposes must be set out)

- reasonably necessary or regarded as incidental to or consequential on powers expressly given.

A non-corporate body set up by statute may discharge only such functions as are conferred by that statute. In organisations such as a non-corporate club or society the members will be personally (i.e. individually and collectively) responsible for the actions of the body, and if necessary the collective membership must be sued.

18.5 Establishment of a body corporate

18.5.1 The traditional system

The original principle of incorporation is the conferring of a separate legal personality on a group of persons, or 'members'. In legislation, these are normally identified as being:

- those holding a particular office
- those appointed by a designated authority (usually a Minister), either directly or after nomination, or recommendation, by another person or body.

Whether or not these members are responsible for the day-to-day running of the body corporate, as opposed to constituting a supervisory and policy-making body, will depend on the actual framing of the statute.

18.5.2 The modern system

The more modern system is to bypass this somewhat artificial device and simply create the statutory body by a statement to that effect, vest the body with the requisite powers and provide for its management structure. In that case:

- no formal provision needs to be made for 'members'
- in consequence, there is no need for 'perpetual succession', as the body continues in existence until the Act creating it is repealed
- provision would be made merely for signification of the agreement of the body by means of a seal, or 'official seal', not a 'common seal', which is another consequence required in drawing the distinction between the body and its individual members
- no reference needs to be made to suing, etc., 'in its corporate name', as that would follow automatically.

Reference needs to be made by legislative counsel to implied powers in provisions such as any in an Interpretation Act on appointment and dismissal,

quorums, vacancies and offences, to determine whether these provisions can be relied on as background rules, or whether they need restating, either in the same terms or with variations.

18.6 Drafting provisions to establish a statutory corporation

18.6.1 Establishing the corporation

Typically a section will formally establish the corporation (as has been seen, there are many possible kinds of title, but it is convenient for present purposes to use this word) naming it, stating that it is a body corporate, and setting out the incidents of corporate status, i.e. its official seal and its powers to enter into legal relations and sue and be sued:

> (1) The Utopia Institute of Sport is established [*not "hereby established"*].
>
> (2) The Institute is [*not "shall be"*] a body corporate which:
> (a) is to have a seal [*note: not a "common seal", as there are no members*];
> (b) may sue and be sued;
> (c) has the functions and powers set out in this Act.

If the corporation is to have formal members, then provision would have to be made for the matters referred to in paragraph 5. Sometimes mention is made in this context of the power to acquire, hold and dispose of property, although more usually this is relevant to the powers granted to it (see below).

18.6.2 Objects/functions

Both are necessary only in the case of larger scale corporations. 'Objects' (sometimes 'aims') state the long-term aims in fairly general terms; 'functions' state what exactly it is that the corporation is set up to achieve (there is often confusion between these two, as there is also between functions and powers – see below). Usually a statement of the functions alone is enough, but if necessary, the section dealing with them can state both:

> **Objects and functions of Institute**
> **4.** (1) The object of the establishment of the Institute is to enable and assist Utopians to develop their sporting skills and to achieve excellence in sport.
>
> (2) The functions of the Institute are:
> (a) to devise and implement programmes for the development of persons who have the potential to excel in sport, and in furtherance of that function;
> (i) to establish, manage, develop and maintain facilities;
> (ii) to provide medical and science services to persons participating in programmes;
> (b) to collect and distribute information relevant to the activities of the Institute;
> (c) ...

18.6.3 Powers

The section dealing with these will contain the principal powers needed by the corporation in order to perform its functions, for example acquiring property, entering into contracts, borrowing or lending money and engaging persons to perform services:

> **Powers of Institute**
> **5.** The Institute may do all things necessary or convenient to be done in connection with the performance of its functions, and in particular may:
> (a) enter into contracts;
> (b) acquire, hold and dispose of real or personal property;
> (c) erect buildings and structures and carry out works;
> (d) appoint agents;
> (e) engage persons to perform services for the Institute;
> (f) ...

18.6.4 Membership/managing body

The membership of the corporation, normally those charged with managing it, must be set out, or alternatively, where formal membership is dispensed with, details of the composition of the managing body (often called 'the Board'):

> **Board of Management**
> 8. (1) The Institute is to have a Board of Management with authority, in the name of the Institute, to perform the functions conferred or imposed on the Institute under this Act.
>
> (2) The Board is to consist of the following persons:
> (a) ...

18.6.5 Management/administration

Provision must also be made for the person to be responsible for the day-to-day running of the corporation. Other sections will typically deal with matters relating to procedure at meetings, finance (including auditing), and annual report. These kinds of provisions tend, unlike those in other types of legislation, to contain standard features and reference will in practice often be made to similar ones in other legislation.

As always, however, care must be taken to ensure that 'standardised' provisions are not simply included without the clearest understanding of what purposes they serve, how far they extend and whether they are relevant, with or without modification, for the purposes of the proposed legislation.

Chapter 19
Licensing Legislation

19.1 Introduction

In public law administration, two kinds of system are commonly used in order to authorise the carrying on of an activity that would otherwise be prohibited: **licensing** and **registration**.

A **licence** is a legal device by which permission is granted, in public law terms normally by the Government or a public authority, by means of some form of official document to carry on the activity. A simple form of licence is often referred to as a permit. **Registration** is a process used for official recording of persons and/or activities in an authoritative list.

Registration usually would, and licensing might, involve the person concerned satisfying certain legally prescribed requirements. Registration might even be automatic in those circumstances.

Both systems could run concurrently, as it is not uncommon for:

- a register to be required of those persons to whom licences have been granted

  or

- a licence (often in the form of a practising certificate) to be required to be taken out by those who have been registered.

19.2 The purposes of licensing and registration

The following principal purposes can be identified:

- the laying down of minimum standards or qualifications for the carrying out of a specified activity, with which applicants must comply
- creating official awareness of those engaged in the relevant activity
- continuing supervision of an activity
- control of the numbers of those engaged in a particular activity
- the raising of public revenue, or recouping of administrative costs involved.

Legislative counsel needs to establish clearly whether the purpose of the scheme involves one or more of the following:

- to enable a selection process to operate
  - merely as to suitability or
  - with the added intention of limiting numbers to be authorised
- to enable a check to be kept on prescribed activities
- to raise revenue
- to control activities which involve danger or represent a threat or potential nuisance to a section of the public
- to protect a resource so that it is not exhausted or overused.

While there may be good arguments in favour of a licensing regime, the **counter-arguments** also need to be kept in mind, and counsel needs, in appropriate cases, to be prepared to ask searching questions to clarify that policy-makers have considered the following potential problems:

- it involves administration, and hence the creation of an extra bureaucracy
- if not properly administered it can be a source of delay, expense and frustration to those affected
- it can be used as a vehicle for discrimination and corruption.

19.3 The contents of licensing legislation

Specific provisions need to be made for introducing a licensing system, as the power to do so will not be implied in a general power to control or regulate activities. The following are some of the main incidents of licensing, although the order in which they appear will not necessarily follow the order below.

19.3.1 The licensing/registration authority

Is an existing authority (e.g. a Minister, a local government authority, the police, the Central Bank) to be given the power, or is it necessary to establish one for the purpose? The latter course is more likely in the case of a registration regime.

19.3.2 The activity to be regulated

The Act must state with precision the activity or activities to be regulated and make it a criminal offence to carry on the activity unless registered or licensed:

> A person who carries on the business of providing transportation services to the public without being the holder of a licence under this Act commits an offence.

Sometimes there is need for an ancillary offence such as falsely holding oneself out as being registered or licensed.

19.3.3 Application

The person or authority to whom, and the way in which, application is to be made must be provided for. Often application is required to be made in a standard form prescribed either in the Act or subsidiary legislation. The section concerned might be the place to set out any required qualifications or any disqualifications.

In cases where the grant of a licence might be a matter of public concern (e.g. liquor, gaming) there would need to be provisions for giving notice of an application and for objections to be lodged. In addition, in cases where there is a considerable risk of malpractice, the authority might want to require the giving of security.

19.3.4 Criteria for grant

These would depend very much on the type of licence granted. In a simple revenue-gathering exercise (e.g. television or motor vehicle licences), the criteria can be set out in the legislation, so that the grant will be automatic on payment of the requisite fee. But in many cases the suitability of the applicant will be a matter for assessment. Clearly this will involve a discretion in the authority to grant or refuse:

> A person applying for registration under this Act must satisfy the Board that he or she:
> (a) is of good character and reputation;
> (b) is resident in Utopia; and
> (c) holds an approved professional qualification.

19.3.5 Processing of the application

Procedure is normally a matter of administration rather than law, but in cases where a person's livelihood or reputation might be adversely affected by refusal to grant, a right to be heard in person, or at least to make written representations, might be required. Courts would be likely in these cases to hold that the rules of natural justice require it. Provisions might be necessary relating, for example, to informing the applicant in writing of the reasons for refusal, particularly if there is to be an appeal procedure, or to giving the applicant the opportunity of making representations in person:

> Before refusing an application for a licence the Council must give the person making the application an opportunity of appearing before, and making representations to, a committee of the Council.

19.3.6 Imposing of conditions

Where specified or prescribed conditions are to attach to a licence of a particular kind, these should be set out in the Act or subsidiary legislation. If the authority is to have the power to impose other conditions, there would need to be an express power to allow it to do so (it would be unsafe to leave such an important power to have to be argued as being a necessary incidental one).

> A licensing authority may attach conditions and limitations to licences in addition to those provided for in regulations, but not in a manner inconsistent with this Act or the regulations.

19.3.7 Duration and renewal

Unless a licence is for a particular occasion (sometimes called an 'occasional licence'), the duration period (commonly one year from the date of issue) must be provided for, probably in the Act. Provisions relating to **renewal** must be set out, particularly where these differ from those on original application (e.g. because a more streamlined procedure is to be involved). This aspect of things does not normally apply with respect to registration.

19.3.8 Variation

If the power to vary is required (e.g. to reflect a change in business premises) it should be stated.

> The Authority may, by written notice, require the holder of a licence to return it to the Authority within 14 days to enable the licence to be amended.

If that power is exercisable by the authority of its own motion (e.g. to add conditions to a licence), then a procedure consistent with natural justice, for example provisions relating to prior notification, and the opportunity to make representations, probably need also to be included.

19.3.9 Suspension, revocation and surrender

These powers are not necessarily to be implied in a power to register or grant a licence but should be expressly dealt with. Again, principles of natural justice would normally require that the person to be affected be given an opportunity to make representations. In cases of surrender, actual delivery up of the document might not always be required unless, for example, in cases where a refund of part of a licence fee is available.

19.3.10 Transfer

A licence is normally personal to the grantee, but some licences, particularly those of a revenue-gathering character (e.g. a motor vehicle licence), or where the licensee dies, may be transferable:

> On the death of the holder of a licence, the personal representatives of the deceased are to be treated as the holders of the licence for 3 months from the date of death or any longer period the licensing authority may approve.

Provision should be made for conditions, if any, which are to apply to transfer (e.g. notification, possibly in a prescribed manner, to the authority).

19.3.11 Appeals

If provided for, these would apply in cases of refusal to register, or grant or renew a licence. An appeal procedure would normally be confined to cases where the applicant or licensee stands to lose economically or in reputation. The matter of exactly who has the right to appeal (is it to be extended to persons other than those directly affected?), the grounds, the appeal authority, the time limitation applicable and the powers of the appellate authority need to be provided for.

19.3.12 Display and production for inspection

If there are precise requirements for display, these must be set out. Apart from these, there would normally need to be some fairly good reason to require production for inspection (e.g. suspicion of conducting a regulated business without a licence).

19.3.13 Inspection of register

The issue of whether or not a register is to be open for public inspection must be considered. Are there public interest issues bearing on the matter?

19.3.14 Enforcement

Powers of appointment of inspectors, and of entry and inspection of documents relating to the licensed or registered activity, might be required, with offences and penalties in respect of obstruction.

19.3.15 Subsidiary legislation

Procedural arrangements, prescription of fees and forms, and other administrative details, are commonly left to be dealt with by subsidiary legislation.

19.4 Typical transitional and savings provisions relating to licences

19.4.1 Automatic grant of licence, or registration, in certain cases

If a person who was an operator of a retirement home immediately before the commencement of this Act applies in the prescribed manner for a licence under section 5 within 60 days of the commencement:

(a) the licensing authority must then issue a licence to that person in respect of the premises in which he or she was operating; but

(b) the provisions of this Act operate [*note: not* shall *operate*] in respect of that licence.

Where at the commencement of this Act a person was practising accountancy, and had been continuously so practising for not less than 5 years immediately before commencement, that person is to be taken to be qualified under section 26 and is entitled to be registered under this Act.

19.4.2 Time to be granted to apply

A person who immediately before the coming into force of this Act was operating a zoo may continue to operate that zoo without a licence under this Act:

(a) for a period of 6 months beginning with that date; and

(b) if within that period he or she applies for a licence, until that application is finally disposed of or withdrawn and, if the application is refused, for a further period of 6 months from the date of refusal.

19.4.3 Postponement of operation of law

A person must not, after a period of 6 months from the date of the commencement of this Act, carry on business as a tourist guide...

19.4.4 Temporary option to choose law

During the period of 3 months from the commencement of this Act, a person who wants to begin constructing, altering or demolishing a building may, at that person's option, apply:

(a) for a building permit under this Act; or

(b) for the permit that would have been required if this Act had not come into force, in which case the application is to be dealt with as though this Act had not come into force.

Chapter 20
Financial Legislation

20.1 Introduction

The expression 'financial legislation' is commonly used in two senses. In its wider sense, it refers to the whole body of legislation concerned with all aspects of finance, including that dealing with banking, financial institutions, financial services (e.g. advice on investments, mortgages, pensions), insurance, capital markets, loans, securities, etc.

In its narrower sense, 'financial legislation' refers to the body of statutes concerned with **public** finance, in particular that of the central government, namely government

- accounting
- expenditure
- borrowing, guarantees and lending
- income from taxation.

This chapter is concerned only with the latter types of legislation.

20.2 Government accounting

The starting point for legislative control of government accounting is usually the Constitution itself. Typically, that document will provide for:

- government funds, often known as 'the public exchequer', to be maintained in a central account which, following the practice in the United Kingdom, is usually called 'the Consolidated Fund'
- the office of Auditor-General (or similar title such as Director of Audit) whose duties are to audit the Consolidated Fund and government accounting generally, and whose independence is normally a matter for express provision.

The **Consolidated Fund** is the fund into which, with limited exceptions, all government revenue, including that from loans, is to be paid. The main exceptions are:

- cases where the Treasury:
  - directs that revenue received by government departments by way of, for example, fees, fines and penalties, and proceeds of sale may, instead of being paid into the Consolidated Fund, be applied for the purposes of the departments themselves by way of appropriations-in-aid; or
  - authorises deductions by those departments of sums required to be paid out by them as, e.g., repayments or refunds; and
- money paid under authority of primary legislation into a special fund set up for a particular purpose, such as a national loans fund (for government lending) or a road tolls fund (for maintenance of roads).

Legislation (e.g. a Government Accounting Act or an Exchequer Act) will also provide in outline for accounting by government departments, particularly the provision for each department to have an accounting officer (normally the permanent secretary or other senior civil servant) who is answerable to the Auditor General, and ultimately to Parliament.

Parliamentary control over government spending is typically exercised by the Public Accounts Committee, a committee of the legislature with power to examine accounting officers under oath and, ultimately, to surcharge accounting officers for money misspent.

20.3 Government expenditure

There may be variations on precise requirements in different jurisdictions, but the following broad principles apply. Payments out of the Consolidated Fund may be made only on the authorisation of Parliament. This is done by means of an annual appropriation. The Bill to enable this to be done sets out the sums of money which government proposes should be applied towards each department of government. Heads of expenditure are grouped under "votes", i.e. sums on which individual votes of Parliament are taken. During the course of the government's financial year some fine-tuning may be required to the figures in the Appropriation Act, and a Supplementary Appropriation Bill may be presented to Parliament for authority to adjust votes (usually by increasing the sums originally allocated).

The drafting of Appropriation and Supplementary Appropriation Bills follows a pattern from which there is usually little need to depart substantially.

Not all public expenditure will, however, be authorised by Appropriation Acts. The Constitution or other specific Acts will typically authorise certain types of expenditure to be charged directly on the Consolidated Fund: e.g. the salaries of High Court judges and certain constitutional officers,

and money required for repayment of loans and to meet liabilities under government guarantees. This authorisation precludes the necessity for the expenditure to have to be included in the annual estimates and thus be subject, at least in theory, to the hazard of being voted down in Parliament.

20.4 Government borrowing, guarantees and lending

All borrowing by governments needs the express authority of Parliament. The borrowing may be either external or internal and, particularly in the case of the former, either general or specific.

Legislation to authorise **external** borrowing (e.g. from international banks and development agencies), which would probably be in currency other than the local currency, would state the general purpose for which loans could be obtained, for example 'for the purpose of financing general development in Utopia', and specify a limit, in terms of the local currency, to which this type of borrowing could extend. Specific loan authorisation legislation might be required in certain cases, for example where the limit of borrowing under general legislation has been reached, or where different terms and conditions are required from the normal.

Internal borrowing usually takes the form of the issue of various types of security, although other methods may be authorised in general terms.

Statutory authority is also required to enable governments to give guarantees (usually required in respect of loans made for purposes of local authorities or statutory corporations). This would be given either under a general authority (subject to the approval of Parliament in each particular case and subject to an overall stated maximum commitment) or a specific loan guarantee Act.

Lending by governments may also be authorised in respect of statutory corporations, together with relevant provisions on accounting and repayment. However, the philosophy of governments generally has tended towards encouraging privatisation and the raising of capital in the private sector.

20.5 Taxation

Undoubtedly the most important area of government financial legislation for legislative counsel is that concerning its main source of revenue: taxation. The need for clarity of expression is self-evidently paramount and, although the courts have moved away from literalistic construction of taxing statutes, they will not readily presume or imply an intention to tax. Taxation statutes can be reduced to a number of basic elements.

20.5.1 The contents of taxation statutes

Imposition of the tax

Although the word 'tax' is the most usual one to describe both the process of levying money for government purposes and the money itself so raised, a variety of other names are also used, including:

> **Duty:** used to signify money raised by the customs and excise department from importation of goods into the country ('import duty') and also occasionally from exportation of goods; and, in the form of 'excise duty', from certain goods manufactured locally (typically beer, wine, spirituous liquor and tobacco, and occasionally also refined motor spirit); the word is also applied to the tax on the estates of deceased persons ('estate duty') and elsewhere.
>
> **Rates:** a tax raised for the purposes of local authorities, typically on the value of immovable property (known as the 'rateable value') and payable annually in a lump sum or in instalments.
>
> **Cess:** in some jurisdictions used to signify a tax raised for the purposes of local authorities otherwise than on immovable property.
>
> **Toll:** a tax imposed on the use of land transportation facilities (particular roads and bridges); in modern times tolls are often applied towards offsetting the capital cost of building, and the upkeep, of those facilities.
>
> **Levy:** as a verb this word is used to describe the process of raising taxation; as a noun, it is usually used to signify a tax authorised to be raised by subsidiary legislation for specific purposes, often in furtherance of the industry or activity on which it is charged.

The largest part of a central government's revenue is raised in most jurisdictions by three main taxes on income and goods generally: income tax (including corporation tax); sales tax, or its more modern expanded equivalent, value added tax (a tax on, *inter alia*, services that would otherwise have to be raised under a number of separate Acts); and import duty. However, the revenue is supplemented by a large variety of other taxes, of which examples include taxes on:

- capital gains
- entertainments ('betting tax', 'entertainment tax')
- estates of deceased persons ('estate duty', 'inheritance tax', 'capital transfer tax')

- heads of population ('poll tax')
- immovable property ('rates', 'property tax', 'hut tax')
- instruments ('stamp duty')
- processes ('oil refinery throughput tax')
- provision of services ('hotel accommodation tax', 'airport tax')
- specific transactions (e.g. sale of second-hand motor vehicles)
- transfers of property between living persons ('capital transfer tax')
- travel ('airport tax', 'vehicle excise duty', 'road/bridge tolls').

The raising of money on certain activities can be expressed as a tax on different components of them. For example, airport tax could be raised as a tax on **air travel** or alternatively on **the use of airport facilities**.

Rate of tax

The rate is most often expressed as a percentage of the value of the income, goods, services, etc., taxed (i.e. an *ad valorem* tax, duty, etc.). Alternatively, tax can be expressed as a fixed sum, related either to measurement of goods, etc., taxed, for example:

- per tonne, kilogramme or gramme (as with coal, lubricating oil or tobacco)
- per litre (as with beer or motor spirit)
- per cubic or square metre (as with cement or fabrics)
- per kilowatt hour (electricity)

or related directly to the subject matter of the tax:

- per head of population (poll tax)
- per journey (airport tax, road or bridge toll)

or simply expressed as a set annual amount (vehicle excise duty).

What is often considerably more complex is the assessment of the value of the thing to be taxed. The complexity of income tax legislation is well known; apart from setting different levels, or 'bands', of tax, it must deal with numerous special cases, exemptions and allowances, as well as complex anti-avoidance provisions, for example provisions for certain benefits to be treated as income. Provisions in customs and excise legislation for assessing the value of imported goods are often sufficiently complex to require being set out in a Schedule.

Persons liable to pay

Precise identification of the persons liable to pay tax is the next requirement of the legislation. In most cases, this will be apparent from the nature of the tax (income tax by the wage or salary earner, import duty by the importer, estate duty by the executors or administrators), although this does not absolve the drafter from the duty to make this clear.

In other cases, the person liable to pay will not be apparent from the nature of the tax and will depend on how the Act is drafted. The liability to pay hotel accommodation tax, for example, could be expressed to be that of the **hotel guest**, in which case the hotel proprietor would almost certainly have to be appointed as collector of the tax on the government's behalf (see the paragraph on **collection** below). On the other hand, the liability could be made that of the **hotel proprietor**, but with the power to pass on the tax to the hotel guest.

When liability to tax arises

Liability to tax would normally arise on the happening of:

- the activity which is being taxed (the earning of a salary, the importation of goods, the purchase of goods or services, the purchase of a ticket for entertainment, the undertaking of a journey, etc.); or
- the state of affairs which precipitates it (death, purchase of immovable property, purchase or lease of a vehicle, etc.).

In a complex area of taxation such as VAT, the liability might be attached to a specific event in the transaction (e.g. the raising of an invoice for goods or services).

When the tax is payable

In many cases the liability to pay is contemporaneous, or practically so, with the liability to tax itself (VAT, sales tax, import duty and airport tax), or may even in practice **precede** the happening of the taxable event (e.g. where tickets are purchased for entertainments which are taxed, or for flights in respect of which airport tax is added to the cost of a ticket).

But very often there is a delay between liability to tax and the requirement to pay it. For example, income tax – unless collected under a 'Pay as you Earn' scheme – must be the subject of an assessment, itself dependent on the submission by the taxpayer of a return of income; and estate duty, where a final assessment of the amount payable may have to await lengthy liquidation processes, for example of foreign-held capital.

Exemptions

So far as possible, exemptions should be set out in the Act, but it is not always practicable to do this and power is often given to exempt by subsidiary legislation.

Refunds, repayments, rebates and remissions

One or more of this loosely connected series of devices are commonly included in taxation legislation both for repaying sums of money to the taxpayer and for forbearance to collect tax due. The terms are not all mutually exclusive, but the following are their usual meanings:

- **Refund:** a return of tax overpaid by the taxpayer; this can arise in a number of situations, for example after reassessment of liability to tax on an appeal, or after a reclaim of tax deducted at source, such as on investment dividends or bank interest.
- **Repayment:** similar to the last term, although it more usually refers to a refund of a total amount paid in error, for example on later acceptance by the revenue authorities that the taxpayer was not liable in law for the amount collected.
- **Rebate:** a repayment, or discount of tax otherwise due, usually made under a formal scheme, for example for complying with a government incentive for setting up manufacturing plant in an economically depressed area, or exporting manufactured goods.
- **Remission:** a forbearance by government to collect tax technically due; commonly used in cases of import duty otherwise due on goods imported, for example for the purposes of charitable organisations.

Collection

Where the administrative arrangements for the collection of a tax are to be made directly by government then there is no need for legislative provisions on the matter; it can be dealt with by internal directions from the Treasury. In many instances it will be necessary to provide for tax to be collected by a person on behalf of government, for example hotel accommodation tax might be collected by the hotel proprietor, airport tax by the airlines, etc.

However, part of the collection process **as it affects the taxpayer** with regard to the more complex taxes such as income tax involves the setting up of procedures for returns, assessments, and for appeal procedures, the latter typically being accompanied by a requirement to pay the assessed amount pending the outcome of an appeal.

Taxation statues often make provision for the recovery of tax by a speedy procedure in the magistrates' courts known as 'summary recovery of debt'. And, especially in statutes providing for the main areas of taxation, there are typically detailed rules concerning distraint (i.e. seizure in accordance with the law) on movable and immovable property of the taxpayer including, in the case of immovable property, the power to apply to the court for a charging order.

Where a collecting agent is appointed, the government will need to take powers to audit the accounts of the agent. This in turn will involve detailed provisions on accounting, including the duty to keep records and make returns (provisions which are likely in practice to be made in subsidiary legislation). Final resort powers of entry, search and seizure will also be required.

Offences and penalties

These will be required, *inter alia*, for non-payment, failure to account, false or misleading returns, and obstruction of inspectors.

Subsidiary legislation

In the more complex taxing statutes, detailed rules will be needed to flesh out the legislation, provide for forms, appeal procedures, etc.

20.5.2 Special procedures for 'money bills'

Because of its importance and potential political sensitivity, legislation dealing with government finance is commonly subject to special procedures in the legislature which are set out in the Constitution. The following definition is typical:

> In this section 'money Bill' means:
> (a) an appropriation Bill or a supplementary appropriation Bill, including any other Bill for the payment, issue or withdrawal from the Consolidated Fund or any other public fund of money charged on those funds, or of any alteration in the amount of such a payment, issue or withdrawal;
> (b) a Bill for the imposition, increase, reduction, withdrawal or cancellation of a tax or duty.

Typically, special conditions applicable to such a Bill would include:

- in a bicameral system, following the UK, introduction into, and with power of rejection or amendment only by, the lower Chamber; or, where power to reject or amend lies with both Chambers, procedure for where the Bill is passed by one Chamber and not the other
- express sanction for the introduction of the Bill to be given by the Head of State, or Minister responsible for finance

- introduction itself to be only by the Minister responsible for finance
- lack of power in the Head of State to veto.

20.5.3 The Finance Bill and provisional collection of taxes

In most jurisdictions one of the most significant of the money Bills will be the annual Finance Bill (at least in so far as the Bill introduces matters which come within the concept of a money Bill). This is introduced by the Minister responsible for finance in order to give legislative effect to the government's proposals for changes in the levels of taxation for the coming year so that there may be collected the necessary level of revenue required to meet proposed expenditure. The Bill itself will typically propose, *inter alia*, amendments to a number of taxation Acts.

Where new rates of particular types of tax are to be introduced (e.g. import duty, VAT) it is desirable that they should take effect immediately, in order to prevent the possibility of, for example, stockpiling of goods on which it is known that the tax, and hence the overall cost, will rise. Thus it is necessary to enable the new taxes in the Bill to be levied as soon as it is introduced. The device for doing this is, typically, a Provisional Collection of Taxes Act, under which an order, or resolution of the legislature, will authorise taxes in the Bill to be collected as from the date of the order or resolution (i.e. the date of publication and introduction of the Bill) **as though the Bill had been passed into law**.

The device clearly needs to operate under specified limitations, and the enabling Act will provide that the order or resolution will cease to have effect on the happening of a number of events:

- failure to introduce the Bill, or more likely to have it read a second time, within a fixed time (usually 3 or 4 months)
- rejection or withdrawal of the Bill
- failure to pass the Bill into law within a fixed time (usually 6 months)
- (as normally happens in practice) the passing of the Bill into law.

Similar provisions on cessation will apply where individual taxes in the Bill are voted down or withdrawn. The consequence of this happening on any but the last of these events could be extremely inconvenient for Government, as the legislation will typically require taxes collected up to that point to be refunded.

Finally, the drafting consequence of such an order or resolution is that the provisions thus brought into effect will, when the Bill is enacted, need to be expressed to operate **retroactively** from the date of the order or resolution.

Appendix A
Legislative Procedure and Preparation
A typical Government directive applicable to a small Commonwealth jurisdiction

References are made below to the Prime Minister, but they apply equally to the President or Head of Government however styled.

Part I Bills

Proposals for legislation

1(1) Where proposals for legislation are initiated within a Ministry they are the responsibility of the Minister holding the portfolio. Where they are initiated within a special Department they are the responsibility of the Minister to whom responsibility for that Department is assigned by the Prime Minister, who must be approached by the Head of Department with a view to obtaining his or her decision about whether the legislation is necessary.

(2) Where a Minister considers that new or amending legislation by Act of Parliament is necessary, interested persons and bodies should be consulted wherever possible, and a Cabinet Memorandum asking for approval in principle must be submitted by the Minister to the Cabinet.

(3) The Cabinet Memorandum must set out the principles of the policy intended to be carried into effect by the proposed Bill, and the reasons why it is considered necessary, but it should not go into detail as to changes in existing law that will be needed. It must also state the classification of the proposed Bill. The classifications are:

URGENT – to be introduced at the current meeting of Parliament;

PRIORITY A – to be introduced at the next meeting;

PRIORITY B – to be introduced at the next meeting but one;

PRIORITY C – to be introduced at some later time.

(4) Wherever possible a draft of the Cabinet Memorandum should be sent in advance to the Law Officers so that they may advise on whether an Act of Parliament is in fact necessary in order to achieve the objects desired, and on other legal aspects of the proposal.

Approval in principle

2(1) The Secretary to the Cabinet will as soon as possible notify the Department concerned and the Law Officers of the Cabinet's decision on an application for approval in principle.

(2) Where approval in principle is given, the head of the Ministry concerned will send Drafting Instructions to the Law Officers for the drafting of the Bill.

(3) Except in cases of extreme urgency, or for other exceptional reasons, instructions for the drafting of a Bill must not be given unless Cabinet's approval in principle has been obtained.

Drafting instructions

3(1) Drafting instructions must contain:

- full details of the policy intended to be carried into effect by the Bill
- references to the enactments proposed to be repealed or amended
- an indication of the priority of the Bill as determined by the Cabinet

(2) Drafting Instructions should be accompanied by the relevant memoranda, reports of committees, and any other material which may be useful to legislative counsel. ***Draft Bills should not be sent as Drafting Instructions, but may, in exceptional cases (such as where the subject matter of the intended legislation is of a highly technical nature), be included.***

Legislative programme

4(1) About two months before each meeting of Parliament, the Prime Minister's Office will circulate a request for a list of the Bills proposed to be introduced during that meeting and at subsequent meetings by each Minister. The returns from Ministries will be consolidated and submitted to the Cabinet Legislation Committee, which will prepare for Cabinet approval a programme for the forthcoming meeting and subsequent meetings. The order of priority for each Bill is decided by the Cabinet.

(2) With the approval of the Cabinet, legislation which is not included in the programme may be introduced during the meeting if the need should arise, but this should as far as possible be avoided, since in such cases there is seldom time for full consideration of the drafting of the Bill.

Hasty and ill-considered legislation is likely to contain errors which may interfere with its intended working and bring the law into disrepute.

Settlement of Draft Bills

5(1) After such discussions and clarification of the Drafting Instructions as legislative counsel may consider necessary, counsel will produce the first draft of the Bill. In the cases of long or complex Bills the first draft may be of only a particular segment of the Bill.

(2) Legislative counsel will send the first draft to the Ministry concerned and any other Departments which are interested in the subject matter of the Bill.

(3) All persons to whom a draft Bill or part of a Bill is sent should scrutinise the Bill with care to make sure that it gives effect to the policy desired. It should not be assumed that, because a Bill has been drafted by legislative counsel, it does not require scrutiny in this way. It may happen that there has been some misunderstanding over the legislative intent, or there may be other reasons for corrections in the draft. However, alterations to the text of the draft Bill must in no circumstance be made otherwise than by legislative counsel.

Memorandum to the Bill

6. The Standing Orders of Parliament require every Bill to be accompanied by a Memorandum to the Bill signed by the Minister introducing the Bill, explaining its main features. The Ministry concerned should settle the wording of the Memorandum to the Bill, but legislative counsel should be consulted to ensure that the Memorandum correctly describes its contents.

Cabinet approval of Draft Bill

7(1) When the form of the Bill has been agreed between the sponsoring Ministry and legislative counsel, the Minister responsible will submit it to the Cabinet for final approval and for permission to introduce the Bill in Parliament. The sponsoring Ministry must forward to the Secretary to the Cabinet a memorandum by the Minister seeking this approval and permission, together with the requisite number of copies of the draft Bill.

(2) The Secretary to the Cabinet will normally forward a copy of the Minister's memorandum and the Cabinet's decision on it to the Law Officers so that a record can be kept of the Bills which have been approved for introduction.

Publication of Draft Bill

8(1) Except where the Certificate of Urgency procedure is to be used, the sponsoring Ministry should arrange for the publication of the Bill as soon as possible after Cabinet permission has been given. The Standing Orders of Parliament require a certain interval to elapse between the publication and introduction of the draft Bill unless the Certificate of Urgency procedure is followed. Seven clear days must elapse between the day on which the sitting commences and the day on which the Bill is to be introduced. If a Bill is published before or during a meeting and is not introduced at a subsequent meeting within one month of the original publication, that Bill must be re-published.

(2) The Bill must be published as a supplement to the *Gazette*.

(3) Only one *Gazette* publication is necessary, but since it is essential that all Members of Parliament should have had as much opportunity as possible to study the text of a Bill before it is debated in Parliament, the notice prescribed by the Standing Orders is regarded as the minimum. Normally, considerably more notice should be given.

(4) It is sometimes the case that a Bill prepared at the instance of one Ministry and designed for a particular purpose affects other Ministries, or is one to which an amendment could be moved to deal with minor points with which other Ministries are concerned. It is important therefore that all Ministries should study Bills published in the *Gazette*, as well as paying careful attention to the legislative programme generally.

(5) The Standing Orders of Parliament permit alterations to be made in the Bill as published if those are of a trivial or drafting character. The alterations are made when the blue copies of the Bill as introduced are printed. Since this procedure avoids the need for formal amendments in Parliament it should be used wherever necessary.

Certificate of Urgency Procedure

9(1) The Standing Orders provide that a Bill mentioned in a Certificate of Urgency, signed by the Prime Minister, may be introduced without publication or distribution to Members of Parliament, and may be taken through all its stages in one day.

(2) Where a Bill has to be introduced under a Certificate of Urgency, the Ministry concerned should make the necessary arrangements with the Secretary to the Cabinet, and should inform legislative counsel without delay. The Ministry should also inform the Prime Minister's Office of the date on which the Certificate has been sent to the Speaker.

(3) It is emphasised that this procedure for the introduction of a Bill is for use in emergency only and is to be avoided as much as possible. In order to achieve its purpose of giving effect to government policies, legislation needs to be prepared with care and due consideration. Legislation put through in haste and without adequate publicity is likely to prove defective.

Passage of Bill

10(1) The progress of a Bill in Parliament is governed by the Standing Orders of Parliament which provide for four main stages. The **First Reading**, which is purely formal, takes place when the Minister responsible for the Bill rises in place and bows to the Chair, and the clerk reads aloud the Long Title. The **Second Reading**, involves consideration of the principles and general merits of the Bill. The Bill then passes through the **Committee Stage** (also known as the **Consideration Stage**), at which the details of the Bill may be considered and amendments made. Normally two sitting days must elapse between **Second Reading** and **Consideration Stage**.

(2) The Bill is treated as having been passed when it receives the **Third Reading**, which normally cannot take place earlier than the next but one sitting day after the **Committee Stage**. The periods between stages prescribed by Standing Orders should be regarded as the minimum. Normally in a Bill of any length or one which is controversial there should be an interval of approximately a week between the **Second Reading Stage** and the **Committee Stage**, and all Government amendments should be put as early as possible.

(3) The sponsoring Ministry should take careful note of the progress of the Bill through Parliament, and a representative of the Ministry should be present at the **Second Reading Stage** and **the Committee Stage**. Legislative counsel should also attend. The Weekly Business Statement, which is normally given in Parliament on Fridays, will usually indicate when a particular stage of a Bill is to be taken. Reference may also be made to the agenda and provisional agenda of Parliament.

Assent

11(1) When a Bill has been passed by Parliament the Clerk of Parliament will follow the relevant procedures laid down and submit Presentation Copies to the Head of State for the Assent.

(2) Where the Assent has been given, it is the responsibility of the Clerk of Parliament to number the Presentation Copies. One copy is retained

by the Prime Minister's Office and the Prime Minister's Office should forward the remaining copies one each to the Chief Justice, the Speaker and the Archivist.

Publication

12. As soon as possible after Assent, the Act should be published in the *Gazette*. The avoidance of delay may be of particular importance where a Bill has been introduced under a Certificate of Urgency. Unless the Act otherwise provides, it comes into force at the commencement of the day following the day on which the Assent is signified, or as provided by the Constitution, or on the date of publication. The date of Assent will appear at the beginning of each Act. Where an Act provides that it should come into force on a date to be determined, the initiative for obtaining Cabinet approval for its date of commencement rests with the sponsoring Ministry.

Part II Subsidiary Legislation

Cabinet Approval

13. Where it is proposed to make subsidiary legislation, the Minister concerned should, subject to the directions given by the Prime Minister, decide whether Cabinet approval for the making of the instrument is necessary. Where Cabinet approval is considered necessary, a Cabinet Memorandum asking for this must be submitted by the Minister to the Cabinet.

Drafting

14(1) Subject to the directions given by the Cabinet or the Minister responsible, the Head of a Ministry should decide whether subsidiary legislation is to be drafted within the Ministry or by legislative counsel. Except in special cases, executive instruments will be drafted within the Ministry concerned, but with any necessary assistance of legislative counsel.

(2) Where an instrument is to be drafted by legislative counsel, Drafting Instructions must be sent to the Law Officers. These must contain full details of the policy intended to be carried into effect by the instrument and should be accompanied by the relevant memoranda and any other material which may be useful to legislative counsel. Subject to the necessary modifications, paragraph 5 relating to the settlement of draft Bills applies in relation to instruments drafted by legislative counsel.

(3) Where subsidiary legislation has not been drafted by legislative counsel it must be submitted in draft to the Law Officers so that its validity and form may be checked before it is made.

(4) All subsidiary legislation intended for publication must be in the form required by the relevant legislation.

Making of subsidiary legislation

15. Subsidiary legislation is made when it is signed by the Head of State or the Minister responsible. The procedure laid down by the relevant legislation should be followed.

Publication

16(1) All subsidiary legislation must be published in the *Gazette*. The Ministry concerned should send a copy of the instrument to the Government Printer for publication.

(2) Where a legislative instrument or executive instrument is sent to the Government Printer for publication, the officer concerned must ensure that it is in the proper form and must indicate whether the instrument is a legislative instrument or an executive instrument.

(3) Unless the instrument otherwise provides, a legislative instrument comes into operation on the date of *Gazette* notification. This date is printed at the end of the instrument. An executive instrument comes into operation on the day on which it is made.

Appendix B
Guidelines for the Preparation of Cabinet Submissions[1]

Introduction

Information relating to matters requiring Cabinet consideration, co-ordination of policy proposals, handling of Cabinet papers and the announcement of Cabinet decisions and subsequent action will be discussed.

Drafting of Submissions

Submissions, whether to Cabinet or to a Cabinet Committee, should be prepared in the following manner:

Length: Submissions should be drafted to bring out essential issues or items. They should be kept short and in general not exceed 3–4 pages. Any necessary attachments to the Submission should be kept to a minimum.

Title: A brief and descriptive title indicating the subject matter for consideration should head the Submission. The heading should be as specific as practicable and show, as appropriate, the short title of any Act proposed to be amended, or of any proposed Bill where new legislation is involved.

Body of the Submission: this should be divided into parts as suggested below, in order to produce a clear and logical exposition of the subject. Paragraphs in the body of the Submission should be numbered consecutively.

- *Purpose of Submission* – the opening paragraph should reveal its purpose.
- *Background* – a brief summary of the events leading up to the proposal, including references to any previous considerations of the subject by the Cabinet or Committee.
- *Issues for Consideration* – treated separately in subparagraphs as necessary.
- *Interdepartmental Consultation* – reference to interdepartmental consultation should be made in the Submission and where there are differences these should be mentioned.

1 Reproduced and adapted from the *Handbook on Legislation*, with the permission of the Attorney-General of the Commonwealth of Australia.

- *Financial Considerations* – costs of the proposal or savings, should be stated. If proposals affect revenue or the tax pattern, they should be developed in consultation with the Treasury and, as necessary, with the Treasurer, or the Permanent Secretary to the Ministry of Finance.
- *Employment Considerations* – where significant employment effects are likely to result from adoption of the proposals, these should be stated.
- *Legislation* – where approval of a recommendation would involve legislation, reference to this should be made in the Submission and an adequate statement of the nature of the proposed legislation should be presented. The Submission should indicate:
  - whether a completely new Act is required;
  - in the case of proposals involving amending legislation, the short title or titles of the Act or Acts affected;
  - whether there is any particular degree of urgency associated with the legislation, for example whether it has to be in force by a particular date;
  - whether there is any other legislation (to be named) which needs to be drafted or otherwise dealt with in association with the proposed legislation.

  In connection with the last two points, reference should be made to any Legislation Committee decision concerning inclusion of the proposed legislation in the legislation programme for a period of Parliamentary Sittings.
- *Recommendations* – the Submission should conclude with a summary of recommendations for which Cabinet approval is sought.

The recommendations should contain no argument or evidence, but should be confined to the action recommended to the Cabinet. The recommendations should stand on their own, although reference may be made as appropriate to the supporting paragraph in the Submission. In effect, the language of the recommendations should be as close as possible to the language of the necessary Cabinet Decision. Care should be taken to ensure that the recommendations are comprehensive, i.e. they should cover all proposals advanced in the Submission.

Attachments and cross-references: Where in the body of a Submission a reference is made to an attachment, that reference should be underlined and it should be made clear which paragraph of the attachment is referred to.

Cabinet decisions of earlier administrations – Quotation of, and explicit references by number and date to, Cabinet Decisions of earlier administrations

should be avoided. According to the conventions which apply in this area, it is desirable that new Governments do not in the normal course have access to Cabinet and other personal or confidential papers of earlier administrations.

Where a particular decision needs to be known, the preferable course is for a new Government to be advised of such of its terms as are necessary, but without providing access to the decision itself and all the associated papers. However, the conventions permit access to Cabinet files by incoming administrations in particular circumstances for the purpose of discovering what operative decisions have actually been made and ascertaining the content of communications in fact made between the Governments and outside persons or authorities.

Date of Submission

The date the Submission is forwarded to the Cabinet Secretariat should be shown on the bottom left-hand corner of the last page of the Submission.

Number of copies

The Cabinet Secretariat will state the number of copies required of each Submission and any attachments.

Time factor

Unless circumstances are exceptional, a strict *'day rule'* will apply; that is, in order to be taken in Cabinet, a Submission must have been circulated to Ministers at least three clear working days beforehand. As far as possible, Submissions should not be listed for the Cabinet or a Cabinet Committee for consideration less than ten days following circulation. If there is any urgency for Cabinet consideration this should be mentioned, for example:

- where Cabinet has requested a report by a certain date
- where some agreement or Treaty is due for renewal
- where legislation has to be in force by a particular date
- where inter-governmental or other discussions are scheduled for a particular date.

Security

Cabinet documents are to be protected, in accordance with standing instructions on the security of official documents, and their confidentiality maintained.

Physical preparation of Cabinet Submissions paper

- Size A4
- Printed on special paper with the appropriate security classification printed in red at the top and bottom of each page
- Typeface not smaller than [one] pica except in columnar attachments
- Page numbers to be shown at the top (centre) of each page
- Attachments
  - each Submission and its attachments should be page-numbered comprehensively, that is, beginning at the first page of the Submission and running through to the last page of the last attachment
  - Where an attachment is so bulky that it is preferable that it is separate or is a bulky report already printed, it may have separate page numbering. A cover should be attached showing appropriate security classification.

FORMAT OF CABINET SUBMISSIONS
CONFIDENTIAL
(*or other security classification*)

Submission No.....

Copy No.....

Purpose of Submission

.....

.....

Background

.....

.....

Issues for Consideration

.....

.....

Interdepartmental-Ministerial Consultations

.....

.....

Financial Considerations

.....

.....

Employment Considerations

.....

.....

Legislation

.....

.....

Recommendations

Minister for.....

Date

Appendix C
Drafting Instructions

1. General matters relating to drafting instructions

On receiving Cabinet approval, the responsible Ministry should work out the details of the scheme in order to prepare drafting instructions. In practice this should be done by a lawyer in that Ministry or a senior official. Instructions should provide legislative counsel with the following:

- sufficient background information to enable appreciation of the facts and problems the Bill is to tackle
- the objectives of the Bill
- the manner in which it is intended that the policy is to be implemented (e.g. prohibitions, licences, penalties, exceptions)
- summaries and results of any consultations that have taken place inside or outside Government (especially with law enforcement authorities)
- reference to any relevant court decisions
- reference to any committee or commission reports considering the matter
- the administrative provisions needed to implement the Bill and the manner in which it is to be enforced
- the extent to which existing laws need to be considered, or amended or repealed
- transitional provisions that may have to be drafted to get smoothly from the existing situation to the proposed one
- whether the commencement of the legislation needs to be delayed, or conversely whether it needs to be given retrospective effect (this aspect of legislation is considered in Chapter 17)
- reference to statute law of other jurisdictions that may have a bearing.

The last point does not mean use of such law as a basis for instructions to draft (see the cautions set out in paragraphs 6–11 of Appendix E). Before

instructions are sent to legislative counsel, a careful check needs to be made to ensure that there is as far as possible a clear explanation of:

- the problems needing to be resolved and the solutions proposed (including suggested maximum penalties for breaches of provisions)
- the effect the new Bill will have on existing legislation.

2. Points that may need to be raised by counsel

If major issues of policy are involved, the client Ministry may need to be asked which policy choice is to be adopted. In addition, legislative counsel should raise any of the following issues, if relevant, as they are essentially of legal significance:

- possible conflict with fundamental rights and freedoms in the Constitution
- any other provision of the Constitution that may have a bearing (e.g. separation of powers)
- any relevant provisions of the Interpretation Act or equivalent, and whether it is necessary or desirable to modify them
- safeguards for persons already engaged in a trade or profession to be regulated by statute, particularly on the first occasion that it is to be so regulated
- proposals affecting specific personal rights (e.g. pensions)
- the need for, and extent of, delegation of powers to be given under a Bill
- retrospective or retroactive effect of any provisions
- any proposed extra-territorial effect to be given in a Bill
- whether the Government is to be bound
- the need for special provisions, for example on evidence or onus of proof.

For a detailed checklist of the matters an **instructing Ministry** needs to consider, reference is recommended to *Guidelines for Instructions to Draft and Process Legislation* by Segametsi Mothibatsela, Legal Adviser in the Rule of Law Division of the Commonwealth Secretariat.

Appendix D
Suggested Approaches to Translation of Policy

Legislative counsel will first of all need to be satisfied as to the type of legislation to be employed (this and associated matters are referred to in Chapter 11). From there it is a question of the detailed analysis of the policy. Apart from the use of the 'six serving men', and the requirement to ensure that as far as possible the matters referred to in the '6 Cs' of effective communication (both referred to in Chapter 2) apply, there can be no universal guide to the analysis required to effectively translate a particular policy into an effective legislative rule or series of rules. Obviously, each will depend on its own particular set of circumstances.

However, there follow two instances of simple policy statements and how legislative counsel might approach each of them:

Policy 1: Wildlife in nature sanctuaries to be protected

Firstly counsel would need to consider the broader aspects of the policy by asking fundamental questions about it:

Why? Environmental conservation.

Who? Anybody who is inside a sanctuary.

What ... exactly is being protected? Unless instructed about specific exceptions, counsel must assume this means **all** animal, and coral and plant life (including what might be termed as vermin, for e.g. rats).

How ... is protection to operate? Presumably this is to be by a complete ban on killing, injuring or damaging the animal and plant life.

Where? Obviously the protection is to apply within each sanctuary. Firstly counsel will need to establish to what kinds of area the policy is to apply. Do 'sanctuaries' included national wildlife parks or reserves, about which there may already be legislation? Or are they to be contained in legislation at a more local level (e.g. for local parks or wildlife sanctuaries)? This will probably be apparent from the nature of the instructions, but counsel might need to consider whether a definition of 'nature sanctuary' or 'wildlife sanctuary' is required.

Presumably the protection also applies to animals in, and plants growing in, a sanctuary that are accessible from outside it.

Having satisfied himself or herself as to the above, there is no rule as to how counsel should now proceed, but it is often a good idea to produce a first draft. This can then serve as a basis for further analysis and refinement. The following assumes that the sanctuary is a land rather than a marine one.

First draft

> A person must not kill, injure or cause damage to an animal or plant in a nature sanctuary.

As the process of analysis continues, it can quickly be seen that there are further matters that require attention.

Policy analysis refinements

'Animal' is capable of more than one meaning, depending on the context in which the word is used:

- mammals
- mammals, reptiles and amphibians (i.e. not birds, fish or invertebrates)
- all animal (as opposed to plant) life.

Presumably here the third of these is intended (i.e. to include birds, fish, insects, spiders, molluscs, snails, worms, etc.) and if so the term needed will be 'animal life'. As regards plants, instructions might be needed with regard to whether a definition is required to include, for example, fungi or seaweed, and it might be helpful to refer to larger plants (trees and shrubs) specifically.

Is the list of prohibited conduct exhaustive? Where animal life is concerned, **capturing** obviously needs also to be included, even where this action causes no injury. Furthermore, at a more subtle level, a ban would also be needed on behaviour that might frighten or disturb animals, especially if it is likely to affect their feeding or ability to breed.

Where plant life is concerned, there are activities that do not necessarily damage a plant that also probably need to be banned, namely removal in whole or part (e.g. some roots or branches), or picking flowers or fruit from it.

And what about domesticated animals that may wander into the sanctuary? Presumably the protection is not intended to apply to them, especially where they are, for example, farm animals that have escaped. Does the same consideration need to be given to domesticated plants (this is possible but less likely)?

How can distinction be made in a rule between what is a domestic animal or plant and what is not? Probably the expression 'in the wild' will cover the latter.

In the light of all these further considerations, counsel would be ready to produce a revised draft.

Revised draft

> A person must not:
> (a) kill, injure, capture, remove or disturb animal life occurring in the wild in a wildlife sanctuary;
> (b) destroy, damage, uproot or remove the whole or part of a tree, shrub or other plant growing in a wildlife sanctuary.

There are two particular points to note with regard to this. Firstly, the legal subject (see Chapter 4) is 'a person', not 'a person in a wildlife sanctuary'; hence, the application to those who might do something prohibited from outside the sanctuary itself. Secondly, the expression 'occurring in the wild' applies only in paragraph (a), meaning that protection for domesticated plants as well as wild ones would be afforded.

Policy 2: No standing on the bus

Here the basic policy analysis is simple:

Why?	Safety of passengers.
Who?	Applies to passengers, not, for example, bus company personnel.
When?	The bus is moving.
Where?	Inside the bus (not literally 'on' top of it), but 'on' conveys that idea

As in the previous example, an initial rough draft might help to focus on the problems.

First draft

> A passenger on a bus must not stand while the bus is moving

Policy analysis refinements

It does not take much thought to see that further clarification and refinement is needed. Firstly, with regard to the obligation not to stand, is it acceptable if, for example, passengers sit, crouch or lie on the floor, or on the seats?

Almost certainly not. In this case it is therefore far more effective to state what passengers are **required to do** (i.e. sit on a passenger seat) than what they are required **not** to do.

Secondly, does the rule mean literally no standing **at any time** while the bus is moving? Is it acceptable if passengers are standing while the bus is moving off if they have not yet reached their seats, or if they are preparing to get off the bus?

The practical answer to this question must be yes, meaning that some kind of exception needs to be considered.

Is the rule to be drafted for all buses whenever they contain passengers (including, for example, buses on private charter or hire), or only buses for use by the public (i.e. on scheduled service)? In the latter case, would the same rules apply to urban bus services as to inter-city bus services? These things would of course depend on the policy instructions, although it is likely that the rule would apply only to buses for use by the public. Private hire would in this sort of area probably be governed by the relevant hire agreement.

Having done the further analysis, it is now usually helpful to make a first rough draft that can be gradually refined in terms of precision and style. Making the assumption that the rule is to apply to passengers on a scheduled service, and also that an exception needs to be made in respect of getting on or off the bus. It can be seen that there are a number of alternative words and phrases that can be used:

> A passenger on a bus must [sit] [remain seated] on a passenger seat while the bus is [moving] [in motion], unless in the process of [getting on or off] [embarking on to or disembarking from] the bus.

This first draft of a rule (when a stylistic decision is made as to particular words or phrases to be used) will create, when penal provisions relating to contravention are added, a straightforward offence.

Refinement of the rule

But further consideration is needed as to how practicable (that is, easy to enforce) the rule will be. This can easily be tested by asking what happens if a passenger fails to comply?

Such a situation could arise by way of deliberate refusal to sit, even though there is a seat available, although in practice it would be more likely where, having been allowed on the bus, the person concerned finds that there is in fact no such seat. If a person, after a request to do so, fails (as the case requires) either to sit or to leave the bus, the driver (if he or she is not simply to ignore the contravention) is going to have to stop the bus and attempt to manhandle the offender off it, or call a bus inspector or the police to the

scene. The latter course would almost certainly be time-consuming and highly annoying for other passengers, and supposes both that the driver would have a radio or telephone and that the inspector or police are easily locatable.

So can the rule be strengthened to get round this problem? The neatest way would be by giving the driver express powers to direct a passenger who fails to sit as required or to get off, and to control the number of persons getting on. That initially produces two rules:

> If a passenger refuses to sit on a passenger seat, the driver may [direct] [require] that person to [leave] [disembark from] the bus.
>
> If all passenger seats are occupied the driver may [direct] [require] a person for whom there is no seat not to [get on] [enter] the bus or to [get off] [disembark from] it.

As the power to require a person to leave the bus is common to both these rules, the draft could be improved slightly by combining the two sentences and by using paragraphs:

> The driver may direct a person not to enter the bus or, having entered, to leave it if:
> (a) all the passenger seats are occupied; or
> (b) the person fails to occupy a passenger seat when one is available.

All that remains then is to draft the necessary penal provisions. As this is a low-level offence (it would probably exist in bye-laws), it is likely that the maximum sentence would consist of a fine only.

Putting all the elements together and polishing the draft in the process, the rule makes the assumption that the buses concerned are controlled by a driver alone:

> **Bus passengers to remain seated**
> (1) A passenger on a bus must remain seated on a passenger seat while the bus is moving, unless he or she is in the process of embarking or disembarking.
>
> (2) The driver may direct a person to not to enter the bus or, having entered, to leave it if:
> (a) all the passenger seats are occupied; or
> (b) the person, being a passenger, fails to occupy a passenger seat when one is available.
>
> (3) A person who contravenes paragraph (1), or who fails to comply with a direction of a driver under paragraph (2), commits an offence and is liable to a fine of $500.

In paragraph (2) it can be noted that a distinction has to be made between a person who is not yet a passenger and one who is (having paid a fare or used or displayed some kind of pass). Practical difficulties might arise in a case where a person is mistakenly admitted as a passenger, and provision made for a refund or credit of any fare paid.

Although an offence is created under both paragraphs (1) and (2), in practice any prosecution would probably be under (2). However, paragraph (1) is still needed to set out the full context of the rule.

Appendix E
Suggested Approaches to Drafting

Attention is drawn in this Appendix to various practical matters which are of particular relevance to legislative counsel at the start of the actual drafting of a Bill

1. In the first draft, counsel will construct the Bill on the foundations worked out in the legislative scheme which has been prepared (see Chapter 11).

2. In drafting individual provisions, counsel is urged to have regard to the approaches to translation of policy suggested in Appendix D.

3. An interval of time should ideally be allowed to elapse between the completion of the first draft and the start of the revision stage. This interval will allow counsel to bring a fresh and clear mind to the revision and he or she will be able to detect more easily errors, omissions and inconsistencies in the first draft. Sentences can, for example, be restricted or made shorter, without obscuring the intended meaning of the sentence. Once the draft has been revised, it is desirable to ask a colleague or colleagues to read the draft critically.

4. If a colleague, on reading the draft, interprets it in a manner not intended by counsel this will indicate at once that some changes to it are needed. In some jurisdictions, it is the practice for counsel to work in pairs. Where this is not the case the draft should so far as possible be checked by at least one other person before it is sent to the sponsoring Ministry.

5. In most cases counsel will have to prepare a number of drafts before the finalised draft Bill is sent to the sponsoring Ministry. During the drafting process he or she must constantly check the draft with other laws and in particular with the Interpretation Act. A date should be inserted on each of the drafts and the earlier drafts saved. At a later date there may be a need to revert to wording that has been used in an earlier draft.

6. While the use of legislative precedents from other jurisdictions may be useful, it is discouraged as a basis for drafts. This is because precedents apply someone else's thinking to a problem that may not be exactly the same as the one faced by counsel drafting the new provisions, and they can be misleading. If used they should act only as a check or comparison **after** counsel has prepared the necessary draft. Some specific provisions may need to be standardised within a jurisdiction, and to that extent a local precedent may be useful.

7. Even precedents from within the jurisdiction need to be used with care. While they might be useful as examples on how to draft the more formal provisions in a Bill to set up a statutory corporation, great care needs to be exercised to ensure that provisions are not included merely because they have been in the past; each must be clearly understood as having a valid function in the Bill being drafted.

8. However, an exception to the caution against the use of precedents would be the occasional cases where a model Act, such as those published from time to time by the Commonwealth Secretariat, has a direct bearing on the subject matter. Such models always refer to the necessity for adaptation of their provisions within a particular jurisdiction.

9. A careful check should be carried out to see whether any precedent being adapted has been the subject of a judicial decision or subsequent legislative amendment.

10. Where an adaptable precedent is found, counsel should be careful to make a note on the draft of the relevant reference. This may seem to be an obvious precaution to take, but in practice it is sometimes forgotten, with the result that valuable time and frustrating effort may later have to be spent in rediscovering the relevant precedent.

11. Legislation is used to solve a problem. The problem covered by a precedent may not be the precise problem being dealt with, and the policy or context may have changed since the precedent was enacted.

12. Counsel must check the draft carefully and ensure that it reads as a coherent and consistent whole. Words and expressions specifically defined in the interpretation clause of a Bill apply throughout the Bill. One way of ensuring that this is not overlooked is for counsel to underline or insert in bold type these words or expressions every time they are used. This will facilitate the requisite attention for the final revision of the draft.

13. In the first draft, counsel is primarily concerned with the coverage of the basic objectives of the proposed legislation and ensuring that practical difficulties in administering and enforcing it are sufficiently dealt with. At the revision stages, counsel must consider whether an improvement in the wording, style and arrangement can be achieved so that the legislation becomes more readable and intelligible to those persons most likely to be affected by it.

14. A great deal of legislation is by its very nature complicated. Counsel must remember that his or her first duty is to convey the legislative intention **as clearly as possible** to those to be affected. In so doing, he or she will have constant regard to the attributes of effective communication referred to in Chapter 2.

15. It is usual to publish with a Bill an explanatory memorandum which explains its objects and reasons. This is sometimes prepared by counsel and sometimes by the sponsoring Ministry. In the latter case it is obviously desirable that the Ministry consult counsel when preparing the memorandum, so that Parliament and the public are not misled as to the intended effect of the Bill.