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LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Report 35

Legislation Manual Structure and Style

May 1996
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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29 May 1996

Dear Minister

I am pleased to submit to you Report No 35 of the Law Commission, *Legislation Manual: Structure and Style*.

The Commission is of the view that legislative drafting in New Zealand would be more consistent and effective if drafters and instructing officials were able to consult a comprehensive set of guidelines. The *Legislation Manual* aims to provide such assistance. It also represents a means by which the Commission can fulfil its obligation under s 5(1)(d) of the Law Commission Act 1985 and respond to a subsequent broad Ministerial reference on legislation, by advising "on ways in which the law of New Zealand can be made as understandable and accessible as is practicable".

As envisaged at present, the *Legislation Manual* will eventually comprise four separate parts, of which two are being issued in this report. Another part will deal with the process of enacting legislation but is being held back until the impact of New Zealand's new electoral system can be assessed. The last part will provide detailed discussion of and precedents for recurring drafting issues.

This report is concerned with the structure and style of legislation and largely reflects current drafting practice. In certain details it departs from current practice, however; and it also draws to a large extent on the Commission's proposed new Interpretation Act, recommended in its Report No 17 in 1990, and its recommended new format of legislation in Report No 27 in 1993.

We recommend this *Legislation Manual* to the New Zealand Government as a means of providing rules and guidelines for the drafting of understandable and accessible legislation in New Zealand.

Yours sincerely

The Hon Justice Wallace

Hon Douglas Graham MP
Minister of Justice
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WELLINGTON

Introduction

- 1 **R**ULES ARE OF THE ESSENCE OF A SOCIETY. In our society, legal rules and principles affect and govern everyone, and impose restraints and duties on individuals and groups. They also confer and protect rights, benefits and liberties. They are increasingly set out in legislation; that is, they are embodied in laws enacted by Parliament.
- 2 Laws apply to a broad range of activities:
 - they maintain the structure of government (eg, the courts and their jurisdiction, the electoral system);
 - they regulate relations between individuals (eg, family law and the law of contract);
 - they regulate commercial and industrial activities (eg, occupational safety and employment);
 - they provide for and maintain essential services such as health, education and welfare;
 - they facilitate business and professional activities (eg, company and partnership law, laws relating to the practice of trades and professions);
 - they impose and arrange for the collection of taxes and other government revenue; and
 - they create and regulate public institutions.
- 3 Because society itself is always changing, legislation must reflect that change. A democratic society continues to exist only if the great majority of its members regard the system as generally supporting and protecting their interests.
- 4 If new laws are to have broad public acceptance and enhance the quality of the statute book, they must
 - be developed through an established and adequate process, one that encourages positive and effective participation,
 - comply with the legal principles on which our society is based: the rule of law, fairness, individual liberty, protection of personal and property rights,
 - be effective and technically sound and fit harmoniously into the fabric of existing laws, and
 - be accessible and understandable.

A Legislation Manual for New Zealand

- 5 Many of the requirements listed in the previous paragraph are already being met in current New Zealand drafting practices. But the Law Commission believes that they would be even better met if all those who are involved in legislative drafting—whether of primary or subordinate legislation—were assisted by a single, comprehensive set of guidelines. For this reason it is issuing a *Legislation Manual*.
- 6 The *Manual* will eventually comprise four parts. The first will deal with the process of enacting legislation, from the development of policy to the Royal Assent. The second is concerned with the structure of legislation; that is, the function and arrangement of its component parts. The third addresses matters of style such as plain language drafting, gender-neutral expression, the use of te reo Māori, and punctuation. The fourth will consider recurring drafting problems—such as appeal provisions and provisions relating to the setting up of statutory bodies—and suggest standard approaches to them.
- 7 Only parts two and three are being issued in this publication. The main body of the text, which comprises the two parts entitled “The Structure of Legislation” and “Matters of Style”, focuses on Acts but applies to the drafting of legislation in general. Guidelines relating specifically to subordinate legislation and to amending laws are provided in appendices A and B.
- 8 As to the process of enacting legislation, the Commission has decided that the changes that New Zealand’s political system is at present experiencing would make it premature to provide definitive guidelines on process, since they are likely to require considerable modification during the next few years. Users are referred to Report No 6 of the Legislation Advisory Committee, *Legislative Change. Guidelines on Process and Content* (revised ed, Wellington, December 1991), the *Cabinet Office Manual*, and the Standing Orders of the House of Representatives. Part four of the *Manual* is to be produced by instalments.

Users of the Manual

- 9 It may be helpful to consider who the potential users of the *Manual* are, for they extend well beyond the obvious groups. In the first place, they will be drafters themselves, whether in the Parliamentary Counsel Office, in government departments or government agencies, or in local bodies, or those from the

private sector who draft on a contractual basis. Such users would be expected to have a close familiarity with the *Manual*. But there are also others who might need to consult it in a less detailed way, and who might find it no less valuable. Among these users might be departmental officials and advisers, as well as those who make submissions on legislation, whether professionally or in a private capacity.

Use of interpretation legislation

- 10 The Law Commission produced its report *A New Interpretation Act: To Avoid "Prolivity and Tautology"* (NZLC R17) in 1990, in response to a broad reference on legislation from the then Minister of Justice, and to the direction given to it in s 5(1)(d) of the Law Commission Act 1985 to advise on ways of making the law "as understandable and accessible as is practicable". Among other matters, the Ministerial reference had asked the Commission to review the provisions of the Acts Interpretation Act 1924, and the result was a draft Interpretation Act, which is set out in chapter II of that report.
- 11 The draft Interpretation Act awaits inclusion in the legislative programme. But in anticipation of its enactment, and because the Commission considers that its provisions will encourage better legislative drafting, it has decided to align the *Manual* with the proposed new Act instead of with the Acts Interpretation Act 1924. This means that reference is frequently made to it, and, further, that any discussion of questions of interpretation occurs in the context of the draft Act: see, for example, paras 88–90.
- 12 Users of the *Manual* should accordingly be aware that the present law differs in some respects from that stated in the *Manual*. The principal difference relates to the position of the Crown. At present, the Crown is not bound by statutes unless they expressly so provide (at least according to s 5(k) of the Acts Interpretation Act 1924). That principle will be reversed, and the Crown, in general, will be bound by statutes unless provision is made to the contrary or the context otherwise requires. Other proposed changes concern
 - the default rule for the coming into force of enactments—after 28 days instead of at once (see paras 45, 75, A46 of the *Manual*, s 4 of the draft Interpretation Act, and ss 10, 10A and 11 of the Acts Interpretation Act 1924),
 - the rules about the prospective application of law which will now be more comprehensive (see paras 62–77, ss 6–8 of the draft Act, and ss 18, 20, 20A, 21 and 22 of the 1924 Act),

- the time that instruments executed by the Governor-General come into force (see s 15 of the draft Act, and s 23(3) of the 1924 Act), and
- the dictionary set out in s 19 of the draft Act.

Of course, it may also be the case that when the new legislation is enacted, it will differ from that proposed in the 1990 report.

Format

- 13 There is one area relevant to legislative drafting which the *Manual* does not feature in any detail: the format of legislation, specifically its visual aspect, the way in which the text is set out on the page, and the typeface. The reason is not that format is unimportant—it has a major impact on the accessibility of legislation—but that it is the subject of an earlier Law Commission report: NZLC R27, *The Format of Legislation* (1993). Readers who are interested in the layout of legislation should refer to that report. However, because it is not always possible to separate strict drafting matters from matters of format, there is inevitably some overlap between the *Format* report and the *Manual*: see, for example, paras 120–127, 211.

Departures from current New Zealand drafting practice

- 14 Much of this *Manual* is descriptive; that is, it is based on the practice developed in the New Zealand statute book. However, in limited respects it recommends departures from the current practice. These departures derive largely—but not exclusively—from recommendations already made in the Commission's reports *A New Interpretation Act* and *The Format of Legislation*. The more important of them are the following:
- the wording of the enacting statement (para 28);
 - definitions provisions (paras 94–106 and 208–211);
 - the addition of footnotes to sections featuring, amongst other matters, references to defined terms (paras 120–122, 211);
 - table of provisions (paras 196–199);
 - subsection headings (para 204);
 - the wording of the empowering provision for regulations (para A7);
 - titles of instruments amending regulations (para A47); and
 - the manner of scheduling amendments (para B30).

Note on examples

- 15 Examples are indispensable in a publication of this kind. But finding suitable examples is not always easy. Even examples of a recommended practice might be embedded in a context which is inappropriate. In its use of examples the Commission has adopted the following policy:
- examples derived from New Zealand legislation are used wherever possible, because they provide a more meaningful context;
 - *positive* [✓] examples are redrafted according to the guidelines recommended in this *Manual*;
 - *negative* [✗] examples remain as they are, but are clearly indicated as such; and
 - because many examples have been redrafted, sources are not normally given.
-

THE STRUCTURE OF LEGISLATION

ORDER OF ARRANGEMENT

16

ACTS ARE EASIER TO USE if their provisions are generally arranged according to a logical order as reflected in practice. The following order is common:

- Table of provisions (see para 196)
- Preamble
- Enacting statement and title
- Purpose
- Commencement
- Definitions
- Interpretation
- Duration/expiry
- Application
- Application to the Crown
- Substantive provisions
- Administrative provisions
- Miscellaneous and supplementary provisions, including enforcement provisions
- Savings and transitional provisions
- Repeals
- Consequential amendments
- Schedules

If an Act is divided into parts, all preliminary provisions, such as purpose, definition and application provisions, should be included in a numbered part, Part 1 of the Act, which is headed PRELIMINARY.

THE DIVISION OF MATERIAL

Parts

- 17 The presentation of an Act in parts serves two purposes:
 - Parts make it easier to comprehend the structure and sequence of the contents. A part indicates the cohesive relationship of the provisions within it to one another and their separation from provisions in other parts.
 - Technically, it is useful to have a collective reference to certain sets of provisions: for example, when it is necessary to bring different provisions into force at different times.
- 18 Parts are numbered and given a descriptive heading. Complex statutes might use an alphanumeric system, as with the Income Tax Act 1994: see also para 253.

Subparts

- 19 A part may contain subparts. Subparts also provide useful reference points and are helpful in larger and more complex Acts. They are identified by letter or number and may contain common definitions or purpose provisions.
- 20 Subparts, too, are numbered and given a descriptive heading.

Sections and subsections

- 21 An Act is divided into numbered sections. A section must have a unity of purpose. However, very long sections with numerous subsections—even with a unity of purpose—are difficult to read. Sections must therefore be kept to a manageable length.
- 22 Each subsection must be relevant to the unifying theme of the section. As a general rule, if a section comprises more than one sentence, present each sentence in a separate numbered subsection. But this rule is not inflexible. Two very closely related thoughts in separate sentences may be presented together in a single section or subsection if that makes communication more effective.

Example:

- ✓ The applicant must apply within 2 weeks after receiving the notice. However, with the Minister's consent, the applicant may apply at any time after receiving the notice.

Note the use of *However* to link the two sentences, and at the same time to indicate the contrasting content.

- 23 Present the primary provision prominently in the first subsection

of a section. Subsidiary matters follow. The design of a section should assume that the section will be construed as a unit. The relationship of subsections to one another is generally complementary and obvious. Qualifications and internal cross-references such as *subject to the provisions of subsection (1)* and *in accordance with subsection (1)* must be kept to a minimum: see paras 174–177 on the use of *subject to*.

Schedules

- 24 Schedules form part of the Act to which they are attached, and the removal of certain matters to schedules allows the provisions in the body of an Act to be presented more prominently and in a more easily flowing sequence. Schedules can contain secondary, minor material, or material equal in importance to, or of even greater importance than, that in the body of the Act. For a full discussion of the structure and contents of schedules, see paras 109–117.
- 25 Schedules are presented in a variety of forms. They should feature numbered and headed parts, subparts, clauses and subclauses if their content lends itself to such a structure.

THE STANDARD COMPONENTS OF ACTS

Preambles

- 26 Preambles are comparatively rare. They immediately precede the enacting words and contain introductory information. Preambles should not begin with *Whereas* nor be the general vehicle for stating the purpose of an Act. This is better achieved by a specific purpose clause in the body of the Act: see paras 35–41. Preambles usually recite the events that lead to the Act and can be useful in understanding
 - Acts of international significance,
 - Acts of constitutional significance, and
 - Acts of an historic or ceremonial nature.
- 27 For example, the beginning of the preamble to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 states:
 - (a) By the Treaty of Waitangi the Crown confirms and guarantees to the Chiefs, tribes, and individual Māori full exclusive and undisturbed possession and te tino rangatiratanga of their fisheries; and
 - (b) Section 88 (2) of the Fisheries Act 1983 provides that nothing in that Act shall affect any Māori fishing rights; and

- (c) There has been uncertainty and dispute between the Crown and Māori as to the nature and extent of Māori fishing rights in the modern context and as to whether they derive from the Treaty or common law or both (such as by customary law or aboriginal title or otherwise) and as to the import of section 88 (2) of the Fisheries Act 1983 and its predecessors; and . . .

Enacting statement

- 28 The recommended standard form is:
The Parliament of New Zealand enacts the Act 199X

Title

- 29 An Act should have only one title, the function of which is to identify the measure. It appears as part of the enacting statement, is referred to simply as the *title*, and provides
- an easy means of citing or referring to the Act, and
 - a sufficiently descriptive identification to help readers find the law they are looking for in indexes and elsewhere.
- 30 Having both a short and a long title no longer serves any useful function. Acts are invariably referred to not by their long title, but by their short title, and the remaining function of the long title appears to be to explain the general purpose of the Act. This function is better performed by a purpose provision: see paras 35–41.
- 31 The title must be concise but informative. Choose the first word of a title with particular care because that is the word which must catch the eye of people using indexes.
- 32 If the scope of an Act is restricted to an identifiable area of a larger topic, it is helpful to begin the title with a reference to the general area and follow it with a parenthetical reference to the particular area. Example:
- Family Benefits (Home Ownership) Act 1964
- Crimes (Internationally Protected Persons and Hostages) Act 1980
- Avoid a string of parenthetical references in a title. That would defeat the object of having a short and convenient label to facilitate reference.
- 33 The need to be brief does not justify departing from or abbreviating the language of the Act. References to people or bodies must be accurate. The language of the title must be consistent with the content of the Act.

- 34 The date of the year in which the Act is passed is part of the title. If more than one Act of the same title is passed in the same year, the later Acts should be distinguished numerically:

- ✓ Finance Act 1990
- ✓ Finance Act (No 2) 1990

An Act might be referred to as (*No 1*) if it is anticipated that there will be more than one statute of that name in a year.

See paras A43–A48 for titles of regulations, and paras B10–B11 for titles of amending laws.

Purpose provisions

- 35 Purpose provisions help users of legislation to understand the particular Act or part of an Act to which the provisions relate. They are operative provisions of the Act and should be drafted so that they are genuinely helpful.

- 36 Draft the purpose clause early in the drafting process. Draft specific provisions implementing the purpose of an Act in the light of the purpose clause, not the other way round. Early drafting of the purpose clause helps the drafter keep the objectives of the exercise in mind as the draft is developed. It establishes a benchmark. As the draft develops, specific implementation provisions can reveal a need to review and refine the terms of the purpose provision.

- 37 Consider carefully how specific the purpose clause needs to be. It may be more appropriate that the clause relates to a particular part in the Act or to a section rather than to the whole Act. Purpose clauses relating to particular parts or particular sections have the advantage of a specific focus.

- 38 Some examples of purpose provisions:

- ✓ The purposes of this Act are
 - (a) to state principles and rules for the interpretation of legislation;
 - (b) to shorten legislation by avoiding the need for repetition; and
 - (c) to promote consistency in the language and form of legislation.
- ✓ The purpose of this Part is to prevent, so far as is reasonably practicable, the detrimental effects of smoking on the health of any person who does not smoke, or who does not wish to smoke, inside any workplace or in certain public enclosed areas.

- 39 Ensure that there is no conflict between the purpose provision and a later specific provision. Such a conflict is unlikely if the drafter keeps in mind the following general distinction: the purpose clause explains *why* the law is being enacted; the remainder of the text shows *how* this purpose will be implemented.

- 40 Ensure that the purpose provision is not in effect saying how the purposes are to be implemented, as in paragraph (a) of the following example:

The purposes of this Act are

- ✗ (a) to enable New Zealand to fulfil its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora by introducing a system of permits and certificates to regulate the import and export of such flora and fauna; and
- (b) to promote the management, conservation and protection of endangered, threatened and exploited species; and
- (c) to further enhance the survival of those species.

This example might be better drafted:

- ✓ The purposes of this Act are to fulfil New Zealand's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora; to promote the management, conservation and protection of endangered, threatened and exploited species; and to further enhance their survival.

- 41 An amending Act might appropriately include a purpose provision in the following situations:

- if it is a stand-alone amending Act which has a distinct purpose and does not become part of the principal Act—for instance, the long title to the Guardianship Amendment Act 1991 indicates that it implements the Hague Convention on Civil Aspects of International Child Abduction;
- if it amends several Acts to give effect to a single purpose, as does the Abolition of the Death Penalty Act 1989; and
- if it inserts a new part with a distinct purpose provision into the principal Act, as does the Forest Amendment Act 1993.

Commencement and duration provisions

- 42 A distinction is made between three events:

- An enactment *becomes law* when the Governor-General assents to the Bill passed by the House of Representatives in the case of an Act (Constitution Act 1986 s 16), or when the Governor-General, a Minister, or an official signs a regulation or other form of delegated legislation.
- An enactment *comes into force* or *commences* at the time or times it states or provides for, or according to the general law.
- An enactment *has effect* in respect of, or *applies* to, actions or events which occurred or will occur during a particular period. That period might be before the enactment became law or came into force, as the enactment states, or, if it is silent, according to the general law.

- 43 The dates may differ. For instance, many major reforms come into force and take effect months after they become law, while a statute curing an irregularity will apply to or have effect in respect of events which occurred before it became law and came into force.
- 44 The following paragraphs (45–52) are concerned with the coming into force or commencement of enactments. Express duration (or expiry) provisions and the temporal application or effect are considered in paras 53–57 and 62–77.

Commencement

- 45 Section 4(1) of the draft Interpretation Act provides that an Act comes into force 28 days after it is assented to, or made (in the case of regulations). Section 4(2) provides that an enactment comes into force at the beginning of the day on which it is to come into force. If either or both of these provisions of general application are not suitable for the commencement of a particular enactment, it is advisable to include a special commencement provision as a separate section. This section immediately follows the enacting statement and purpose provision.
- 46 A commencement provision may take one of three possible forms:
- It may specify a day for commencement—
 - ✓ This Act comes into force on 1 July 1990.
 - It may empower a person or body to specify a day for commencement—
 - ✓ This Act comes into force on a day to be fixed by the Governor-General by Order in Council.
 - It may provide for commencement on the occurrence of a specified event—
 - ✓ This Act comes into force on the day when the Natural Gas Act 1990 comes into force.

The last form is appropriate only if:

- the Act in which it is contained is closely related in subject matter and operation to the Natural Gas Act 1990; and
- the whole of the Natural Gas Act 1990 comes into force at one time.

If that Act has two or more commencement dates, the form needs to be modified to refer to a particular provision of the Act. Example:

- ✓ This Act comes into force on the day when section 3 of the Natural Gas Act 1990 comes into force.

- 47 Two important considerations apply whichever method is used: first, there must be certainty whether an enactment is or is not in force; secondly, there must be adequate public notice and record of the act or occurrence on which commencement depends.
- 48 Commencement can be conditional on a specified event occurring.
Example:
✓ Part 4 and Parts 6 to 9 come into force on 1 July 1994 if the Chief Electoral Officer declares, under section 19(5) of the Electoral Referendum Act 1993, that the proposal favouring the introduction of the proposed mixed member proportional system is carried.
- 49 A further possibility is a combination of the first and second methods in para 46: the Act comes into force on a stated day if an Order in Council has not been made by then.
✓ (1) This Act comes into force on a day to be fixed by the Governor-General by Order in Council.
✓ (2) If this Act has not come into force within 1 year after the day when it is assented to, it automatically comes into force on the next day.

Multiple commencement dates

- 50 Different commencement dates may be necessary for different parts or provisions of an Act. But all commencement provisions in an Act should be gathered in one place. The contrary practice of presenting commencement provisions only in the part or provision to which they relate makes the user's task more difficult than it need be. It is also unhelpful to include a provision such as:
✗ Except as otherwise provided in this Act, this Act comes into force on 1 July 1990.
- 51 Provision for multiple commencement dates is made by directly stating that different commencement dates apply to different provisions; or, alternatively, by including an empowering provision that allows different days to be fixed for different provisions.
Example:
✓ (1) Except as provided in subsection (2), this Act comes into force on 1 February 1995.
✓ (2) Section 12, Parts 3 to 5, sections 56 and 57, and Schedule 1 come into force on a date or dates to be fixed by the Governor-General by Order in Council.

But, in general, multiple commencement dates make an Act less easy to use and should be avoided if at all possible.

- 52 It may be helpful to supplement the commencement provision with notes to the specific sections or parts of the Act affected, particularly if users are likely to consult such sections or parts in isolation. In addition, a notice under the title of the Act should alert users to the fact that there are multiple commencement dates.

Expiry

- 53 An Act continues in force until it is repealed or expires; similarly, a regulation continues in force until it is revoked or expires. At any time, an amending Act may be enacted that repeals all or part of a principal Act. However, if Parliament intends from the outset that an Act or a part of it is to be in force only temporarily, include an expiry provision immediately after the commencement provisions.

- 54 The techniques used for expiry provisions are the same as those used for commencement provisions. An Act may specify a date for expiry, may empower a person or body to fix a date for expiry, or may provide for expiry on the occurrence of a specified event. Provision can be made for all or part of an Act to expire.

- 55 Provide for expiry in simple terms:
- ✓ This Act expires on 31 December 1993.
 - ✓ This Act expires 1 year after the day when it comes into force.
 - ✓ Parts 4 and 5 expire on a day which the Governor-General may fix by Order in Council.

The effect of *on* and *after* in these provisions is made clear by s 24 of the draft Interpretation Act: a period of time ending *on* a day includes that day, and accordingly the expiry occurs at the end of that day; and the period beginning *after* a day does not include that day.

- 56 Use direct provisions for expiry. Do not use forms like the following:
- ✗ This Act shall be deemed to be repealed on the expiry of 5 years from the day it commences.

- 57 If a Bill is to contain an expiry provision, consider the circumstances expected to exist at the time of expiry. On expiry there may be assets, liabilities, continuing functions, activities or consequential matters which require specific savings and transitional provisions to deal with them. Section 6 of the draft Interpretation Act provides that an expiry is to be treated as a repeal so that the general savings provisions in that section apply on the expiry of a statute: see paras 66–68 on savings and transitional provisions; paras 107–108 on repeals and amendments.

Application provisions

- 58 The preparation of legislation regularly presents four issues concerning the scope of application of the proposed law:
- *Subject*: to what actions etc will the law apply? For instance, will it apply to services as well as to goods? This matter goes to the substance of the proposed law and is not considered further here.
 - *Temporal*: to what actions etc in what period of time will the law apply? For instance, will it apply to past periods as well as the future, or indeed instead of the future (for the measure might be solely retrospective)? What transitional and savings provisions, if any, are required?
 - *Personal*: to whom will the law apply? (This question includes whether it applies to the Crown.)
 - *Spatial*: to what actions etc in what places is the law to apply? For instance, is it to apply outside New Zealand as well as within?
- 59 Note that the issue of *temporal* application or effect is distinct from the issues of when the law becomes law (para 42) and when it comes into force or commences (paras 45–52).
- 60 The *spatial* issue is distinct from the question of where the law which Parliament is making *is to be in force*. Currently, Parliament makes law which is to be *in force in New Zealand* as narrowly defined under s 19(1) of the draft Interpretation Act—although it may apply to events and actions happening elsewhere. But sometimes it makes law which is to be in force in Niue, Tokelau and the Ross Dependency: see paras 128–130.
- 61 Many statutes expressly address the questions of temporal, personal and spatial application. In the absence of express provisions, the general law applies. That is:
- a new statute operates only prospectively and does not affect vested rights and obligations;
 - it binds the Crown; and,
 - with increasing exceptions, it does not apply to events outside New Zealand.
- See also paras 42, 69–72.

Temporal application, including savings and transitional provisions

- 62 Statutes often deal separately with temporal application and with savings and transition. The provisions on temporal application may appear at the beginning of the measure; those on savings and transition usually appear at the end. However, both raise exactly

the same set of issues. For this reason, they are considered together here—even if it may be convenient for aspects to be separated in the legislative text.

- 63 New legislation must frequently have regard to existing situations. For example:
- rights may have become established or obligations accepted or imposed under the law in force before the new legislation takes effect—for example, a long term lease may be signed, or an act alleged to be criminal committed, before law is passed affecting leases or changing the criminal law;
 - proceedings may have been brought and be pending when new law is enacted changing the courts system or the law of evidence or civil procedure;
 - people may have been employed under a statute repealed and replaced by the new law;
 - regulations may have been made under a statute repealed and replaced by the new law.
- 64 The critical principle is that of *non-retrospectivity*: that rights and duties established under the old law are left unaffected by the new law. The reasons supporting and limiting the principle are effectiveness of the law, justice (as reflected in s 26(1) New Zealand Bill of Rights Act 1990), reasonable expectations, responsibilities of government, and effective administration.
- 65 More specifically, the reasons supporting non-retrospectivity are as follows:
- much law cannot operate *effectively* unless those who are subject to it know in advance of its requirements, so that they can behave in compliance with that law;
 - it may be *unjust* to apply to actions new law, especially criminal law, which was not in force at the time of the actions; and
 - substantive *rights and duties* established under the law should not be abrogated, especially when there is a *reasonable expectation* of their permanence.
- 66 On the other hand, legislation might appropriately apply to earlier situations if:
- it is *benign*—for instance, by validating some irregularity or conferring backdated benefits;
 - it establishes *new institutions and procedures* applying to past (or continuing) situations and does not affect the substantive rights and duties created under the earlier law; or
 - a *public interest* requires the alteration of a continuing set of rights, duties, interests and expectations, especially if they are longlasting.

67 These considerations lie behind ss 6 to 8 of the draft Interpretation Act, which state three propositions:

- new legislation in general has no effect on established rights and liabilities and other things which are established (including things which no longer exist or are no longer in force) (s 6);
- actions of a continuing character (such as regulations or appointments) done under a repealed enactment can continue in effect under new, substituted legislation (s 7); and
- references in legislation to an enactment which has been amended or replaced are in general to be read as referring to the current enactment (s 8).

In the second and third cases the established positions are integrated into the developing body of law, to take account of the need to relate various continuing parts of the law to each other.

68 The importance of these provisions (especially s 6) cannot be over-emphasised. In many cases, the general provision will be sufficient and no special savings or transitional provisions need be inserted.

69 Established rights and obligations are often protected, either by the general law (see para 61) or by specific provisions which may be application or savings provisions. A *savings* provision preserves a law, right, privilege or obligation that would otherwise be abrogated or affected by a change in the law. This example concerns a right to an office:

- ✓ The person holding office, immediately before the Act comes into force, as an Authority established under the Inland Revenue Department Act 1974, will continue in office as if, at the time of that person's appointment, that person had been appointed as an Authority established under this Act.

70 *Application* provisions, read as appropriate with or without the general law, have essentially the same effect as savings provisions. Contract statutes provide an example. A new statute might apply only to contracts entered into *after* the statute comes into force, leaving existing contracts to be governed by the earlier law (eg, wider general principles about non-retrospectivity and the implications of the word *only*):

- ✓ The provisions of this section apply only to contracts made after this Act is passed.

Alternatively, they might state that they do not apply to contracts entered into *before* the legislation comes into force, leaving unspoken the proposition that the legislation will apply (only) to contracts entered into after the statute comes into force:

- ✓ This Act does not apply to contracts entered into before it commences.

(Both of the above methods have the same effect.) Or the statute might apply to *all* contracts, existing and future, leaving no room for the operation of the general law and overriding the principle against retrospectivity:

✓ This Act applies to every contract, whether made before or after this Act commences.

- 71 Almost every statute changes the existing body of the law in some manner. Accordingly, the application of the general law or the inclusion of special application, savings or transitional provisions must be considered in every drafting project. Instructing officials may focus on the successful development and refinement of the new policies and provisions, but they and those responsible for the drafting have a duty to ensure attention is given to the immediate impact of the new law on current circumstances and to find out whether special provisions are necessary. The current circumstances include regulations and rules and appointments made under the Act. Particular attention should be given to the consistency of existing delegated legislation with the new Bill.
- 72 Avoid unnecessary application, savings and transitional provisions. However, specific provisions may be needed when a major new law repeals and replaces an existing one. The developments and refinements contained in the new law may be such that the straight-forward application and savings provisions provided in the draft Interpretation Act are insufficient or inappropriate. The Biosecurity Act 1993, with a whole part (Part 10) devoted to savings and transitional provisions, provides a major recent instance.
- 73 Take care in drafting application and transitional provisions not to refer to *the coming into force of this Act* if different provisions of the new Act are to come into force at different times. A more specific reference is necessary.
- 74 The provisions need to be fashioned to fit particular circumstances. The issues may be important ones of policy on which instructions are required. It is necessary to balance the principle that legislation should apply only prospectively against the recognition that the relevant policy and law will change, and that continuing situations will sometimes be adversely affected.
- 75 If the enactment is to apply to earlier events and actions, an express commencement provision should probably also be included:
✓ This Act comes into force on the day after it receives the Royal Assent.

The reason is that the default period for the commencement of an enactment is 28 days after assent, and the effect of the retrospective application should not be delayed.

76 Some curative (and therefore retrospective) legislation appropriately takes a declaratory form:

- ✓ Every power conferred on the Governor-General by any enactment is a royal power which is exercisable by him or her on behalf of Her Majesty the Queen, and may accordingly be exercised either by Her Majesty in person or by the Governor-General.

Again, for the reason given in para 75, an express commencement provision should probably be included. Such curative provisions will often save the effect of judgments given or proceedings pending under the old law.

77 Savings and transitional provisions are generally of temporary effect and of little interest after an initial period. They should be assembled and presented as a group. This can be in a separate part at or near the end of the statute. For example, in rewriting the Income Tax Act, subpart Z of each part has been set aside for transitional provisions.

Personal application

78 Provisions in this category define the scope of the legislation more accurately, often by excluding persons or things not intended to be affected:

- ✓ This Act applies to the trustee companies listed in Schedule 1.
- ✓ This Act does not apply to the professional practice of a medical practitioner or a physiotherapist.
- ✓ This Act does not apply to a place that is used as
 - (a) a restaurant or café, or
 - (b) a take-away food shop, or
 - (c) a retail shop located in a public passenger terminal or station.
- ✓ This Act does not apply to a residential tenancy agreement if the tenant is a party to an agreement for the sale and purchase of the premises.

79 Section 10 of the draft Interpretation Act provides that every enactment binds the Crown unless it provides otherwise or the context otherwise requires. The contrary position should be expressly established as follows:

- ✓ This Act does not bind the Crown.

If it is intended that only part of an Act will not bind the Crown—for example, provisions creating offences—this should also be expressly stated:

- ✓ Part 5 of this Act does not bind the Crown.

Territorial application

- 80 Territorial application raises two separate questions:
- in respect of what places, or events in what places, is the proposed law to have effect?
 - in what place or places is that law in force, as part of the law of that place or those places?
- The first question is addressed in paras 82–86, and the second in paras 128–130.
- 81 Sometimes the answers to the two questions will be the same; but increasingly, as Parliament passes law which is in force in the whole of New Zealand and applies to events outside it, the answers will differ. One extreme example illustrates the difference. The Crimes Act 1961 s 92 makes it an offence to commit piracy. That section is *in force* in New Zealand and nowhere else. But that law, in general, *has effect* only in respect of actions done outside New Zealand, essentially only on the high seas: see United Nations Convention on the Law of the Sea, article 101.
- 82 If the legislation is to apply to places or events outside New Zealand, three questions at least should be answered:
- does New Zealand have the authority under international law to regulate such places and events?
 - as a matter of policy, does it wish to? and
 - if the answer to those questions is “yes”, how should the legislation reflect those answers?
- 83 If there is no explicit provision, the presumption is that legislation applies only to events and persons within New Zealand. The presumption might be rebutted by implication.
- 84 International law can allow or even require States to enact legislation and to take jurisdiction over activities occurring beyond their borders. Piracy and war crimes provide instances of permissive and obligatory jurisdiction. An increasing array of treaties now governs these matters. Those responsible for proposing legislation should be alert to the possible relevance of these instruments.
- 85 The extended application of national law, even if permitted (or arguably so), may not be considered desirable in policy terms. Conflicting requirements of different national laws might be applicable to the one transaction. There might be a related need for understandings or agreements with the other countries involved; for instance, by agreements setting out the uniform law applicable to the situation or determining which national law is to apply.

- 86 The legislation might explicitly state that it applies to areas and activities beyond New Zealand; or that might be a matter of implication. There may, however, be dangers in relying on such an implication. The fact that many statutes do make explicit reference to activities outside New Zealand might support the argument that an Act which is silent about its application to events outside New Zealand does not extend to them. As matters regulated by Parliament become increasingly international or global, the inclusion, or not, of an express provision becomes increasingly necessary. For instance, legislation protecting marine mammals might provide as follows:
- ✓ This Act applies in respect of
 - (a) things done in New Zealand or the exclusive economic zone of New Zealand; or
 - (b) things done on a New Zealand ship or aircraft wherever that ship or aircraft may be; or
 - (c) things done by a New Zealand citizen outside New Zealand and the New Zealand economic zone in breach of an enactment which gives effect to an international agreement for the protection of marine mammals.

Interpretation

- 87 Interpretation provisions may be general or specific. General provisions improve the understanding of a whole Act or Acts; specific provisions improve the understanding of individual terms used in all Acts or in particular Acts.

The draft Interpretation Act

- 88 Interpretation provisions can provide greater consistency in the form and language of the whole statute book. The draft Interpretation Act contains general and specific interpretation provisions which can apply to all statutes: see paras 89–93. The purposes of the Act are set out in s 1 as follows:
- (a) to state principles and rules for the interpretation of legislation;
 - (b) to shorten legislation by avoiding the need for repetition;
 - (c) to promote consistency in the language and form of legislation.

These purposes can be fully achieved only if drafters are familiar with and make full use of the provisions of the draft Act.

General interpretation provisions

- 89 Section 9 of the draft Interpretation Act is an example of a general interpretation provision to aid in the interpretation of all statutes:

9 General principle

- (1) The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context.
- (2) An enactment applies to circumstances as they arise so far as its text, purpose and context permit.
- (3) Among the matters that may be considered in ascertaining the meaning of an enactment are all the indications provided in the enactment as printed or published under the authority of the New Zealand Government.

90 General interpretation provisions may also be included in a particular Act to promote understanding of its provisions and, for instance, their interrelationship. Example:

✓ **Relationship between core provisions and other provisions**

If there appears to be an inconsistency between a provision in this Part and a provision in another Part, that other provision is to be interpreted having proper regard to the fact that this Part states fundamental principles.

91 The Sale of Goods (United Nations Convention) Act 1994 contains the text of the Convention in a schedule. Article 7 of the text has the general interpretation provision:

✓ (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

92 An interpretation provision might also refer the court to the materials arising out of the statute's drafting history:

✓ The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law.

Specific interpretation provisions

93 Specific interpretation provisions are of narrow technical effect, and relate to the understanding of concepts referred to in the

statute. If such interpretation provisions, other than definitions, are necessary, they should be arranged in a separate clause or clauses.

Examples:

A reference in this Act to the time when a purchase price is paid must, where the price is paid by instalments, be taken to be a reference to the time when the first instalment of the purchase price is paid.

If there is any conflict in meaning between the Māori and the English version of the Preamble, the Māori version prevails.

Definitions

94 A definition is used to give a standard meaning to words or phrases that occur frequently in an Act. Use definitions to avoid uncertainty, ambiguity and repetition, but beware of redefining terms which should have a consistent meaning across the statute book, such as *registered medical practitioner*, as defined in s 2 of the Medical Practitioners Act 1968.

95 The draft Interpretation Act contains definitions of terms such as *Act*, *month*, and *person*, which apply to all other enactments. Such terms should also not generally be given a different meaning in another Act. A definition contained in the Interpretation Act should not be repeated in other enactments, but a note to the sections which feature the relevant terms should refer to it: see para 122.

96 A definition must not contain substantive matter: the user of a statute is entitled to assume that a definitions section contains definitions and nothing else. For example, the conferment of a power should not have to be inferred from the content of the definition, as in:

Commissioner means the Health and Disability Commissioner appointed by the Minister.

The following definition correctly refers to the substantive provision which confers the specific power:

Commissioner means the Health and Disability Commissioner appointed under section 8.

Be particularly cautious about including substantive matter in sections containing definitions which apply only in those sections.

97 A definition may delimit, extend, or restrict the meaning of a term in common usage. If a term does follow common usage closely—for example, *High Court*—a definition may not be needed. A defined term should, however, follow the usual meaning of the term to the greatest practicable extent, and must not have a stretched

or artificial meaning. Within an Act, the overuse of definitions and the creation of different definitions for the same term cause confusion and must if at all possible be avoided.

Delimiting definition

- 98 The purpose of a *delimiting* definition is to provide certainty by removing the blurred edges of a term's accepted meaning, to summarise the meaning of a longer expression, or to identify one of several alternative meanings. Examples:
- ✓ **month** means calendar month.
 - ✓ **reservoir** means an artificial lake, pond or basin for the storage, regulation or control of water, silt, debris or liquid-borne material.
 - ✓ In this Act, depending on the context in which the term is used, **Bank** means either
 - (a) Bank of New Zealand constituted under the Bank of New Zealand Act 1979, or
 - (b) that bank deemed to be incorporated and registered as a company by virtue of this Act.

Extending definition

- 99 The purpose of an *extending* definition is to add an additional element to the common meaning of a term. Extending definitions are usually introduced by *includes*:
- ✓ **floating restaurant** includes a floating bar, canteen, coffee shop, food store or kitchen.
 - ✓ **master** includes every person having command or charge of a ship.

Restricting definition

- 100 The purpose of a *restricting* definition is to remove some element of the common meaning and often to provide a useful shorthand:
- ✓ **Convention** means the United Nations Convention on Contracts for the International Sale of Goods done at Vienna on 11 April 1980.
 - ✓ **charge** does not include anything described in this Act as a fee.
 - ✓ **Minister** means the Minister of Labour.

Definition by reference to other statutes

- 101 Repeat a definition from another statute rather than refer the reader to the provision alone. Exceptions to this rule are
- the draft Interpretation Act, which defines in s 19, for example,

such fundamental terms as *month*, *New Zealand* and *enactment* (but the existence of such definitions should be noted),

- where statutes deal with aspects of the same subject-matter, such as taxation or transport, and
- long technical definitions intended for broad application.

If a definition from another statute is used, include a note of the source, since this may assist in interpretation and in facilitating consequential amendments to it if they are required.

Location of definitions

- 102 Scattered definitions obstruct a comprehensive understanding of an Act. Definitions are therefore best collected in one place and arranged in alphabetical order early in the Act after the purpose, commencement, and duration provisions. If there are many definitions, however, presenting them early in the Act can detract from the prominence of the major substantive provisions. In such a case it is better to place the definitions in a dictionary, or schedule, at the back of the legislation, with a provision or note early in the Act informing the user where the definitions can be found.
- 103 If a section contains a word with a particular definition which applies only to that section, the section can include the definition. Beware of confining the application of a definition to a particular section and then using the word in the same sense elsewhere.
- 104 Any definition not given in the major definitions provision at the front (or back) of the Act should nonetheless be listed alphabetically in that provision, with a reference to the section in which the definition can be found. In other words, an Act must contain a single comprehensive list of the defined terms.
- 105 Do not introduce a series of definitions with the formula “In this Act . . . , unless the context otherwise requires . . .”; it is sufficient to use the phrase “In this Act . . .”. Careful checking of the definitions should ensure that the words defined do have a consistent meaning.
- 106 At a very late stage of drafting, check that every word defined in the draft is actually used in the draft and is used in the sense stipulated in the definition. Such a check will allow detection of cases where a meaning for a word has been stipulated at an early stage of drafting, and then the word has been omitted or used in a different sense. Check also that words defined in the draft Interpretation Act are used in the sense stipulated in that Act.

Repeals and amendments

- 107 Generally, repeals and amendments do not affect established rights, transactions or matters that are completed or otherwise closed. This principle is expressed in s 6(2) of the draft Interpretation Act: see para 67. Sometimes, however, this principle is easier to state than apply. If there is doubt, there is a good case for including a specific savings or transitional provision to remove the doubt: see paras 62–77 on temporal application, savings and transitional provisions.
- 108 A repealing Act does not need to repeal expressly any Act that has amended the principal Act. This is so whether the amending Act makes a textual amendment to the principal Act or not. The fact that it is an amending Act makes it part of the Act. This is confirmed by section 11 of the draft Interpretation Act, which provides:
- An amending enactment is to be read as part of the enactment which it amends.
- See also appendix B, “Drafting amending laws”.

Schedules

- 109 Schedules are used to improve readability. The removal of certain minor administrative or technical matters to schedules allows the substantive provisions to be presented more conspicuously. For example, if all the procedural provisions regarding a new statutory body are removed to a schedule, the functions of the body can be stated immediately after the provision creating the body. This helps the user understand the purpose of the statute.
- 110 The contents of schedules can also be of equal importance to or even greater importance than material in the body of the Act—for example, the text of a convention which the Act implements. Indeed, if an Act adopts the instrument as part of the law, then the schedule becomes the essence of the statute, an example being the Sale of Goods (United Nations Convention) Act 1994. Material may also be placed in schedules for the purposes of reference and information, as in the Biosecurity Act 1993, in which Schedule 1 is devoted to “Matters for consideration in the preparation of proposals for pest management strategies”.
- 111 A schedule falls within the definition of *enactment* in s 19(1) of the draft Interpretation Act and is, in general, part of the law in the same way as any other provision. Drafting a schedule therefore requires similar care as drafting the body of an Act; and it is important to ensure that there is consistency of wording between the body of the Act and the schedule.

112 A schedule should have a unity of function apparent from its heading, and should be linked to a section in the statute. It is the linking section in the body of the Act that can give the schedule the force of law, and in addition it may provide some explanation of the function and content of the schedule:

- ✓ The enactments referred to in Schedule 2 are amended as indicated in that schedule.
- ✓ This Act applies to the trustee companies listed in Schedule 3 and to all other trustee companies registered after this Act comes into force.

Schedules should also be arranged and numbered according to the order in which they are introduced in the Act.

113 There are no fixed rules about what may and what may not be presented in schedules, and material varies considerably from statute to statute. There are certain conventional practices. The following material can often be arranged usefully in schedule form:

- repeals;
- savings and transitional provisions;
- minor and consequential amendments to other laws;
- tabulated material such as fees;
- procedural provisions—for example, the procedure for appeals or the procedural rules for statutory bodies;
- lists such as of flora and fauna in the Convention on International Trade in Endangered Species, or of drugs in the Misuse of Drugs Act 1975;
- the text of an external document, such as an international convention or a contract;
- technical material such as a plan of an area referred to in the statute; and
- material for the purposes of information only.

114 In the past, a schedule often contained the text of forms to be used in the administration of the statute. The difficulty with this practice is that forms may need alteration or replacement. References in statutes to forms are often better made in less rigid terms. Example:

- ✓ An application must be made in the form approved by the Commissioner.

115 A user must not be left in any doubt about the contents of a schedule. If necessary, a table of provisions can be included at the front of the schedule. An example is the Sale of Goods (United Nations Convention) Act 1994 which presents the United Nations Convention in a schedule, listing the 101 articles in a table of provisions at the beginning of that schedule.

- 116 The material within a schedule may be presented in whatever form most effectively communicates the information. Lists, tables, columns, graphs, flowcharts, or any graphic means of communication may be used: see paras 123–127. If items in a schedule are in tabular format, these can be numbered for ease of reference. If the schedule consists of a list of items dealt with in columns, it can be convenient for the first column to be headed *Item number* and for each item to be numbered sequentially. See paras 243–253 on numbering and lettering conventions.
- 117 If a schedule is likely to be amended from time to time, it may be helpful to identify its constituent parts by number for ease and precision of reference. If frequent amendments are likely, then it may be appropriate to draft an empowering provision in the main body of the Act that allows the schedule to be amended by Order in Council. However, such a provision should not be included without a clear understanding of its possible consequences.

THE USE OF EXPLANATORY MATERIAL

- 118 Drafters must never lose an opportunity to make legislation easier to understand. This is primarily a matter of using plain language and drafting clearly: see paras 141–156. However there is room for further developing the use of explanatory material in statutes.
- 119 The text may be supplemented usefully by explanatory notes (either section notes or endnotes containing defined terms, cross-references, origins of sections and legislative history), flowcharts, comparative tables, graphs, diagrams, formulas, and, in longer Acts, indexes of key words and phrases. This material may or may not be part of the text of the statute itself; for example, tables usually form part of the text while notes do not.

Notes

- 120 Notes can be placed after each section (referred to as section notes) and at the end of the Act (endnotes). Present these in a consistent manner which makes it clear that they are not part of the text.
- 121 Consider the practical value of information before including a note. Do not allow a multitude of not very helpful references to some outdated statute to interrupt the flow and interfere with the appearance of an enactment. For example, it may be preferable to present a comparative table at the end of the Act rather than to give a note after every section.

122 Notes can

- identify the terms in the section which are defined elsewhere in the Act or in the draft Interpretation Act (see paras 95, 101, 211),
- state the origin of the section—for example, any amendment to, repeal of, or substitution of the section,
- outline the legislative history of the Act,
- identify those provisions that implement New Zealand's obligations under international law,
- provide internal cross-references—for example, from defences and remedies to procedure, and vice versa, or between general and specific provisions empowering the making of regulations within the Act,
- list, in a complex statute, those provisions containing a delegation of legislative power or those provisions containing a right of appeal or review,
- make cross-references to other Acts, cases, or to reports of law reform bodies or other relevant bodies, on which the legislation is based, and
- provide material from the explanatory notes which accompany Bills.

Tables

- 123 Tables present data in a more accessible form. For example, a table of comparative references at the end of the statute can be used to refer to the provisions of an enactment which have been replaced or omitted by a new enactment, or on which the later enactment is based.

Flowcharts

- 124 Flowcharts are used to
- show complicated procedural matters,
 - give a quick overview of a statute,
 - show the interrelationship between different elements in a statute, and
 - answer questions of entitlement and liability.
- 125 Flowcharts function most effectively if the specific questions being asked can be answered "yes" or "no". Prime examples are questions of entitlement and liability. Flowcharts are particularly useful to lay users of a statute. The drafter should consider, "What does the user of the Act need to know now?"

- 126 Points to consider when deciding whether to use flowcharts are:
- whether the area of law is a self-contained system or subsystem;
 - whether the elements to be shown are clearly defined in the statute; and
 - whether such a presentation would oversimplify the law and create “loopholes”.

Other explanatory material

- 127 Use formulas, diagrams, maps, graphs and pictures when they are the most straightforward way to explain a concept or a calculation. Examples are the use of formulas in tax Acts, and the colour representation of the New Zealand flag in the Flags, Emblems, and Names Protection Act 1981. See paras 239–240 on the style of algebraic formulas in legislation.

MAKING LAW FOR NIUE, TOKELAU
OR THE ROSS DEPENDENCY

- 128 The general presumption in relation to the territorial force of New Zealand legislation is that it is part of the law of New Zealand in the sense of the islands and territories within the Realm of New Zealand, other than the self-governing State of the Cook Islands, the self-governing State of Niue, Tokelau, and the Ross Dependency. Such legislation might apply to events occurring only in some part of New Zealand or only outside it: see paras 80–86.
- 129 However, legislation enacted in New Zealand can be in force as part of the law of other places:
- New Zealand can make law for Niue, but only at Niue’s request and with its consent;
 - New Zealand can make law for Tokelau, although, increasingly, Tokelau is making its own law or advising on that law; and
 - New Zealand can make law for the Ross Dependency, consistently with the relevant treaty provisions.
- (Note that New Zealand can no longer make law which is to be in force in the Cook Islands.)
- 130 In practice, this issue does not arise very often. In almost all cases, the law enacted by Parliament is in force as part of the law of the principal islands of New Zealand only. But sometimes it will be given a wider or different scope, usually by specific express enactment. Example:
- ✓ The provisions of this Act are in force as part of the law of Tokelau.

By contrast, many subordinate lawmakers, such as municipal authorities, can make law only for certain geographic areas, or, in the case of the Governor-General in Council or Minister, may have delegated statutory power to choose to do so.

MATTERS OF STYLE

PLAIN LANGUAGE

The users of legislation

- 131 **T**HE USERS OF LEGISLATION OBVIOUSLY VARY, ranging from members of Parliament, officials, judges, and lawyers to interest groups and individual members of the public affected by the legislation. This variation may require corresponding adjustments in drafting style.
- 132 On the one hand, legislation may be directed towards a narrow range of specialists and may, in part, be highly technical: an example is the Explosives Act 1957. On the other, it may be aimed at a broader group (even if members of that group will resort to it infrequently): an example is the Consumer Guarantees Act 1993.
- 133 It is important for drafters to be aware of different kinds of users. When writing for specialists, they do not need to avoid detail and technical terms, particularly if these are important for precision and for eliminating ambiguity. But when writing for the public at large, they should endeavour to draft in more general and commonly understood terms.
- 134 Furthermore, as Burrows points out, the style of drafting may also depend on the aim of the legislation; that is, whether it is coercive or not:
Detailed drafting is particularly appropriate to, indeed often necessary for, statutes regulating the criminal law, revenue law, business and commerce. It is also necessary where broad powers, such for example as powers of entry onto private premises, could infringe basic human rights. Such powers require careful delimitation. On the other hand statements of general principle are suitable where it is desirable simply to chart directions and leave the Courts to work out their detailed application on a case by case basis, as for instance in the New Zealand legislation on contract . . . (*Statute Law in New Zealand* (Butterworths, Wellington, 1992), 63)
- 135 But whoever the audience and whatever the context, there is never any justification for poor organisation, prolixity or unnecessary obscurity.

The principles of plain language

- 136 There is no mystery to plain language. Plain language is ordinary language, expressed directly and clearly. It is intended to simplify (to the extent possible), but not be simplistic; to enhance style, rather than be stylistically bland. In legislation its use is intended to remove the barriers to communication, and in this way make the law more accessible.

The barriers to communication

- 137 The barriers to communication are caused in the main by the following factors:
- the absence of underlying principle;
 - poor organisation, with the result that the import of a section or even of the whole Act is difficult to discern;
 - long, convoluted sentences;
 - unnecessarily arcane and archaic language;
 - excessive internal reference and qualification; and
 - unnecessarily repetitive wording.

- 138 All of these factors have become habits in legal writing of all kinds, to the extent that some people have even considered them necessary to the effective functioning of the law. But they can (and should) be rectified or removed. This *Manual* gives advice on how to avoid them and find more acceptable substitutes.

- 139 The elimination of traditional legal writing habits will not have the effect of making the law less certain, as some lawyers fear. Indeed, the traditional drafting style itself frequently gives rise to uncertainty, and the “translation” of already existing legal documents into plain language has been known to uncover anomalies which had been overlooked. It has also been shown that there are relatively few legal terms of art which survive plain language scrutiny. It may be difficult to find a more succinct phrase for the term *fee simple*, for example, but the phrase *bequeath and devise* can be replaced with *give*, and *agree and covenant* reduced to *agree*.

The advantages of plain language drafting

- 140 Pursuing a plain language policy in legislative drafting is not easy. Some kinds of legislation are not as amenable to plain language as others, and, initially at least, drafting in it may be more time-consuming. But the advantages of plain language drafting are many, and they outweigh the disadvantages. For not only will plain

language legislation make the law more accessible to those unversed in it, and less tortuous to those who are legally trained, but it will ultimately be more cost-effective—since all users will require less time and less assistance in interpreting and applying it.

DRAFTING IN PLAIN LANGUAGE

- 141 Drafters should always try to write with the users in mind. This means drafting as simply and directly as possible. The search for simplicity and directness should not, however, be at the expense of precision. Three factors which contribute greatly towards effective communication are
- good organisation of material,
 - simple sentence structure, and
 - careful word choice.

Organisation of material

- 142 Good organisation of material improves understanding by setting up a structure which the user can readily follow, whether across the Act as a whole or within a section. Take time to plan, therefore.
- 143 Ideally, planning should be a co-operative process between instructing officials and drafters, which begins with establishing the main goals and principles and deciding, for instance, the distribution of material within the Act, the schedules and subordinate legislation. It may be helpful to plan with the assistance of visual aids, such as tables, diagrams and flowcharts. Indeed, the Act itself might be improved by the inclusion of such aids.
- 144 Sequence should be logical:
- substantive matter should precede procedural matter;
 - the general should precede the particular;
 - provisions of universal or wide application should precede provisions of limited application;
 - that which is basic or fundamental should be presented prominently and not be obscured by minor provisions; and
 - the procedural or administrative provisions should be removed where possible to a schedule so as to give prominence to important material.
- See para 16 on the order of arrangement of enactments.

Sentence structure

- 145 A long sentence forces the reader to hold a number of ideas in suspense and tends to have a less transparent structure. It therefore

places greater demands on a reader's comprehension and memory skills. Generally, but not invariably, a sentence should not exceed 30 words in length. There are a number of ways of achieving shorter sentences, and they are set out in paras 148–156.

146 A sentence should have one central message; it should not be overburdened with multiple messages. It is important, therefore, that the core structure of a sentence can be easily recognised by a reader. The core structure should not be obscured by multiple or complex modifying elements, particularly those positioned before the subject. A special case or an exception to a general principle or statement should follow that general principle or statement. So should modifiers like *unless* or *until*.

147 Avoid separating the parts of a sentence, clause or phrase, or the parts of a compound verb, by inserting another verb, clause or phrase. Example:

✓ The Minister may issue a licence to the applicant if the Minister is satisfied that the applicant has sufficient funds . . .

is preferable to

✗ The Minister may, if satisfied that the applicant has sufficient funds, issue a licence to the applicant.

Sometimes, however, it is necessary to create such a separation to remove any ambiguity:

✓ If all of the joint tenants do not apply under subsection (1), then, unless the court orders otherwise, the application must be served on every joint tenant who is not already a party.

Eliminate unnecessary words

148 Eliminate all unnecessary words. Two simple methods are to use definitions, if appropriate, and to avoid redundant phrases such as *of this section* and *of this Act*. See also paras 157–179, 257 on word choice.

149 Use the rule that if a person or thing is mentioned in a document, the reader is entitled to assume that a later reference in the same terms is a reference to that person or thing, unless the contrary is indicated or there is a possible ambiguity. This rule is sometimes known as the “narrative style rule”. For example, the following italicised words are unnecessary:

(1) A person may apply to the Registrar for a licence to . . .

✗ (2) An application *under subregulation (1)* must be in triplicate.

- ✘ (3) A person *who applies for a licence under subregulation (1) and who is under 16* must lodge a fourth copy of the application with the Court.

If the provision deals with only one type of licence, it is safe for the reader to assume that any reference to an application relates to that type of licence, and any reference to an applicant is to a person applying for that type of licence.

Use verbs whenever possible

- 150 Another way of eliminating unnecessary words is to use verbs whenever possible, instead of noun phrases. Thus, write
- ✓ a person may apply
 - not* a person may make application.

Active instead of passive

- 151 It is usually preferable to write in the active rather than the passive voice. Example:
- ✓ The Minister may appoint up to 9 persons to be members of the Advisory Committee.
 - not* Up to 9 persons may be appointed by the Minister to be members of the Advisory Committee.

Present tense and indicative mood

- 152 Use the present tense and the indicative mood wherever possible:
- ✓ A person who allows a dog to soil a pavement commits an offence . . .
 - not* A person who shall allow a dog to soil a pavement shall commit an offence . . .

Affirmative statements

- 153 Use affirmative statements. They are usually more direct and straightforward than negative statements. Multiple negatives are confusing, as the following example shows:
- ✘ In proceedings for defamation in which the defendant relies on a defence of honest opinion, the fact that the matter that is the subject of the proceedings attributes a dishonourable, corrupt, or base motive to the plaintiff does *not* require the defendant to prove anything that the defendant would *not* be required to prove if the matter did *not* attribute any such motive.

Modifying elements

- 154 To avoid ambiguity, take care in placing modifying elements, whether they are adjectives, participles, adverbs, phrases or clauses. The general rule is to place a modifier as near as possible to the sentence element it modifies. In the following example the position of the modifier creates an ambiguity:

✗ Every owner of gold bullion *in New Zealand* must . . .

It should be reworded, depending on the sense intended, either as:

✓ Every person *in New Zealand* who owns gold bullion must . . .

or:

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

Pronouns

- 155 Use pronouns rather than producing unnatural and stilted sentences. But what they refer to—their antecedents—must be clear. It is preferable that a pronoun follows its antecedent. Note that pronoun equivalents such as *that person* and *such person* can produce the same ambiguity as pronouns. Possessive adjectives (eg, *her* and *their*) and nouns in the possessive case may also be used in legislation. Use the contracted form 's, but take care with the placing of apostrophes. See paras 186–187 on the use of pronouns in gender-free expression.
- 156 The drafter may have a choice between constructing a sentence in singular or plural terms. The general rule is to use the singular unless the plural form avoids sexist singular pronouns:
- ✓ A person who . . . commits an offence and . . .
not All persons who . . . commit an offence and . . .

Word choice

The golden rule is to pick those words that convey to the reader the meaning of the writer and to use them and them only.

(Gowers, *The Complete Plain Words*
(3rd ed, HMSO, London, 1986), 3)

- 157 The following are some basic rules to follow in choosing words:
- use simple and familiar words unless they do not accurately express the intended meaning;
 - use a single word, if possible, rather than a phrase;
 - prefer verbs to noun forms;
 - do not use different words to express the same meaning, or the same word to express different meanings;
 - avoid Latin and French expressions, jargon and archaic words;
 - use examples, tables, diagrams, and flowcharts as a supplement to, or in place of words when they assist communication.

Words and phrases to avoid

- 158 There are a number of words and phrases traditionally associated with legal drafting which drafters should now be wary of:
- *Never use* said, aforesaid, abovementioned, aforementioned, beforementioned.
 - *Avoid* and/or, foregoing, forthwith, hereafter, hereby, herein, hereinafter, hereinbefore, hereto, hitherto, preceding, pursuant to, save that, succeeding, thereafter, thereby, therefrom, thereof, whatever, whatsoever, whereas, wheresoever, whomsoever.
 - *Avoid twin phrases* (suggested alternatives follow in parentheses):
 - all and singular (“all”)
 - aid and abet (“assist”, “encourage”, “help”)
 - as and from (see para 164)
 - each and every (“each”, “a”, “all”)
 - force and effect (“into force” or “has effect”)
 - null and void (use “void” only)
 - if and when (use one or the other)
 - let or hindrance (“obstruction” or “interruption”)
 - rest, residue and remainder (use one only)
 - unless and until (use one or the other)
 - will and testament (“will” only).
 - *Do not use* “above” and “below” in references (eg, “subsection (1) above”). They are unnecessary and may become inaccurate once a text is amended.
- 159 The following table lists some other expressions which are better avoided, with suggested substitutes:

AVOID	USE
as to whether	whether
by reason of	because
furnish	give
if there are any conditions which do not comply	if any conditions do not comply
in lieu of	instead of
in like manner as	as, in the same way
in relation to	
in respect of	for, to, about
in the event that	if
is allowed to	
is permitted to	may

AVOID	USE
is void and of no effect	
does not have any force or effect	has no effect
meets the requirements of	complies with
of which	whose
otherwise than	except
prior to	before
subsequent to	after
pursuant to	under
specify	set, give, state
take such steps as are appropriate	take appropriate steps
with the permission of the Minister	with the Minister's permission

Words and phrases to use with care

- 160 Certain words and phrases must be used with care, because their meaning is often misunderstood:
- all—each—every
 - and—or
 - any
 - before—after—from
 - being/not being
 - comprise
 - deem
 - except—unless
 - existing
 - less than/more than
 - may—must—shall
 - notwithstanding—subject to
 - such
 - where—if

ALL—EACH—EVERY

- 161 These words are often used where they would be better omitted or replaced by *a*, *an*, or *the*. *All* should be omitted in the following example:
- ✘ All elected members hold office for 3 years.
- The use of *all*, *each*, and *every* should be restricted to contexts in

which their core meaning is needed. *All* may be appropriate where the emphasis is on the collective, and *each* or *every* where the emphasis is more on the individual (but avoid *each and every*).

AND—OR

- 162 *And* should be used only in a conjunctive sense (ie, to join matters), and *or* should be used only in a disjunctive sense (ie, to express alternatives). But drafters must remember that *and* has been judicially construed in a disjunctive sense and *or* in a conjunctive sense. The conjunctive sense of *and* may be made more certain by the use of *both . . . and*; for example, *buyers who are both wholesaler and retailer*. The disjunctive sense of *or* may be highlighted by using *either . . . or . . . but not both*; for example, *buyers who are either wholesalers or retailers but not both*. Consider the context carefully, and if the chance of ambiguity exists, eliminate it. If necessary, restructure the sentence. See para 183 for usage of *and—or* in a series of paragraphs.

ANY

- 163 *A* or *an* is usually just as effective as *any* and free from ambiguity. *Any* may be ambiguous because it is capable in some contexts of carrying the same meaning as *every*. In the following example, it is not clear whether the Minister must consult one organisation or every organisation:
- ✘ The Minister must consult any organisation which appears to the Minister to represent a substantial number of citrus growers.

BEFORE—AFTER—FROM

- 164 Subsections (1) and (2) of s 24 of the draft Interpretation Act set out rules for interpreting these words in connection with time. A period described as beginning *from* or *after* a given date, event or act does not include that date, or the day the event or act occurred. A period described as ending *before* a given date, event or act does not include that date, or the day of the event or act. Use *after* instead of *from*, since it is less ambiguous.

BEING/NOT BEING

- 165 Do not use *being* and *not being* to join relative clauses:
- ✘ a person who is 70 or over, being a person who has a driver's licence.
- Join the two clauses with *and* instead:
- ✓ a person who is 70 or over and has a driver's licence.

COMPRISE

- 166 A whole comprises the parts of which it is constituted but the parts do not comprise a whole. Thus New Zealand comprises two large islands and a number of smaller ones. It is not correct to say that two large islands and a number of smaller ones comprise New Zealand.

DEEM

- 167 The purpose of this word is to create a legal fiction: it has a defining function. It should be used only if something is to be what it is not, or if something is not to be what it is:
- ✓ A person who has received an offer of compensation is deemed to have accepted the offer unless the person registers an objection within 30 days of receiving the offer.

Avoid using *deem* if it bears the meaning of *think* or *consider*. In the following example the use of *deem* is not appropriate:

- ✗ Nothing in this Act shall be deemed to affect a right to compensation under any other law.

The provision would be better expressed as *Nothing in this Act affects . . .*, or more directly, *This Act does not affect . . .* *Deem* can often be replaced by *regarded*, *taken* or *treated as*.

EXCEPT—UNLESS

- 168 If a provision is expressed to apply *except* in specified circumstances or *unless* something happens, consider whether there is provision for the consequences if that circumstance does occur, or that something does happen; that is, when the provision no longer applies. A complementary provision may be necessary, as supplied in the following example:
- ✓ A mortgagee who exercises a power to sell mortgaged property may not become the purchaser of the mortgaged property except,
 - (a) in accordance with section 166, at a sale of land or goods through the Registrar, or
 - (b) in accordance with an order of a court made under section 168.

EXISTING

- 169 This word requires an unambiguous reference to a fixed point in time. A definition may be desirable.

LESS THAN/MORE THAN

- 170 To provide for *less than X* and *more than X* has the effect of excluding X itself and leaving it unprovided for. Use *not exceeding/*

exceeding or *less than/at least* instead. *Above/below* and *over/under* should be similarly avoided. *Less* means “a smaller amount of” and is applied only to things measured by amount. When things are measured in number, the correct adjective is *fewer*: *less tonnage*; *fewer ships*.

MAY—MUST—SHALL

- 171 *May* should be used where a power, permission, benefit or privilege given to some person may but need not be exercised: exercise is discretionary.

✓ The District Court Judge may impose any other conditions on the person's release that the Judge considers necessary.

Must should be used where a duty is imposed which must be performed:

✓ Before questioning a person who is entitled to the questioning safeguards, a police officer must enquire whether the person wishes to consult a lawyer.

- 172 Although *shall* is used to impose a duty or a prohibition, it is also used to indicate the future tense. This can lead to confusion. *Shall* is less and less in common usage, partly because it is difficult to use correctly. Use *must* in preference to *shall*: it is clear and definite, and commonly understood.

- 173 *Shall* and *must* are often used unnecessarily in declarative expressions, in an attempt to capture a sense of authority and obligation. In this situation, the present tense is often more appropriate:

not A parent *shall be* entitled to appear . . . but A parent *is* entitled to appear . . .

not It *shall be* lawful . . . but It *is* lawful.

not A person *must be* a resident to be eligible . . . but A person *is* eligible only if resident . . .

See also para 152.

NOTWITHSTANDING—SUBJECT TO

- 174 If provisions in one or more enactments are or may be inconsistent with each other, the drafter must clarify which provision is to prevail. It is not incorrect to use both *notwithstanding* and *subject to* to connect the provisions. But, used excessively, they impair readability and indicate that each provision should be more carefully drafted. Problems arise when either phrase is used without a specific reference. If there is no inconsistency, the phrases should not be used.

- 175 The phrase *subject to this section* is generally unnecessary because

a section will be construed as a whole unit. *Subject to* should not be used when the intended meaning is *in accordance with*; these phrases do not have the same meaning: the first denotes a conditional relationship, and the second compliance.

176 *Notwithstanding anything in this Act* (or variations) and *subject to any enactment to the contrary* are formulas frequently found in New Zealand statutes:

- ✗ Notwithstanding anything in any other enactment . . .
- ✗ Notwithstanding the provisions of subsections (1) and (2) of this section or section 60(2) of this Act, but subject to subsection (2A) of this section and section 60(3) of this Act . . .
- ✗ Subject to any enactment to the contrary

Similar formulas are:

- ✗ Except as provided in this Part . . .
- ✗ This Part of the Act shall apply notwithstanding anything in any other Part of this Act . . .

Although these formulas may indicate that the provision containing it is intended to prevail, they often do not indicate which provisions are to be overridden. The difficulties which such formulas create are

- uncertainty or even impossibility of application,
- incomplete communication of the legal effect of the provisions,
- the probability that users will be misled,
- the possibility of implied or express repeal by a subsequent provision, and
- the possibility of a broader application than that intended.

177 A more straightforward way of clarifying the relationship between different elements of an Act must be found. The use of affirmative rather than negative statements, and specific identification of the affected provisions is one possibility. Example:

- ✓ Payment must be made within 21 days, except in the circumstances described in subsection (1).
- ✓ Part 3 of the Land Transfer Act 1952 prevails over sections 10-15 of this Act when . . .

SUCH

178 *Such* can be ambiguous in its point of reference. It can also produce a starchy effect when over-used. Example:

- ✗ Printed books purporting to contain statutes, Ordinances, or other written laws in force in any country although not purporting to have

been printed or published by authority as aforesaid, books purporting to contain reports of decisions of Courts or Judges in *such* country, and textbooks treating of the laws of *such* country, may be referred to by all Courts and persons acting judicially for the purpose of ascertaining the laws in force in *such* country; but *such* Courts or persons shall not be bound to accept or act on the statements in any *such* books as evidence of *such* laws.

Such can be simply omitted or replaced with *the, a, that* or a variant. Thus the last clause of the example would become:

✓ . . . but a court or a person is not bound to accept or act on the statements in those books as evidence.

WHERE—IF

179 *Where* is commonly used to suggest place (eg, “the street where you live”). It also refers to situations or sets of circumstances, which may be actual or hypothetical. Example:

✓ The complainant is not required to state his or her address or occupation in court, except where leave is given under paragraph (c).

Where has also been traditionally used to introduce a conditional clause, but in that case *if* is preferable:

✓ This section applies if the conviction subsisted when the statement in question was made.

PARAGRAPHING

Paragraphing provides a visual aid to comprehension by breaking up solid blocks of type; it delivers the sentence in packages, so to speak, making it easier for the mind to grasp the whole.

(Driedger, *The Composition of Legislation*
(2nd ed, Department of Justice, Ottawa, 1976), 53)

180 To facilitate communication, a sentence may be presented in a “paragraphed” form. That is, its structure may be exposed by using numbered or lettered paragraphs. But restraint should be shown in such “sculpting” of paragraphs. This technique, while very useful, can produce artificially complex sentences, which may in fact impair communication. And, unless there is a specific need to present a list, do not divide a sentence into paragraphs of one- or two-word elements.

181 Each paragraph must follow grammatically from the words introducing the series and must perform an equivalent function in the sentence. That is, the paragraphs must constitute a genuine series, and they must be parallel. For numbering and lettering practice, see paras 243–253.

182 A series of paragraphs may be followed by words which apply to all the paragraphs, but only if the result is not too unwieldy:

- ✓ A person who satisfies the Board that the person
 - (a) is of good character, and
 - (b) holds a prescribed qualification in forestry, and
 - (c) has not less than 3 years practical experience in forestry in a Commonwealth country,is entitled to be registered as a forester.

However, stating the essence of the provision at the outset would make the sentence more readable:

- ✓ A person is entitled to be registered as a forester if the Board is satisfied that the person
 - (a) is of good character, and
 - (b) holds a prescribed qualification in forestry, and
 - (c) has not less than 3 years practical experience in forestry in a Commonwealth country.

(Indentation of lettered or numbered paragraphs, as in the examples, is important because it helps to expose the sentence structure.)

183 The linking words *and* and *or* show whether paragraphs are cumulative or alternative. They should be inserted after every paragraph, unless there is good reason not to. If they appear only after penultimate paragraphs, users might be prompted to apply the linking word only to the last two paragraphs.

184 Paragraphs may be divided further into subparagraphs. If a sentence needs to be divided beyond subparagraphs, review the structure of the sentence. Break it up into shorter sentences, for example, since two or more sentences which involve some repetition of opening words are easier to follow than one very lengthy sentence which has to be divided into subsubparagraphs.

Form of proviso

185 The traditional form of legal proviso beginning *Provided that* should not be used. It is an archaic, grammatically dubious form not used in ordinary communication. Ambiguity may result if it is uncertain whether the proviso is intended to be a true proviso derogating from a general provision or a parallel supplementary provision. There is no one general form with which to replace the proviso. A simple *but* or *except that* may be adequate, or the use of a separate subsection. Example:

- replace* Any act or omission . . . shall constitute an offence: Provided that this subsection shall not apply to any act or omission which is expressly authorised by . . .
- with* Any act or omission . . . constitutes an offence; but this

subsection has no effect if the act or omission is expressly authorised by

- or*
- (1) Any act or omission . . . constitutes an offence.
 - (2) Subsection (1) does not apply if the act or omission . . .

GENDER-NEUTRAL EXPRESSION

186 Always use gender-neutral language. Some of the more common methods of avoiding the traditional use of male pronouns include the following (the first four approaches are adaptations of the sentence *A member of the Tribunal may resign his office*).

- Omit the pronoun:
 - ✓ A member of the Tribunal may resign office.
- Use masculine and feminine pronouns:
 - ✓ A member of the Tribunal may resign his or her office.
- Repeat the noun:
 - ✓ A member of the Tribunal may resign the office of member.
- Use the plural:
 - ✓ Members of the Tribunal may resign their offices.
- Convert a noun to a verb form:
 - ✓ The Commissioner may consent
 - not* The Commissioner may give his consent to
- Use a relative clause:
 - ✓ A mortgagee who exercises a power to sell mortgaged property may not
 - not* Where a mortgagee exercises a power of sale, he may not

187 These techniques are not all suitable in all contexts. The repetition of nouns in place of pronouns, for instance, may produce a clumsy sentence, and using both the masculine and feminine pronouns can sound awkward. Choose the technique that communicates the message as effectively and as elegantly as possible. It may be necessary to rework the sentence altogether.

188 Avoid terms for occupations or activities that are sex-specific:

drafter	<i>not</i>	draftsman
ambulance worker	<i>not</i>	ambulanceman
firefighter	<i>not</i>	fireman
milk vendor	<i>not</i>	milkman
worker/employee	<i>not</i>	workman
testator	<i>not</i>	testatrix
administrator	<i>not</i>	administratrix
staffed, crewed	<i>not</i>	manned

189 As a general rule, *chairman* should no longer be used. *Chairperson*

is an acceptable alternative but *chair* is not. Other alternatives are the following:

- president
- presiding person, officer, member
- convenor
- co-ordinator
- moderator.

THE USE OF TE REO MÄORI

190 Section 3 of the Māori Language Act 1987/Te Ture o te Reo Māori 1987 declares the Māori language to be an official language of New Zealand. Māori is used increasingly in New Zealand statutes. Its use ranges from the inclusion of isolated Māori terms, such as *whānau*, *kaumātua*, or *taiāpure*, to whole passages of the text, as in the preamble to Te Ture Whenua Māori Act 1993. However, only one current statute appears in a bilingual form, namely the Māori Language Act itself, and in that case the Māori text was not actually enacted.

191 There are two major questions to consider in connection with the use of te reo Māori in legislation:

- whether the use of Māori is appropriate and, if so, when; and
- if it is appropriate, whether an English translation should be provided.

There is also the question of whether a macron should be used to indicate long vowels.

192 The guidance given in these paragraphs is based on the practice as discerned in current New Zealand legislative drafting. Two principles should be followed in using te reo Māori:

- consult in the appropriate quarters—for example, with the Māori Language Commission/Te Taura Whiri i te Reo Māori if there is a need to create new terms in Māori; and
- be consistent throughout the statute, and in any amendments or subordinate legislation deriving from it.

193 Māori terms are not always given English equivalents in legislation. This may be because they are commonly understood (eg, *iwi*, *kaumātua*) or because they do not lend themselves to brief explanation (eg, *mauri*, *tikanga*). Include Māori terms in the definitions section only if they are to be given a specific meaning for the purposes of that Act; otherwise their meaning may be narrowed (or widened) unintentionally. Example:

kaitiakitanga means the exercise of guardianship; and, in relation to a resource, includes the ethic of stewardship based on the nature of the resource itself

- 194 When using a Māori term which is not commonly understood and which does not require definition for the purposes of the Act, it may be better not to provide any English equivalent or explanation in the text, but to leave it for judicial interpretation according to *tikanga* and with the assistance of expert evidence.

Macrons

- 195 Current statutory practice is to indicate a lengthened vowel in Māori by doubling it. However, the convention agreed on by most authorities for indicating a lengthened vowel is the macron. Use macrons where they are appropriate, therefore, and not a double vowel. Thus write *wāhi* and not *waahi*. Be aware, however, that tribal preferences can determine the pronunciation of certain words, and therefore whether or not a vowel is lengthened.

TABLE OF PROVISIONS

- 196 A list of contents, headed TABLE OF PROVISIONS, should be prepared and placed immediately before the first provision of every enactment longer than four sections. In general, regulations should follow the same practice. The table of provisions offers the user a quick means of access to the enactment.
- 197 The list should set out in sequence all headings, including section headings. Include part, subpart and section numbers. If schedules contain headings and numbered provisions, these should also be included in the table of provisions or at the beginning of the schedule: see para 115.
- 198 If an amending Act inserts a new section in a principal Act, the table of provisions of the amending Act should also include the section heading of the inserted section. When the principal Act is consolidated, the list of contents will need to be annotated to include the inserted section heading.
- 199 The table of provisions of a large and complex Bill is likely itself to be large and complex. It may be helpful to present a summary of the contents, perhaps showing part and subpart headings only. Prepare a table of provisions early in the drafting process. It provides a means of keeping the structure of a Bill under continuing review and may indicate as the draft develops that
- the structure is capable of improvement,
 - provisions are misplaced,
 - necessary provisions have been omitted, or
 - headings have become inaccurate.
- If changes are made to the Bill after its introduction, the table of provisions of the Bill as reported back should reflect those changes.

HEADINGS

- 200 Headings are intended to save users' time by helping them to find their way about the legislation. Headings should be descriptive, and they should be brief; but not so brief that they sacrifice clarity. Their language must be consistent with that of the enactment to which they relate.
- 201 Parts, subparts, sections, and schedules should have a unity of purpose. The discipline of drafting descriptive headings accurately can reveal a lack of unity and indicate the need to restructure. Review headings at a late stage in drafting. It is easy to overlook keeping headings consistent with changes in the draft.

Section headings

- 202 The primary purpose of section headings is to provide a descriptive label. Individually, they indicate the contents of the section; collectively (in the table of provisions), they indicate the contents of the Act.
- 203 But a heading can also provide a summary of the section. A summarising heading can be particularly helpful with a complex section, but it is important to ensure that such a heading is not misleading. Avoid ambiguous headings such as **Application**, or uncertain headings such as **Proof of permission, etc**, or headings which do not relate directly to the text of the section:
- ✘ **Corrupt use of official information**
Every person to whom section 96 applies is deemed for the purposes of sections 105 and 105A of the Crimes Act 1961 to be an official.
- 204 Sometimes it may be appropriate to draft headings in the form of questions. The reason is that users of legislation frequently approach it with specific questions in mind, and it is helpful to attempt to anticipate these. In complex sections, it may also be helpful to provide subsection headings, which should be raised (like section headings) above the text but appear in italics.
- 205 If a schedule is designed in numbered clause form, include clause headings drafted according to the same principles as section headings. See also paras 109–117.

Other headings

- 206 Apart from being gathered under part and subpart headings, groups of provisions may be gathered under italicised headings known as *cross headings*. Such provisions should be closely related. Cross

headings do not themselves create distinct divisions and are not numbered, but may be helpful within a part or subpart with many provisions.

- 207 Drafters must ensure:
- that part, subpart and cross headings are accurate in the description of their contents and broad enough to include all material presented within them; and
 - that all material relevant to the heading is actually presented under it.

DEFINITIONS

- 208 In drafting definitions, use *means* if the complete meaning is stipulated. *Includes* is appropriate if the stipulated meaning is incomplete. Do not use the phrase *means and includes*. It is impossible to stipulate a complete and an incomplete meaning at the same time. In an unusual case it may be appropriate to use the formula *means . . . and includes . . .* if the function of the second part of the definition is to clarify or remove doubt about the intended scope of the first part of the definition:

✓ **conduit** means any pipe, tunnel, or artificial channel which lies above, on or under any land and is used or intended to be used for the conveyance of waste water and includes associated fittings, pits and supports.

- 209 The point of application of a definition may be restricted:
- ✓ **year**, for the purposes of Part 3, means the period from 1 July to the next following 30 June.

If necessary, a definition may contain two or more parts, each applying to different circumstances or different provisions:

- ✓ In this section, **court** means
- (a) if the defendant is to be tried on indictment, the court before which the defendant is to be tried; and
 - (b) in every other case, a District Court.

- 210 A definition may also be expressed in negative terms:
- ✓ **aircraft** does not include a hovercraft.

Highlighting of definitions

- 211 Each section that contains a defined term should alert the user to its presence by means of a note as follows:

✓ **30 Misconduct of plaintiff in mitigation of damages**
In proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose

reputation is generally bad in the aspect to which the proceedings relate.

Definitions: **defamation**, s 2; **person**, *Interpretation Act 199*–s 19(1)

However, if the term is fundamental to the legislation or is used frequently, it may be noted only on the first occasion it appears. Defined terms which are used in schedules—for instance in explanatory material such as tables—should be similarly noted. See also paras 94–106.

PUNCTUATION

- 212 Punctuation provides a signpost to sentence structure. It makes it easier for the user to comprehend the structure of the sentence and therefore to understand the message. But a sentence that is ambiguous without punctuation probably needs recasting.
- 213 Use punctuation only if it serves a demonstrable purpose. Gowers writes: “Taste and common sense are more important than any rules; you put in stops to help your readers to understand you, not to please grammarians” (*The Complete Plain Words*, 152). However, a consistent approach is also helpful.
- 214 For example, a series of lettered paragraphs might correctly be introduced by a colon or without punctuation marks, and these practices should be followed consistently, unless the meaning clearly requires a departure. Similarly, each paragraph in a series might end with a semi-colon or a comma; and, again, a consistent practice should be adopted.
- 215 Which practice to follow depends on the content. If a sentence contains a series of propositions in paragraph form, use a colon to introduce and semicolons to separate the paragraphs (see, eg, para 225). If a sentence contains a series of short items which flow naturally into one another, then no mark of punctuation is required to introduce the paragraphs, and commas should separate them (see, eg, para 224). Use a comma to introduce only if it completes a qualification of the preceding words, as in the following example:
- ✓ 2 **Definitions**
(1) In this Act
 . . .
 judge means,
 (a) in the case of any proceedings before the High Court, a judge of that court, and
 (b) in the case of any proceedings before a District Court, a judge of that court . . .

See also paras 180–184.

Full stop

- 216 Every sentence should end with a full stop. There should be no full stop after an abbreviation or a contraction, a heading, title, number, table or symbol of currency or measurement.

Comma

- 217 Drafters should use commas with care, since their insertion or omission can greatly alter the meaning of a sentence. An understanding of the syntactic relationships of the words and word groupings in a sentence is necessary to the correct use of commas.

- 218 Commas serve two distinct purposes: to separate and to enclose. A comma may separate
- an introductory modifying clause,
 - items in a series (whether words, phrases or clauses) (see paras 181–182),
 - words or numbers where misunderstanding might otherwise result, or
 - long independent clauses joined by conjunctions such as *but*, *and*, *nor*.

Commas inserted before and after the relevant phrase or clause may enclose

- commenting or non-restrictive modifying phrases or clauses, or
- modifying phrases or clauses if enclosure helps to illuminate the sentence structure.

- 219 Commas should never enclose a restrictive relative clause. A restrictive relative clause is a clause without which the substance of the sentence would be incomplete. The italicised relative clause in the following sentence, for example, should not be enclosed in commas, because it is essential to what the drafter needs to communicate:

- ✓ The Authority may recover as a debt due from the owner of the licensed works costs and expenses *that are reasonably incurred in taking measures for remedying pollution damage* . . .

In the following sentence a non-restrictive clause is correctly enclosed with commas because it could be omitted without changing the essential meaning of the sentence:

- ✓ The members of the Board, who are appointed under section 9, hold office for a maximum term of 4 years.

- 220 Except for commas enclosing material of a parenthetical nature, a comma should not separate a subject from its verb nor a verb from its object: see para 226.

221 A comma cannot perform the task of a co-ordinating conjunction like *and*. Two sentences cannot properly run on without a co-ordinating conjunction or a semi-colon or a full stop between them. The mistaken use of a comma in such circumstances is referred to as a “comma splice”. Thus

✘ Subsection (2) does not apply to an order under section 74, it does apply to an order under section 75.

should be punctuated as follows:

✓ Subsection (2) does not apply to an order under section 74; it does apply to an order under section 75.

Colon

222 The principal use of the colon in legislation is to introduce a series of paragraphs, subparagraphs or a list or tabulation. Do not use it to separate a series of paragraphs or definitions. See para 225.

Semi-colon

223 A semi-colon is a mark of co-ordination, not termination:

- It may join in one sentence two independent clauses which are closely enough related to make it desirable to show their coherence in one sentence: see para 221.
- It may co-ordinate a series of paragraphs, subparagraphs or items listed: see para 225.

224 If a series of paragraphs is followed by words applying to all the paragraphs, the paragraphs should be separated by commas:

- ✓ A person aggrieved by the action of a local government authority
- (a) in rejecting plans, or
 - (b) in fixing or refusing to extend any period, or
 - (c) in imposing or refusing to vary any building condition,
- may appeal to a District Court within the time and in the manner prescribed in the regulations.

No punctuation mark is required to introduce the series.

225 If a series of paragraphs is a collection of propositions, independent but connected, they should be separated by semi-colons and introduced by a colon:

- ✓ (1) The following are declared to have been abolished:
- (a) estates tail and estates by wrong;
 - (b) the making of a forfeiture by any conveyance;
 - (c) the passing of the legal estate in any land by any of the following means:

- (i) a covenant to stand seized;
- (ii) livery of seisin;
- (iii) a contract for the sale and purchase of land;
- (d) the rule of law known as the rule in *Shelley's* case.

Parentheses

- 226 Parentheses or brackets enclose explanations, illustrations or digressions that are loosely connected with the message of the sentence. Use them with caution because an interruption to the flow of the sentence may impede understanding, particularly if the parenthetical insertion is longer than a few words. In legislation, it is conventional practice also to enclose within brackets the numbers and letters denoting subsections and lesser elements.
- 227 A reference to a legislative provision may be made clearer by a parenthetical explanation of the content of that provision, especially when that reference is to another Act:
- ✓ No person may subdivide land, unless the subdivision is . . . effected by a transfer, exchange, or other disposition of land made by an order under section 129B of the *Property Law Act 1952* (which relates to the granting of access to land-locked land).

SPELLING

- 228 Although modern English spelling is often wayward, rules do exist. In legislation, the one important spelling rule is to be consistent. This rule applies not only within a particular instrument but also across all legislative instruments. For example, in New Zealand legislation the preferred spelling of *organise* or *organisation* uses the -s rather than the -z variant.
- 229 If a preferred spelling is not established, follow the spelling preferred in *The New Shorter Oxford English Dictionary* (Clarendon Press, Oxford, 1993) or, where no preference is stated, follow the spelling first used. Refer to the *Heinemann New Zealand Dictionary* (2nd ed, Heinemann, Auckland, 1989) if a specifically New Zealand variant is sought.
- 230 Names and titles must be spelt accurately even though the correct spelling conflicts with the usage adopted for legislation in New Zealand. For example, even if New Zealand practice is to prefer *-ise* to *-ize*, reference should still be made to the World Health Organization.

CAPITALS

They should be used sparingly—though not so sparingly as the American poet e.e. cummings used them, contending that only God merited a capital.
(Fieldhouse, *Everyman's Good English Guide*
(Dent, London, 1982), 159)

- 231 There is a trend against unnecessary use of capitals to begin words. When in doubt, reject the capital. Take care, however, to be consistent.
- 232 Capitals should not be used
- to begin each paragraph of a series of paragraphs within a sentence, or
 - to begin each word defined in a series of definitions.
- 233 Words used in a general sense do not take a capital letter even though the same word used in a particular sense does:
- ✓ Every schedule, other than Schedule 3, comes into force on 2 January 1997.
 - ✓ The Disciplinary Tribunal is a tribunal for the purposes of the Tribunals Act 1988.
- 234 Use a capital for
- *Act*,
 - *Crown*,
 - names and titles of persons of considerable eminence (*Governor-General*, *Chief Justice*), and
 - words of general signification used in a special or technical sense (*the Fund*, *the Planning Authority*, *the Disputes Tribunal*).
- Do not use a capital for words such as *court*, *judge*, *government*, unless they have a singular, specific sense:
- ✓ the New Zealand Government; the Court of Appeal.

SYMBOLS, FORMULAS, ABBREVIATIONS AND ACRONYMS

Shortened forms are used in order to save space and make reading easier by eliminating needless repetition.

(Australian Government Publishing Service,
Style Manual for Authors, Editors and Printers
(5th ed, AGPS Press, Canberra, 1994), 107)

- 235 A symbol, abbreviation or acronym may be used in legislation if it is generally recognised. For example, the use of symbols such as \$ and % is beyond question.
- 236 Do not abbreviate or contract the first word of a sentence; and do not use abbreviations and contractions which are appropriate only

in less formal writing. In this category are forms such as

- ✗ Govt, Dept, Mon, Feb, GP, TV, s or ss (section or sections), isn't, it's, won't

However, abbreviations such as s or ss may be used in notes which are attached to but not part of the text of legislation.

- 237 If legislation has a technical content, experts may readily understand abbreviations and contractions, but the use of definitions to explain such abbreviations and contractions will help legislators, administrators, lawyers and judges.
- 238 The tendency nowadays is to abandon the use of full stops after shortened forms or between the letters of acronyms.
- 239 Algebraic formulas assist in calculating amounts if explaining the calculation in words becomes lengthy and involved. If possible, express the variables of the formula in words rather than symbols. Example:

✓ $-(\text{---} \times \text{---})$

(Provide definitions of the variables immediately below the formula, if they are required.)

- 240 If it is not possible to express the formula in words, then express it using symbols represented by the initial letters of the variables. This makes the formula easier to remember and apply. For example, the following formula, which is used for calculating net specified income, is adapted from s OB 1 of the Income Tax Act 1994:

✓ $(\frac{\times}{\text{---}})_{\text{---}}$

In this example, *a* represents assessable income, *n* the number of weeks during which the taxpayer was a full-time earner, and *t* the amount of tax payable.

- 241 In legislation referring to a particular body, office or individual, it is accepted practice to shorten names and titles to their generic form (eg, *the Commission for the New Zealand Fire Service Commission*). If shortening names and titles in this way, however, it is important to ensure that there is no ambiguity: this can be achieved by listing the contraction in the definitions section.
- 242 If a distinctive shortened form seems desirable, an acronym may be created. Acronyms must be clearly explained either in the definitions section or in the specific part or section in which they

are used. A reference in the definitions section is preferable unless the acronym is used in only a limited number of sections which will be read together. In that case, it may be introduced in parentheses after the name or title appears for the first time in full.

NUMBERING AND LETTERING PRACTICE AND TERMINOLOGY

Acts and regulations

243 Acts are numbered as follows:

- Part 1
- Subpart 1
- 1 (section)
 - (1) (subsection)
 - (a) (paragraph)
 - (i) (subparagraph)

Use Arabic and not Roman numerals to number parts, subparts, sections and subsections. The numbering pattern for regulations is the same as for Acts, although the terminology is different:

- 1 (regulation)
 - (1) (subregulation)
 - (a) (paragraph)
 - (i) (subparagraph)

Do not use bullet or dot points, since they create difficulties in making cross-references and subsequent amendments.

244 A consistent practice should be adopted in the lettering of two series of paragraphs in one section or subsection. Begin the second series as if it were a continuation of the first series:

- ✓ **food** means food for human consumption, including
 - (a) drink, other than water; and
 - (b) chewing gum and similar products;but does not include
 - (c) milk and cream; or
 - (d) live animals or birds.

245 However, it is often possible to avoid such a paragraph format altogether. In the example, the provision could be redrafted simply as follows:

- ✓ **food** means food for human consumption, including drink (other than water), and chewing gum and similar products, but not including milk or cream, or live animals or birds.

Schedules

- 246 Schedules are numbered consecutively in Arabic numerals; for example, Schedule 1, Schedule 2 and so on. If there is only one schedule to an Act, it should nevertheless be numbered Schedule 1. This makes it easier to add further schedules at a later stage. Include a list of contents if it is helpful: see paras 196–199.
- 247 Text in a schedule is presented in accordance with the same numbering and lettering conventions which otherwise apply in the statute. However, there may be variations on these conventions with lists or when the text of treaties is reproduced.

Amendments

- 248 A section inserted between ss 2 and 3 is distinguished as s 2A; further sections would be ss 2B, 2C and so on. A section inserted between 2A and 2B would be s 2AA. Very infrequently, a complication can arise. Suppose an Act has ss 2, 2A, 2B, and 3. An additional section inserted between 2 and 2A would be identified as s 2AA, but a section inserted between 2A and 2B would also be s 2AA. Obviously, to identify two sections as s 2AA is unacceptable; and the best solution is to use 2AA in the first case and 2AB in the second.
- 249 An additional subsection inserted between subss (2) and (3) is distinguished as subs (2A). Similarly, a subsection inserted between (2A) and (3) is identified as subs (2AA). The practice for paragraphs and subparagraphs is similar. Paragraphs inserted after para (b) are lettered (ba), (bb), (bc). Subparagraphs inserted after subpara (ii) are designated (iia) and so on.
- 250 A part inserted by an amendment to an existing Act would be identified similarly; for example, Part 1A, Part 1B. If an additional schedule is to be inserted later within a series of schedules, it should also be designated by letter; for example, Schedule 3A.
- 251 If a consecutive number or letter is available for an inserted provision, there is no need for complicated rules of practice. These rules are only for insertions *within* an existing series. If a section contains four subsections and a fifth is added after subs (4), the fifth one is numbered (5).
- 252 Do not renumber or reletter provisions as a result of amendment. If s 5 is repealed, s 6 and later sections should not be renumbered in consequence, as this might create problems with cross-references.

Alphanumeric system

- 253 For lengthy and complex Acts, consider using the alphanumeric referencing system. The system was adopted in the Income Tax Act 1994. The new system does not number the whole Act consecutively from 1; instead parts and subparts are lettered in separate series, but each beginning with A. Thus a reference to each section of the Act begins with an alphabetical reference, first to the part, and secondly to the subpart, followed by a number. So a reference to a specific section could take the form CB 3. Such a system allows new subparts and provisions to be inserted over time, without resulting in complex section identifiers; it also gives a better sense of structure.

REFERENCES TO LEGISLATIVE PROVISIONS

- 254 Use figures rather than words:
- section 27 *not* section twenty-seven;
 - Part 3 *not* Part Three;
 - Schedule 2 *not* Schedule two.
- 255 Complex references should generally be made in a short form and not spelt out in full:
- ✓ section 14(4)(a)(i)
 - not* subparagraph (i) of paragraph (a) of subsection (4) of section 14
- (Note that they are referred to in descending order of generality: section, subsection, paragraph, subparagraph.)
- 256 References to other provisions of an enactment should be specific and identify the provision by its designated number or letter. Do not use vague references such as *preceding*, *above* and *following*. Avoid also the apparent but deceptive precision of references such as *next following* or *immediately preceding*. These can very easily become incorrect as a result of later amendments.
- 257 A reference in one section of an Act to another provision of the same Act should not include the words *of this Act* or *hereof*. Unless there is a specific reference to some other Act, the context makes it clear beyond doubt that the reference is to a provision in the same Act. No other unspecified Act could be intended.
- ✓ Subject to section 14, an aggrieved person may appeal . . .
 - not* Subject to section 14 of this Act, an aggrieved person may appeal . . .
- 258 The same rule applies within all elements of the Act: parts, subparts, sections, subsections, paragraphs, schedules. See also para 148.

- 259 However, the need to avoid ambiguity remains. If an internal reference and an external reference are in the same provision, it is necessary to make the import of the references immediately clear. A reference to *of this Act* or a similar reference may then be desirable:
- ✓ A person aggrieved by a decision of the Authority under section 14 of the *Citrus Marketing Act 1997* or a decision of the Commissioner under section 15 of this Act may appeal . . .
 - ✓ A person aggrieved by a decision of the Authority under section 4(3) or under subsection (3) of this section may appeal . . .

REFERENCES TO NUMBERS AND DATES

- 260 Style books give conflicting advice on the way to express numbers. The trend in legislation is to use figures in place of words as long as the meaning is clear and a consistent practice is followed.
- 261 Figures should be used instead of words except
- at the beginning of a sentence,
 - where the position of one number in relation to another could be confusing, and
 - with the number *one*.
- Examples:
- ✓ The Council comprises 7 members all of whom must be podiatrists.
 - ✓ Seven members may require the president to summon a general meeting.
 - ✓ After the financial year ending on 30 June 1991, four members representing apple growers are to be elected one of whom must reside in the Bay of Plenty.
- 262 If the number exceeds 4 digits, use commas to separate groups of numbers:
- ✓ 4,000,000 \$2,340.78
- 263 Figures should be used for sums of money and also when the number relates to a symbol or unit of measurement:
- ✓ \$47 12% 1.34m 17kg
- But in legislation, fractions are usually expressed in words:
- ✓ one-quarter, seven-eighths
- 264 Express ordinal numbers in words up to and including *tenth*, but from then on in the form *11th*, *20th* etc.
- 265 The recommended form for referring to dates is *4 September 1990*. If a short form is needed (eg, in columns of a schedule in tabular form), the recommended form is *4.9.1990*.

REFERENCES TO AGE AND PERIODS OF TIME

- 266 Note that a reference to age can be read inclusively (as in *18 and under*) or exclusively (as in *under 18*). Formulations such as *has reached (or attained) the age of 18* or *18 years of age* are unnecessary. Simply state the age, as in the following examples:
- ✓ The president cannot be reappointed after reaching 67.
 - ✓ A person who is under 18 may not hold a firearms licence.
 - ✓ A person who is 20 or over at polling day is entitled to vote.
- 267 It is unnecessary to use *period* when the period of time is specified. For example, write
- ✓ within 12 months beginning on 1 July 1999
- instead of
- ✗ within the period of 12 months beginning on 1 July 1999.
- See also para 164 on the use of *before*, *after*, and *from*. Note that the draft Interpretation Act s 24 contains standard interpretations of most words used to indicate periods of time.
-

APPENDIX A

Drafting Subordinate Legislation

GENERAL COMMENTS

- A1 Subordinate legislation includes regulations and instruments such as codes, rules, guidelines, rulings, and determinations. Regulations and other instruments belong to a single continuum of subordinate legislation. The choice of instrument may have significant drafting implications, but the variations make generalisation difficult.
- A2 Many, but not all, of the differences between regulations and other instruments seem to be a matter of practice and expectation rather than essential attributes of the instrument concerned. Differences may diminish in the future: for instance, regulations might be drafted in less formal language. But it is convenient, at least for current purposes, to draw a line between the two main categories: regulations and “other” subordinate instruments.
- A3 The drafter must have a clear picture of the intended scope and purpose of the subordinate legislation before drafting the provision or provisions in the Bill which empower the making of subordinate legislation. Proposals to give effect to the detail of the legislative scheme by legislative instruments other than regulations should be based on a clear understanding of the comparative advantages of those forms over the more usual regulations.
- A4 The empowering provision for the instrument should ensure that the precise limits of the lawmaking power conferred by Parliament are set down as clearly as possible in the empowering Act. A single provision should authorise the making of only one kind of subordinate instrument. If more than one kind of instrument is required under the statute, provide for this in separate empowering provisions.
- A5 Drafters, policy-makers and members of the legislature are familiar with regulations as the main form of subordinate legislation, and there are well-accepted conventions regarding their structure, style, content, and the process for making them.

- A6 Conventions relating to “other” instruments are less well-established, for two reasons. First, there is a great variety of forms. Secondly, some of them, particularly “rules”, have become more prominent over the last five years and are still evolving. Given that practice is not settled in this area, and is likely to change further, it is not possible to offer more than options for drafters to consider when drafting empowering provisions or preparing subordinate legislation of this kind.

DRAFTING EMPOWERING PROVISIONS IN THE ACT

Regulations

- A7 In 1961 the Government directed that a particular form of empowering clause be used in Bills, and that all empowering provisions should be consistent with it. The 1961 formula removed earlier subjective and general wording. This ensured that Parliament stated the limits on the law-making power as precisely as possible, and that the power remained subordinate and subject to control by the courts. Following this reasoning the recommended formulation is:

✓ The Governor-General in Council may make regulations . . .

- A8 The clause sets out in lettered paragraph form the specific authorisations, and then adds the following standard general paragraph:

✓ providing for such other matters as are contemplated by or necessary for giving full effect to this Act and for its proper administration.

Interpret the apparent breadth of these general words with caution. They will be construed by the courts in their context and with regard to the purposes of the Act in which they appear. They will cover matters that are incidental or ancillary to what is enacted in the statute itself, but will not support a widening of or a departure from the scheme of the Act.

- A9 There is no general formal legal requirement of notice or consultation in New Zealand before subordinate legislation is made. Any specific requirements about notice and consultation before the making or commencement of delegated legislation must be included in the empowering provision.

- A10 Arrange the paragraphs of an empowering provision in logical sequence, and ensure that the words of each paragraph flow grammatically from the introductory formulation. In a complex Act, it is likely that, in addition to the general provision empowering

the making of regulations, there will be specific references to matters being prescribed. Examples:

- ✓ . . . prescribing the procedure for applications under this Act;
- ✓ . . . prescribing minimum standards for continued registration as a veterinarian;
- ✓ . . . prescribing the requirements for accreditation;
- ✓ . . . prescribing conditions on which or subject to which special voters may vote.

Prescribed is defined in s 19 of the draft Interpretation Act as follows:

prescribed means prescribed by or under the enactment.

- A11 It may be helpful to include a note listing the various sections under which regulations can be made or which contemplate the making of regulations. This should appear at the foot of the general empowering provision.

Other instruments

- A12 Instruments vary considerably with regard to
- their role in enabling the policy objectives of the legislative scheme to be implemented,
 - their intended legal effect,
 - the relationship between the instrument and regulation-making powers, and
 - the relationship between the instrument and the enforcement provisions of the Act.
- A13 Some instruments elaborate on or operate with a small part of the particular Act; for example, the *codes of practice* under s 33 of the Ozone Layer Protection Act 1990 and *codes of standards* under ss 21–22 of the Broadcasting Act 1989.
- A14 Examples of empowering provisions which authorise instruments detailing the legislative scheme more generally are ss 28–30 of the Civil Aviation Act 1990, which allow the Minister to make rules, and s 46 of the Privacy Act 1993, which allows the Privacy Commissioner to issue codes of practice.
- A15 Policy decisions on the function of the statutory instrument, its legal effect and evidential weight in relation to offences must be settled before the empowering provisions can be drafted. Of particular importance in clarifying the role of the instrument in relation to the overall statutory scheme are issues relating to legal effect and enforcement.

Legal effect

- A16 The status of the instrument within the legislative scheme depends on the particular context. For example, the instrument may state a directly binding obligation (as do the Civil Aviation rules) or it may indicate a mode of compliance with obligations stated elsewhere (eg, documents approved by the Building Industry Authority under the Building Act 1991 for use in establishing compliance with the Building Code). This *Manual* is concerned with instruments which play an explicit role within the legislative scheme. There are other publications, intended to educate, for instance, which may have some weight because they are issued by government; but these are not discussed here.
- A17 Although in principle there may be a considerable number of possibilities for specifying legal effect, in practice two options are common.
- A18 First, the Act may require a court to “have regard to” the instrument when considering an alleged breach of the Act (or a regulation), as in s 20(9) of the Health and Safety in Employment Act 1992:
- ✓ A Court, in determining whether or not a person charged with failing to comply with a provision of this Act has complied with that provision, may have regard to an approved code of practice that
 - (a) was in force at the time of the alleged failure; and
 - (b) in the form in which it was then in force, related to matters of a kind to which the provision relates.

In this case the instrument is linked to obligations under the Act. Compliance with the instrument can be evidence of compliance with the Act.

- A19 Secondly, the Act may provide that regulations may be promulgated to give the instrument a specified legal effect. Here there are two main sub-options:
- The regulation may make breach of the instrument an offence giving rise to a sanction such as a fine, as under the Civil Aviation Act 1990 ss 28(6) and 100(1)(b) and (c):
 - ✓ No breach of an ordinary rule constitutes an offence unless that offence is prescribed in regulations made under this Act.
 - ✓ [The Governor-General in Council may make regulations,]
 - (b) prescribing those breaches of rules made under this Act that constitute offences,
 - (c) prescribing those breaches of rules made under this Act that constitute infringement offences,
 - ...

- The regulation may provide that proof of compliance with the instrument is deemed to be compliance with an obligation specified elsewhere, in either the Act or a regulation, as in s 54(2) of the Gas Act 1992:
 - ✓ Regulations made under paragraphs (b) to (m) of subsection (1) may
 - (a) require compliance with the whole or a part of a gas code of practice;
 - (b) provide that proof of compliance with
 - (i) a gas code of practice, or a part of such a code, or
 - (ii) an approved code of practice in force under section 20 of the Health and Safety in Employment Act 1992, or a part of such an approved code of practice,
 is proof of compliance with the provisions specified in the regulations.

A20 The critical point in each case is to make the intended connection between the instrument and the regulations and the Act explicit. Cross-references to regulation-making powers may be helpful in doing this.

Enforcement

A21 Enforcement of the instrument itself is obviously dependent on provisions as to its legal effect. Consider how the instrument and the enforcement of the Act as a whole should interrelate. Ask the following questions:

- Is it envisaged that the instrument will be made binding by a regulation? If so, does the Act create offences and state penalties or authorise regulations that do so?
- If an enforcement regime specific to the Act is to be established, what part will the instrument play in relation to it? (See the Takeovers Act 1993 and the Privacy Act 1993 for examples of enforcement regimes specific to the statute, ultimately backed up by the ordinary courts.)

Again, cross-references to offences, penalty and enforcement provisions may be helpful.

The content of empowering provisions

A22 The more important the instrument is in relation to the statutory scheme to which it belongs, the more prominence should be given to the provisions of the Act authorising the instrument. Procedural safeguards and the accessibility of the instruments to those affected

need to be carefully considered. There are likely to be advantages to clearly stating the policy on these matters in the empowering Act.

A23 All provisions empowering the making of instruments should specify the following:

- who may recommend or issue the instrument;
- if the instrument must be approved, who may approve it (when the “approver” differs from the “issuer”);
- what should or may be covered in the content of the instrument;
- the legal effect and the way the instrument relates to the enforcement provisions of the Act.

A24 With all instruments which are intended to play a significant role in the implementation of the objectives of the Act, consider the following:

- the process for developing the instrument, an example being consultation requirements;
- whether there should be provision for urgent development and approval of instruments;
- whether the instrument should be regarded as a regulation for the purposes of the Regulations (Disallowance) Act 1989, which means that the instrument must be laid before the House of Representatives and may be disallowed, amended or substituted by a resolution of the House;
- whether the instrument should be regarded as a regulation for the purposes of the Acts and Regulations Publication Act 1989, which means that the instrument must be published in the annual series of regulations;
- the means of notification (eg, in the *Gazette*) and publication of the instrument;
- the incorporation of material originating from other organisations, and the consequences for the instrument of subsequent amendments to the incorporated material (how will updates of incorporated material become part of the instrument? how will the instrument accommodate later editions of manuals or reference works it refers to?);
- in what way, if at all, the administering body should be able to exempt organisations or individuals from their obligations to comply with provisions in the instruments;
- the need for proof of the existence and content of the instrument for the purposes of evidence; and
- the need for provisions specifying when the instrument comes into effect.

DRAFTING SUBORDINATE LEGISLATION

- A25 Although subordinate legislation is less important than primary legislation and often procedural in character, drafting it requires the same skill and care as that taken in drafting Bills.
- A26 Any legislative instrument must always be drafted within certain constraints. These arise in the main from having to fit the proposed new law into the larger framework of existing statute law and the legal system in general. The drafter of subordinate legislation faces additional constraints because of the relationship between the subordinate legislation and the empowering Act. For this reason, subordinate legislation can be more difficult to draft than primary legislation.
- A27 In general, the recommendations made in this *Manual* about style, language, drafting techniques, order of arrangement, division of the material, headings, paragraphing techniques, numbering and lettering, and schedules apply to drafting regulations as well as to drafting Bills. Some recommendations apply also to the drafting of instruments other than regulations. The following paragraphs refer to those few issues applicable particularly to drafting subordinate legislation.
- A28 The failure of the drafter to acquire a sufficiently thorough knowledge and understanding of the empowering Act causes most of the problems associated with subordinate legislation. Invalidity can result in particular
- from a failure to comply with the terms or conditions of the empowering provisions in the Act; or
 - because the subordinate legislation is *ultra vires*; that is, beyond the power conferred by the empowering Act; or
 - because the provisions of the subordinate legislation are inconsistent with a provision of the empowering Act or with other existing Acts.

Failure to comply with the empowering provisions

- A29 Any particular conditions applicable to the enactment are usually contained in the empowering section. The proper performance of the legislative prerequisites or requirements is not primarily a matter for the drafter. However, the drafter should draw any unusual requirements to the attention of the instructing officials:
- There may be timing considerations: generally, the law containing the power must be in force when the power is exercised, although this rule is ameliorated by s 5 of the draft

Interpretation Act (which provides for anticipatory exercise of powers). Note that retrospective subordinate legislation must be expressly authorised and is generally undesirable: see paras 64–66.

- The power must be exercised by the person or body on whom it is conferred: in the absence of express legislative provision (and this is unusual), a power to make regulations cannot be subdelegated.
- There may be a statutory requirement that some person or body be consulted before the exercise of the power.
- The empowering provision may provide for the subordinate legislation to be made only on the recommendation of a specified Minister or other person or body.
- There may be a statutory requirement for approval, or confirmation of, or consent to making the instrument.

The empowering Act may state the consequences of the failure to comply with some of these requirements.

Ultra vires subordinate legislation

- A30 It is a drafter's duty to consider whether the substance of the instructions falls within the limits of the delegated power. If it appears that the proposals are or may be ultra vires, or the drafter has doubts about the matter, the instructing officials should be advised.
- A31 The empowering provision should be interpreted in a practical and balanced fashion, and with particular regard to the expressed or implied purposes of the principal Act in accordance with s 9(1) of the draft Interpretation Act. This provides:
The meaning of an enactment is to be ascertained from its text in the light of its purpose and in its context.
- A32 Subordinate legislation that is ultra vires is generally drafted too widely. Occasionally, however, subordinate legislation may be unduly narrow when read in the context of the legislative scheme. For instance, if the regulations are required to substantially implement an objective stated in the Act, they ought not to narrow that objective.

Inconsistency with principal legislation and other existing statute law

- A33 Knowledge and understanding of the whole of the empowering Act are required. The drafter cannot rely on a sound knowledge of the empowering provision but only a vague perception of the remainder. In drafting subordinate legislation, the drafter is trying to create

an integrated whole comprising the Act and one or more pieces of subordinate legislation. This has two aspects:

- the structure of the subordinate legislation must be complementary to and compatible with that of the primary legislation; and
- the language used in the subordinate legislation must be consistent and in harmony with that used in the primary legislation.

A34 The drafter must also consider the relationship between the regulation or other instrument and other legislation. Statutes such as the New Zealand Bill of Rights Act 1990, the Privacy Act 1993 and the Human Rights Act 1993, which apply across all spheres of activity, are particularly important. But the relationship between the delegated legislation and other legislation relating to the same area is also relevant.

Regulations

Compatibility of structure

A35 Often regulations will deal in detail with only one matter contained in the principal Act. However, the structure adopted in the principal Act should be reflected in the subordinate legislation so far as is practicable. If appropriate, use the same division into parts and the same headings. Deal with topics in the same order in the subordinate legislation as in the principal Act. If there are multiple sets of regulations under the Act—in the case of the Fisheries Act 1983, for instance—it is useful for there to be a consistent and logical ordering that applies across all regulations on the same general matter.

Consistency of language

A36 Consistency is not only a matter of facilitating communication and the maintenance of professional standards: a court may interpret a change of language as indicating a change of intended meaning. A word used in an enactment made under the authority of an Act has the same meaning as it has in that Act: see s 21 of the draft Interpretation Act. This may be so whether or not the word is defined in the principal Act. It is essential for policy-makers and drafters to have a strong grasp of the terms used in the Act and of their interconnections.

A37 Variation in subordinate legislation from the words used in the principal legislation is likely not to be deliberate but a result of insufficient familiarity with the words of the principal Act.

This problem occurs also in drafting amending legislation: see paras B7–B9.

- A38 In subordinate legislation, it is not necessary to repeat definitions contained in the principal Act. It is undesirable, but may on occasion be unavoidable, to define a word differently in subordinate legislation from the principal Act.
- A39 It is important to consider consistency of the language used in the legislation (Act, regulations and other instruments) and language used in material that can be incorporated by reference, such as the text of an international agreement. Differences in definitions used and the style of the incorporated material (eg, the fact that it is addressed to signatory states rather than individuals) may make incorporation by reference impractical.

Other instruments

- A40 The variety of instruments other than regulations means that it is difficult to generalise about drafting them. However, some very broad suggestions can be made:
- Each instrument should briefly set out its relationship with the principal Act (or regulation); that is, it should include a reference to the provisions under which it is made.
 - The legal effect of the instrument should be specified (eg, in the approved codes under the Health and Safety in Employment Act 1992).
 - The process undergone in developing the instrument should be recited and a notice of issue or approval by the relevant Minister or Chief Executive included.
- A41 Consider all the following matters in determining how the instrument should be drafted:
- the function of the instrument (ie, the role of the instrument in the overall legislative scheme);
 - its intended legal effect (is adherence to the instrument compulsory or merely one of several ways of complying with the Act?);
 - the most likely users of the instrument;
 - the nature of the information to be conveyed; and
 - attitudes and social values to be conveyed by the instrument.
- A42 To avoid confusion, words used in an Act should be used in the same sense in legislative instruments made under that Act. If extra information and explanation is published with the instrument itself, it should be clearly distinguished from the operative part of the instrument.

THE STANDARD COMPONENTS OF REGULATIONS

Title and commencement

- A43 The titles of regulations facilitate reference
- in the course of advice and administrative use,
 - in court, and
 - if and when the instrument is to be amended or revoked.
- A44 Treat titles of regulations in the same way as titles of Acts: see paras 29–34. As with Acts, the title of the regulations should be part of the enacting statement:
- ✓ Under sections 134 and 135 of the *Mental Health (Compulsory Assessment and Treatment) Act 1992*, the Governor-General in Council makes the *Mental Health (Medical Fees) Regulations 1992*.
- A45 The enacting statement should indicate the statute and section under which the regulations have been made. It should also state compliance with any procedural requirements: see para A29. Example:
- ✓ Under section 82 of the *Toxic Substances Act 1979*, and, in the case of Part 1 of the regulations, under section 7 of that Act, the Governor-General in Council, acting on the advice of the Minister of Health tendered on the recommendation of the Toxic Substances Board, makes the following regulations.
- A46 The commencement provision in regulations should be separate from the enactment and title provision. The commencement of enactments (which by definition, in s 19 of the draft Interpretation Act, includes regulations, rules and bylaws) is provided for in s 4 of the draft Interpretation Act, subs (1) of which states that, in the absence of contrary provisions, enactments come into force 28 days after the day on which they are assented to or made. Retrospective operation can be provided for only to the extent that the empowering Act authorises and is to be avoided if possible: see paras 64–66.

Titles of amending regulations

- A47 Titles of amending regulations should conclude with the year in which the amendment is made, rather than with reference to a number indicating how often the instrument has been amended since it was created. Thus
- ✓ Dangerous Goods (Licensing Fees) Amendment Regulations 1981
Dangerous Goods (Licensing Fees) Amendment Regulations 1983
 - not* Dangerous Goods (Licensing Fees) Regulations 1983, Amendment No 2.

- A48 If regulations are amended more than once in the same year, the title should include a number to distinguish the amendments:
- ✓ Fisheries (Auckland and Kermadec Areas Amateur Fishing) Amendment Regulations 1992
 - ✓ Fisheries (Auckland and Kermadec Areas Amateur Fishing) Amendment Regulations (No 2) 1992
- A49 An amending regulation should include a separate provision declaring that the instrument to be amended is to be referred to as *the principal regulations*. It is not necessary to declare that amending regulations are to be read together with and deemed part of the principal regulations. That is provided for by s 11 of the draft Interpretation Act—an amending enactment is to be read as part of the enactment which it amends: see para 108.

Purpose clauses

- A50 A purpose clause is rarely needed in subordinate legislation. The purpose of subordinate legislation will generally be that of the principal legislation or some aspect of it. To express a purpose differently from that in the principal legislation might invite an argument that the subordinate legislation is ultra vires.

Penal provisions

- A51 Include penal provisions in subordinate legislation only to the extent authorised by the empowering legislation. If an empowering provision authorises the creation of offences and penalties by regulation, it should state the matters that can be the subject of criminal liability and the maximum penalty that may be prescribed. This means that Parliament has endorsed the scope of such regulations.
- A52 It is important to draft penal provisions in subordinate legislation in the wider context of the criminal law. But access to the criminal law is widened by placing penal provisions in principal Acts, rather than in regulations.
-

APPENDIX B

Drafting Amending Laws

- B1 An amending law repeals, alters, or substitutes existing provisions in an enactment, or it incorporates new provisions in the text. Drafting amending laws requires a thorough understanding of both
- the policy, purpose, and substance of the proposed changes, and
 - all relevant existing law.
- It is important to be aware that an amendment to one enactment may well affect other enactments, and consequential amendments may also be necessary. Many consequential amendments are of only minor importance; others avoid serious inconsistencies.

REPEAL BY IMPLICATION

- B2 Amending laws should achieve their purpose explicitly, whether that purpose is to enact additional provisions or to alter existing provisions. Repeal by implication, which occurs if two enactments conflict, means that the enactment which is later in time prevails over the earlier one, which is repealed.
- B3 Repeal by implication is undesirable because
- a user of the earlier enactment may be unaware of the existence of the later provision, or
 - there may be real doubt whether the two enactments can be reconciled.

TEXTUAL AMENDMENT

- B4 The preferred method of amendment in New Zealand is textual or direct amendment. This enables express alterations to be made to an enactment, whether by repeal, alteration, substitution or incorporation of new provisions. It produces a single text capable of being reprinted from time to time. However, it conveys little meaning without reference to the particular enactments being amended, because the text in the amending Bill is limited to that which is actually altered.

- B5 There are three ways of helping to overcome this difficulty:
- providing comprehensive explanatory material to accompany the Bill or enactment;
 - adding descriptive parenthetical statements to the amending provisions (see para 227); and
 - repealing and replacing entire provisions instead of specific insertions, omissions or substitutions of expressions.
- B6 The alternative to textual amendment is *referential or indirect* amendment. This involves a narrative statement in the amending law, which simply declares the effect of the amendment. The texts of the existing and amending laws must then be read together, which can lead to confusion and uncertainty.

CONSISTENCY OF STRUCTURE AND LANGUAGE

- B7 A logical, helpful structure is as important—though perhaps not so easy to achieve—in amending legislation as in a principal Act. Textual amendments should be drafted so that they fit harmoniously into the existing structure of the statute.
- B8 Note that an amending Act which contains only direct textual amendments to an existing statute is for practical purposes spent immediately after commencement. The amendments become part of the principal statute, which from that time is regarded and interpreted as a whole in its amended form.
- B9 The language of amending legislation should also be consistent with that in the existing statute. As a general rule, the choice of words in amending legislation should reflect that in the principal Act:
- If a principal Act refers to the *issue of licences*, amendments should also refer to the *issue* and not *grant* of a licence.
 - If a principal Act refers to a specified *day*, the amending Act should not use *date* in a similar context.
- However, there are three exceptions to this general rule:
- Replace archaic and unnecessarily complex language with plain language equivalents unless that creates inconsistency or uncertainty: see paras 145–179.
 - Use gender-neutral language, even if the principal Act does not: see paras 185–189.
 - Modernise the expression of such matters as dates and numbers: see paras 260–265.

THE TITLE

- B10 The title of an amending Act should reflect the title of the principal Act. Thus an Act amending the Resource Management Act 1991, for example, is entitled the Resource Management Amendment Act 1994. The statement of the year of enactment relates to the amending Act and not the principal Act. A second amendment to the same Act enacted in the same year would be entitled Resource Management Amendment Act (No 2) 1994. If it is known that an enactment will be amended more than once in a year, then the first amendment Act can be entitled (*No 1*).
- B11 An amending Act which amends more than one principal Act, however, requires an appropriate umbrella title. This may or may not indicate the amending nature of the Act. An example of an amending Act with an umbrella title is the Abolition of the Death Penalty Act 1989.

REFERENCES IN AMENDING LAWS

- B12 A repeal provision identifies in precise and express terms what is repealed. Vague references such as *so much of the Factories Act 1934 as is concerned with steam engines* are inexact and of little assistance to the user.

The principal Act

- B13 Amending Acts should contain a provision declaring that the Act amended is to be referred to as *the principal Act*. This avoids the need to refer in each amending provision to the complete title of the amended Act. A separate section early in the amending Act makes the reference explicit:
- ✓ This Act refers to the Criminal Justice Act 1985 as the principal Act.

Specific provisions

- B14 It is best to refer to a provision by number and letter. Using imprecise terms such as *preceding*, *above*, or *following* can cause confusion, particularly if later amendments insert further provisions.
- B15 Sections are the most convenient identifiers in Acts; so each section in an amending Act should begin by identifying the section that is being amended, or the section before or after which a new provision is to be inserted.

Examples:

✓ Section 5 of the principal Act is amended by repealing subsection (4).

not The principal Act is amended by repealing subsection (4) of section 5.

Subsection (4) of section 5 of the principal Act is repealed.
(Note that these examples do not use the word *hereby* before *repealed*. There is no advantage in using it, and it is archaic.)

✓ After section 5 of the principal Act, the following section is inserted . . .

not The principal Act is amended by inserting the following section after section 5 . . .

B16 The same principle applies to parts:

✓ Part 9 of the principal Act is repealed.

✓ After Part 3 of the principal Act the following Part is inserted.

B17 Complex references are sometimes necessary in amending Acts. An amending provision may, for example, need to refer to particular words in a subparagraph. As a general rule, the most satisfactory order of reference in an amending enactment is from major to minor elements: section, subsection, paragraph, subparagraph. Example:

✓ Section 3 of the principal Act is amended in subsection (5)(b)(iii) by omitting "1982" and substituting "1995".

Specific words

B18 Amending legislation often identifies and inserts or omits particular words. If the words are few, set them out in full:

✓ Section 29(1) of the principal Act is amended by omitting the words "or, where service is effected by an officer of the Court or a sworn or non-sworn member of the Police or a traffic officer within the meaning of the Transport Act 1962,".

B19 If the reference is lengthy, other means of identification may be used:

✓ Section 5 of the principal Act is amended by omitting the words from "court" to the end of the section.

✓ Section 5 of the principal Act is amended by omitting the words from "court" to "the end of each year" inclusive.

B20 If the words identified in an amending provision occur more than once in the provision to be amended, refer to the relevant words by reference to the order of their appearance:

✓ Section 22 of the principal Act is amended by omitting "court" where it first occurs.

Prior amendments

- B21 Section 8 of the draft Interpretation Act provides that a reference in an enactment to another enactment is a reference to that other enactment as amended or substituted at that particular time. It is therefore unnecessary for an amending provision to refer to the fact that the enactment to be amended has previously been amended or substituted.

TERMINOLOGY

- B22 Amending provisions perform one or more of three functions:
- the removal of existing material;
 - the removal of existing material and the substitution of other material in place of the removed material; and
 - the inclusion of additional material.
- It is important to be consistent in the use of terminology relating to these functions. The following five should suffice: *repeal* and *omit* for removal; *substitute*; and *insert* or *add*.

Repeal/omit

- B23 *Repeal* is used to indicate the removal of complete enactments which stand alone. Acts, parts, subparts, schedules, sections and subsections are *repealed*.
- B24 Elements lesser than subsections (ie, paragraphs, subparagraphs, clauses, words, figures and expressions) are *omitted*.

Repeal/omit and substitute

- B25 Material to be removed is repealed or omitted, and the new material which replaces it is *substituted*. This follows the usage in ss 7 and 8 of the draft Interpretation Act.

Insert or add

- B26 New material is *inserted*, except at the very end of a statute, where it is *added*.

SCHEDULING AMENDMENTS

- B27 Repeal provisions may be included as a subsection of a substantive provision. But if an Act is to contain a number of repeal provisions, they should be presented together. One repeal section may be

adequate, perhaps with separate subsections for the repeal of provisions from different statutes.

B28 In more complex cases, however, repeals, along with consequential amendments, are often presented in column form in a schedule. This practice is useful where a large number of similar amendments need to be made to an Act. An example might be an Act which contains numerous penalty sections, each of which is modified by the amending Act.

B29 Scheduled amendments and repeals require a linking section in the body of the enactment which gives effect to the relevant amendments or repeals as scheduled. Examples:

✓ The enactments in Schedule 2 are amended as indicated.

✓ The enactments referred to in Schedule 3 are repealed.

A cross-reference to the linking section appears at the beginning of the schedule.

B30 The schedule then lists the relevant amendments or repeals. An amendment is expressed as follows (under the heading ENACTMENTS AMENDED and the cross-reference to the linking section):

✓ (1988/2) *Police Complaints Authority Act 1988*
section 33(4)

Omit: "clause 5 of Schedule 1 to the *Defamation Act 1954*"

Substitute: "clause 3 of Schedule 1, Part 2 to the *Defamation Act 1992*"

A repeal is expressed more simply (under the heading ENACTMENTS REPEALED and the cross-reference to the linking section):

✓ (1956/107) *Electoral Act 1956*
section 128

B31 It is better not to allocate consequential amending provisions to a separate Bill. There is no particular advantage in doing so, as the amending provisions will appear in the amended Act in exactly the same form (whether the amendments were brought about by a single Act or several) as in the principal Act. A separate Bill has the added disadvantage that the origin of the amending provisions will become less clear—for instance, by the loss of the relevant title and purpose provisions.

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