DRAFTING LEGISLATION IN CARICOM MEMBER STATES – A MANUAL ON LEGISLATIVE STYLE AND PRACTICE

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Revised May 2018
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PREFACE

Background

The Improved Access to Justice in the Caribbean Project (IMPACT Justice) was developed from recommendations made by regional justice sector stakeholders at a series of meetings in the Bahamas and Trinidad and Tobago in 2011 for a comprehensive reform of the sector.

Two projects were recommended - one concentrating on the courts and judiciary and the other on civil society. The Caribbean Court of Justice and the University of the West Indies were the institutions identified as having the capacity, respectively, to implement these projects. In late 2012 they submitted proposals to CIDA which were approved in 2013/14 by the Canadian Department of Foreign Affairs, Trade and Development (DFATD) (of which CIDA was by then a division). Both projects commenced on April 1, 2014.

The civil society project - IMPACT Justice - is being implemented under a Contribution Agreement between DFATD and the University of the West Indies, Cave Hill Campus. The Project Implementation Unit is based at the Caribbean Law Institute Centre (CLIC) of the Faculty of Law at the Campus.

As a major part of its work, IMPACT Justice is drafting model laws for the region, but will also assist CARICOM Member States in drafting amendments to existing laws. Other Project activities include working with bar associations to develop a model Legal Profession Act which will contain a code of ethics; enhanced disciplinary procedures and continuing legal education for the legal profession; legal education for non-lawyers; the development of legal information databases and regional and national frameworks for the promotion and activation of alternative dispute resolution, restorative practices and community-based peace-building mechanisms.

The Barbados workshops

A meeting of Attorneys General, Chief Parliamentary Counsel and others was held in May 2014 to discuss how the Project could assist them with their legislative needs. The meeting endorsed the hosting, early in the life of the Project of a workshop on legislative style and practices. The output of the workshop would be a manual for the guidance of legislative drafters in the English-speaking countries of the CARICOM on how, amongst other things, to
adapt model laws for local purposes. A related workshop on drafting instructions was held during the same week, and a separate Manual has been produced on that topic.

The workshop on legislative style and practices was attended by participants from several CARICOM countries. They were all involved in drafting legislation at various levels of seniority. Some were the sole drafters in their country; others were part of a large drafting team. The workshop looked at -

- Language and Law – the Need for Regional Coherence
- The Legislative Sentence – Style Issues Generally
- Plain English and Gender-Neutral Drafting
- The Architecture of the Statute Book – Placing and Structure of Statutes
- The Incorporation of Treaties into National legislation
- Local Requirements for Statutes – Interpretation Acts, Constitutions
- Subsidiary Legislation, Codes, etc.
- Other Legislative Style Rules – Commencement, Amendments, etc.

This Manual broadly follows the same pattern and incorporates the views of those who participated in the workshop. It also draws on a number of other sources, as listed in the Bibliography.

The Facilitators

The workshop facilitators were John Wilson, an experienced law drafting consultant from the UK recruited by the IMPACT Justice project, and Segametsi Mothibatsela, a Commonwealth Fund for Technical Cooperation (CFTC) expert in legislative drafting stationed at the time at the CARICOM Secretariat in Guyana.

In late 2017 the Manual was reviewed by Sandra-Dawn Taylor, Chief Parliamentary Counsel of Barbados; Albert Edwards, Deputy Solicitor General (Legislative Drafting) of Belize; Maurice Bailey, Director of Legal Reform of Jamaica; Ian Macintyre, Chief Parliamentary Counsel of Trinidad and Tobago and Turkessa Benjamin-Antoine, Senior Legal Officer, Legal Unit, OECS Commission and the changes which they recommended were included in this edition of the manual.
Purpose of Manual

This Manual is not intended as an exhaustive statement of rules for style and practices in legislative drafting, but represents a broad consensus of views on these matters in law drafting offices in English-speaking CARICOM Member States and in the wider Commonwealth. As such, IMPACT Justice hopes that the Manual will lead to standardisation and improvement in the quality of legislative drafting in the region, and thanks all those who contributed to its preparation.

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May 2018
ABBREVIATIONS/GLOSSARY

‘AGC’ means Attorney General’s Chambers or equivalent (in some jurisdictions it might be the Ministry of Justice). It includes the Solicitor General, Crown Solicitor and Director of Public Prosecutions (DPP) as appropriate;

‘Bill’ means the draft of an Act or Ordinance that is intended to be introduced into the legislature for consideration and possible enactment;

‘Cabinet’ means the main executive body of a government includes an Executive Council, or equivalent;

‘CARICOM’ stands for Caribbean Community and Common Market and is defined as an organization made up of 15 Caribbean nations to promote economic integration among members.

‘Clerk’ means the clerk or other person responsible for processing of legislation through the legislature;

‘Constitution’ means the Constitution of the country or territory for the time being;

‘drafter’ means the person responsible for drafting a legislative item, and includes a Legislative Counsel, Parliamentary Counsel or Legal Draftsman.

‘drafting office’ means the office of a government responsible for the drafting of legislation and includes the Office of Parliamentary Counsel or Law Drafting Unit;

‘Head of State’ means the Governor General, Governor, President or equivalent authority of the country or territory;

‘instructing department’ means a department that has issued drafting instructions to a drafter;

‘instructing officer’ includes the Permanent Secretary or head of department preparing the drafting instructions and responsible for overseeing the legislative process;

‘Interpretation Act’ means the local statute defining various standard terms used in legislation, and making general provisions about appointments, time, documents, and other matters;

‘legislation’ means the process of making law, or the product of that process, according to the context;

‘legislature’ means the Parliament, Legislative Assembly or other body given power by the Constitution to make laws;
'Minister' means the member of the Cabinet responsible for a legislative item;

'Permanent Secretary' means the permanent secretary or other chief executive officer of the instructing Ministry or Department;

'policymaker' includes the Minister or the Permanent Secretary or other officer designated to provide policy instructions on a legislative item;

'statute' means an Act, or (in the case of some British Overseas Territories) an Ordinance;

'subsidiary legislation' includes rules, regulations, orders and other items of legislation made by a person or body to whom power to make them is given by the primary legislation.
CHAPTER 1

NEED FOR REGIONAL HARMONISATION

1.1 Economic, Political and Practical Reasons

CARICOM Member States have for some time sought to harmonise their laws for economic, political and practical reasons. One of the practical reasons is that the Caribbean Single Market and Economy (CSME) promotes the movement of skilled labour, and the regional training programme for drafters offered by the University of the West Indies could mean that law drafters might well move around the region seeking employment. It is important that they be able to work in other jurisdictions and feel at home with the laws of other jurisdictions.

Another practical reason for encouraging harmonisation of laws is to facilitate the adoption of CARICOM model laws at the national level. If CARICOM Member States have a similar approach to the drafting of legislation, or follow similar principles, model legislation could be more easily adopted at the national level.

For these reasons, there is general agreement that legislative drafting style and practices in CARICOM Member States should become more harmonised. The lack of a manual for legislative drafting in several jurisdictions and the need for uniform practices in legislative drafting in the region has inspired the preparation of this Manual. It is for use primarily by drafters in the English-speaking Member States of CARICOM but might be of interest to the wider Commonwealth drafting community.

1.2 Good Governance

Good governance and the rule of law requires legislation that is clear, simple and results in a coherent and user-friendly statute book. Laws should be accessible and readily comprehensible; their language should be readable, intuitive and consistent. The obstacles to a good statute book are policies that are too complex or not properly thought out, and laws that are not clearly drafted.

1.3 Nature of the Manual as a Regional Tool

The Manual aims to:

- promote a uniform drafting style in CARICOM Member States;
- help achieve stylistic consistency in the region;
- serve as a ready reference for legislative drafting in the region.

The Manual therefore:

- looks at the structure of the statute book as a whole;
indicates the generally agreed methods of legislative drafting in the region;
- suggests some drafting practices that could be adopted to promote clarity and precision in legislation;
- encourages the use of simple and modern legislative language;
- considers ways of expressing key provisions in legislation;
- looks at different ways of implementing treaties in the laws of a country.

The Manual is not a training manual on legislative drafting but is for the guidance of people who already know how to draft legislation. It does not seek to be an exhaustive resource and should be used in conjunction with texts on legislative drafting. Indeed, the authors assume that drafters in the region are familiar with the basic texts on legislative drafting and that they keep abreast of developments in the subject.

Certain terms are used in the Manual that might not apply to all the jurisdictions but are common to many of them, such as ‘Cabinet’ and ‘Ministry’. It refers to ‘the legislature’ rather than Parliament. It refers to ‘Permanent Secretary’ to include the chief executive officer of a Ministry. It refers to the Attorney General’s Chambers (AGC) to include the Solicitor General and the DPP if they are the appropriate legal advisers on a topic. It does not mention Ministries of Justice as such. It refers to the Minister as the political head of a Ministry.

The Manual mostly deals with the drafting of primary legislation, but its principles apply equally to subsidiary legislation, although the process for making subsidiary legislation will be different. It complements the ‘Manual on the Legislative Process and Drafting Instructions’, which is primarily for instructing officers, and should be looked at for policy considerations, timetable issues, and the nature of drafting instructions generally.

The Manual does not seek to lay down strict rules of style or practice. It indicates what is common practice among CARICOM Member States, and sometimes what is being done elsewhere in the Commonwealth. It occasionally recommends a particular practice which is widely used in the region.

A regional manual need not be very detailed or applied rigidly. It can provide for alternative approaches. It should promote clarity and plain English, so that the man in the street can read legislation and understand what it says. Indeed, legislation should be simple, even for legislators.

Sometimes drafters are not as diligent as they could be in carrying out research because of the urgency of matters brought for their attention, and at these times a manual would also assist. A desirable aim is that an informed reader should be able to look at a piece of legislation drafted in the CARICOM region and identify it as such. A standardised approach to
important matters and difficult questions would therefore be useful. However, it must be recognised that there might never be fully harmonised legislation in CARICOM, and that it is more important for jurisdictions to agree among themselves on substance.

Each jurisdiction will have its own preferences for certain stylistic features; some might not wish to move to gender-neutral drafting. Some use section headings, others have marginal notes. Some jurisdictions have an extensive Explanatory Note for each Bill, while others hardly use them.

If total harmonisation of practice among the Member States of CARICOM cannot be achieved, it is desirable that drafters should at least be consistent with other legislation of their respective jurisdictions in their use of punctuation, spelling and similar matters, and it is hoped that this Manual might help achieve that.

1.4 On-Going Issues

Given the importance of the Interpretation Act in the drafting of legislation, a question the Member States might need to address is whether their respective Interpretation Acts should be made more uniform. This Manual does not deal directly with that issue, but does indicate the ways in which Interpretation Acts affect the drafting process.
CHAPTER 2

LAW DRAFTING AND THE LEGISLATIVE DRAFTER

2.1 Aims of Good Drafting

Each law that is drafted is part of the jigsaw puzzle that makes up the legal framework of a jurisdiction. It is important that each legislative provision fits neatly into that puzzle. The key to achieving this lies in conformity to the Constitution and consistency in the use of language. Much (but not all) legislation seeks to alter the way that people behave, that is, to stop certain behavior or make people do certain things. Legislation might also state a principle that society agrees on or that creates and confers rights. The process involves the making of policy and the drafting of laws to express the policy in enforceable legal terms. There are two sets of key players in the process—the policymakers and legislative drafters.

For a discussion of the nature of legislation, the legislative process, the role of the drafter and the nature of drafting instructions, reference can be made to the ‘Manual on the Legislative Process and Drafting Instructions’ issued in parallel with this Manual.

Legislative drafting is an integral part of the law-making process. It involves the art of converting legislative proposals into legally sound and effective law. Although it is important that legislation is written in clear, easily understood and unambiguous language, legislative drafting is not a mere literary exercise. It is not literature, a press release, or a report. It is a specialised kind of writing and acquiring the necessary skill takes time.

A good legislative draft should:

- be clearly and simply expressed;
- not have ambiguous terms;
- be consistent in language;
- have clear definitions;
- follow a standard structure;
- have a clear title in simple terms;
- only contain legislative provisions;
- be consistent with existing legislation;
- set out a clear timetable for action.

This Manual will therefore look at:

- the short title of a Bill and the need to consider future users of the statute book;
- the long title and the need to be comprehensive;
- the commencement of a statute and other preliminary provisions;
- Divisions, Parts and Chapters and how legislation should be structured;
- the sequence of provisions to present a clear picture and a logical flow of ideas;
- the interpretative provisions of a Bill and the role of the Interpretation Act;
- the substantive provisions of a Bill, including the conferring of powers and the enforcement of provisions;
- the final provisions that are needed to make a Bill complete;
- the explanatory material that should accompany a Bill.

2.2 The legislative drafter

Drafters "perform an extremely difficult task. There is much that is beyond their control. The pressures on them are many. They have to think of the past, the present and the future." *(Legislative Drafting, VCRAC Crabbe, Cavendish Publishing, 1993).*

Politicians are elected to implement their vision for the country, including the development of the laws of the country, while the drafter's responsibility is to draft laws which are legally sound, coherent and workable to give effect to those policies. It is not for the drafter to predict the policies of future governments.

In order to achieve this aim, the drafter:

- must have an analytical mind;
- must be meticulous;
- must have a keen eye for detail;
- must be not only interested in the law but in the workings of society;
- should be a team player, capable of listening and prepared to accept and appreciate criticism;
- should be always mindful that the goal is to draft the best law possible.

The drafter must also be a problem solver who is:

- a visionary who can see into the future as to how the law will develop, and so put in place provisions which will stand the test of time;
- an architect who can build structures and put in place sustainable legislative solutions to national challenges;
- a project manager who can deliver the product in a timely manner;
- a diplomat who can reduce the tensions which might arise between the various players in the legislative process.

He or she usually works alone, and does not have control over the timeliness of policy instructors who are required to clarify instructions or comment on draft legislation. However, in the larger drafting offices of the CARICOM, such as in Trinidad and Tobago, drafters also often work in teams, with the more experienced drafters leading the teams.

The drafter is often expected to be a legal advisor to Government and as such must be able to give advice on constitutional and public law matters. Ideally, a drafter will have both a law degree and a formal qualification in legislative drafting, or will at least have received intensive on-the-job training under an experienced drafting mentor.

As well as having a good basic knowledge of law, a drafter should be well informed about the events in the country and the world generally. He or she should be able to appreciate the cultural, economic, political and social policies that will form the background to the drafting of a piece of legislation.

A drafter must know the Constitution and Interpretation Act and the workings of the legislative process. and keep abreast of what is happening in the world of legislative drafting. He or she must also be ready to learn from colleagues, to work with them and to work with officers of all government departments. In addition, drafters should be guided by current judicial interpretation of statutory provisions.

Additionally, drafters should be guided by current judicial interpretation of statutory provisions.

2.3 Drafting Instructions

The drafter does not make the law up, but requires explicit instructions as to what is to be achieved in legislation. Once authority has been given by the Cabinet or Minister for draft legislation to be produced, the head of the relevant department should issue drafting instructions, and the drafting process only commences upon receipt of instructions from the instructing Ministry.

It is essential that the instructing department is aware that this is an interactive process and therefore the contact particulars of the officer with direct responsibility for the legislation should be included when drafting instructions are issued. The drafting instructions should be in writing. This protects the drafter and is important for institutional memory. They should be in simple, non-technical language.

It is often useful for the drafter and instructing officer to meet before the instructions are finalised and to discuss any issue that might cause problems. They might also need to meet
during the drafting process. It is normal procedure for the instructing officer to come to the drafting office for this purpose, but if a Minister is to be in attendance, protocol would require the drafter to go to the Minister’s office.

Drafters should engage the instructing officers at an early stage so that the officers will be aware of their role in the drafting process. There must be collaboration between them to ensure that the best draft legislation is achieved. It is also critical that instructing officers are aware that they will be consulted from time to time as the more information and clarification the drafter has, the better he or she will be able to perform.

It should be noted that the Cabinet minute outlining approval does not constitute drafting instructions and the drafter should wait for detailed and proper drafting instructions.

For a full discussion of the need for and nature of drafting instructions, see the *Manual on the Legislative Process and Drafting Instructions*.

### 2.4 Cabinet Approval

Before starting to draft any legislative item, the drafter needs to be assured that its drafting has been approved by the Cabinet, in the case of a Bill, or by the Minister, in the case of subsidiary legislation. The inclusion of an item in the speech by the Head of State at the start of the legislative year is not itself sufficient authority to commence drafting, and a drafter should never be expected to waste time on items that might never see the light of day.

### 2.5 Consultations

During the course of drafting an item the instructing department might well need to have consultations both inside and outside government. It is generally not very desirable for the drafter to attend public consultations along with the policy makers and it is not the drafter’s job to contact stakeholders directly. However, sometimes drafters are needed to explain things in simpler language to stakeholders or render legal advice to the policy maker.

Drafters might be required to attend at Committee Stage on a Bill to advise on possible amendments to the Bill. However, this is part of the legislative process, rather than of the consultative process.

### 2.6 Drafting a Bill

Once the drafting office receives drafting instructions, the drafter should as soon as practicable produce a preliminary draft of the Bill or other instrument requested. Some Bills might be simple and in standard form and can be drafted quite speedily. Others might involve major new legislative areas and take months or even years to draft.
The drafter must, if necessary seek to clarify the drafting instructions and carry out the necessary research including ascertaining what the existing law is, including any amendments.

The drafter should ensure that the instructions do not involve ‘intermixing’; distinct matters which have no connection to each other should not be dealt with in the same Act.

The drafter should check that:
- none of the proposed provisions replicate provisions in Acts of general application such as the Interpretation Act;
- the proposed provisions do not depart from an Act of general application unless for good reason;
- the proposed legislation does not deal with matters that are also dealt with by another Bill being drafted or that has been introduced into the legislature;
- if the proposed legislation is intended to respond to a court decision, legal opinion or international convention, that a copy of the decision, etc. is available.

The drafter should, as appropriate, ensure that a Bill:
- does not give unlimited exemption powers;
- requires exempting powers to be in writing, preferably after appropriate consultation;
- requires consultation before decisions are made affecting people’s livelihoods;
- requires reasons to be given in writing for decisions;
- gives a right to be heard before a license or permit or similar item is refused or revoked;
- provides for an appeal against such decisions;
- does not include an ‘ouster clause’ (excluding the jurisdiction of the courts by way of judicial review) unless there is a compelling reason for it;
- incorporates provisions ensuring good governance, accountability and transparency.

2.7 Use of precedents

Very few things in legislation are completely novel. Drafters can benefit from information gained from the laws of other jurisdictions, more especially with the access that information communication technology provides. This information should however be handled with
Law Drafting and the Legislative Drafter

cautionsince the circumstances in each jurisdiction differ. It might be better to base a draft on precedent within the jurisdiction than to modify foreign legislation carelessly.

2.8 Use of consultants

It is sometimes useful for a government department to be able to engage the services of a consultant drafter for a major piece of legislation. The consultant might be from inside the jurisdiction or, more usually, from outside. This often involves funding by aid donors and regional or international bodies.

A consultant draft can be very useful but it needs to be scrutinized with care as it might not fit the local legislative style or take account of existing laws or include all the final clauses needed. Consultant drafts sometimes also leave too many things to be done by regulations, which might not be made. Ideally, the consultant should be retained to draft any necessary regulations also. For a fuller discussion of this whole topic, see the Manual on the Legislative Process and Drafting Instructions.

2.9 Dealing with amendments

The drafter might be required not only to draft new legislation but to amend existing legislation. This might involve amendments to one or several statutes or items of subsidiary legislation. Amendment might also be required as a consequence of a new Bill, and these can be included in the Bill or dealt with separately. See the Chapter on Amendment Bills.

2.10 Subsidiary legislation

The drafter might be required to draft subsidiary legislation as well as primary. In some jurisdictions this is done by legal advisors in the respective departments, but any drafter should be prepared to draft regulations, rules etc. as well as statutes.

Drafting of subsidiary legislation can be a convenient way to train new drafters, but it must be noted that subsidiary legislation might be the heart of a legislative scheme, and could be quite complex. Drafting of a simple Bill can sometimes be a better way to start training a drafter. See the Chapter on Subsidiary Legislation.

2.11 Ongoing duties of the drafter

The draft will be forwarded to the instructing department for its comments. The comments should be forwarded to the drafter in writing as soon as possible to facilitate the finalisation of the draft Bill or other instrument. Note that several versions of the draft Bill or other instrument maybe produced before it is finalised.

Once the drafting process is complete (meaning that the drafter has completed the final draft of the legislation requested, and the instructing department is satisfied that its
instructions have been duly reflected in the instrument) steps must be taken to send the draft Bill to Cabinet for its approval (or to the Minister for making in the case of subsidiary legislation).

The drafter should then keep track of a Bill as it goes through the legislature as he or she might be required to draft amendments before it is enacted. In some jurisdictions, drafters are required to attend Parliamentary debates and to assist at Committee Stage or at meetings of Select Committees.

2.12 Commencement

The drafter needs to be alert to the issues related to the commencement or start date of legislation. Is it to commence on publication or on a date fixed by the legislature, or to be appointed by, for example, a Minister? Should parts of a statute commence at different times? In some jurisdictions Acts come into force on the date of assent, rather than on publication. In others, the commencement date is fixed by the Head of State or a Minister. See the Chapter on Commencement.

2.13 Drafting style

The drafter will need to decide on the appropriate language for the drafting of the legislation. What is the target audience for the legislation? Is it to be drafted in a traditional style, consistent with existing statutes, or is it to be in a more modern style? What are the stylistic rules in the jurisdiction? See the Chapters on Drafting Style: General and on Plain English Principles.

2.14 Timetable

The drafter is responsible for drafting legislation in a timely manner but does not have control over the timeliness of policy instruction so any clarification of them that is needed or of comments on drafts. The drafter should therefore liaise with the instructing department at an early stage as to how long the drafting is likely to take. Good legislation takes time, and the drafter should ensure that enough time has been allowed for the drafting before the Bill has to be introduced into the legislature or the item has to be made. It is usually preferable to have consultations with the instructing department aimed at reaching consensus on this point.

A realistic timetable requires an assessment of the steps that will be needed to complete a particular legislative project, and careful estimates of the time that will be needed to complete those steps. There might be a need for periodic reconsideration of the timetable, for example in the light of difficulties encountered, and a procedure for altering it. The timetable for
primary legislation should take into account the time needed for the drafting of any subsidiary legislation that is required.

2.15 Training the policymakers

In most CARICOM Member States it is the drafters who are the most familiar with the techniques and processes of legislation in their respective jurisdictions. Permanent Secretaries and other senior officials are generally responsible for developing government policy, which may require the making of laws to implement the policy. In so doing, they should seek the support of the drafting office in maintaining awareness of the legislative process and the need for comprehensive drafting instructions.
CHAPTER 3

THE STRUCTURE OF LEGISLATION

An important requirement for clarity in legislation is that the material should be coherently organised. This is particularly necessary in the case of a lengthy statute or set of regulations. A Bill might run to several hundred clauses, with a number of Parts or Chapters (or Divisions if used) and additional Schedules, and it is important that the drafter considers at the outset the structure of the Bill and how it reads in outline.

The following principles refer to a draft Bill, but apply equally to subsidiary legislation.

3.1 Legislative scheme

The sections, and thus the Parts or Chapters (or Divisions, if used), should be in a logical sequence. It would be useful for harmonisation of legislation among CARICOM Member States if drafting offices could adopt similar schemes for legislation.

Generally, the framework of a Bill in the common law system will include:

- Preliminary provisions;
- Operational provisions;
- Final provisions.

Within the operational provisions there will usually be the following categories:

- provisions imposing obligations and conferring powers on the main addressees;
- provisions dealing with administrative implementation;
- provisions dealing with enforcement measures;
- provisions dealing with adjudication and dispute settlement, including appeals;
- provisions dealing with funding of the scheme, rule-making and other measures;
- provisions concerning technical matters, notices, evidence etc.

In the CARICOM Members States, the usual sequence of provisions in a Bill is:

- an explanatory memorandum stating the contents and objectives of the Bill in non-technical language. It is usually placed at the beginning of the Bill;
- Long title setting out the purpose of the Bill in general terms;
- [Preamble, if any, rarely used]
- Enacting formula, e.g. [This Act may be cited as....]
The Structure of Legislation

- Short title (the short title corresponds with the title by which the Bill is to be cited if it becomes law, and should remain unchanged throughout the passage of the Bill)
- Commencement or start date (in some jurisdictions this appears as a final provision)
- [Authority/ constitutional declaration if required]
- Interpretation provisions
- [Purpose, if required]
- Application and scope
- Main or substantive provisions
- Supplemental and administrative provisions
- Offences and penalties
- Regulation-making power
- Repeals
- Transitional and savings provisions
- Consequential amendments
- [Review and expiry provisions, if required]
- Schedules

In this scheme, typically:
- The substantive provisions set out the main principles of the Bill. The key and core elements of the Bill will be included here. An example might be the establishment, composition and functions of a Commission etc.
- The supplemental or administrative provisions deal with practical matters relating to the implementation of the Bill, such as notices, powers, finance, reports etc.
  - Offences and penalties include matters relating to appeals, dispute resolution, etc.

3.2 Principles

The provisions of a Bill should flow from one proposition to the other. The following principles are useful to have in mind when structuring a Bill or item of subsidiary legislation:
- general provisions come before special provisions;
- more important provisions come before less important ones;
- permanent provisions come before temporary ones.

If, for example, there is to be a registration scheme, provision for the appointment of a
Registrar needs to be made early on. The incorporating of a body usually comes early in a Bill also, although sometimes it might be preferable to state the basic rule at the start, such as that a person cannot practice as a doctor without being registered.

If a Bill is structured in Parts, ‘PART 1 - PRELIMINARY’ should normally include the short title and commencement, the interpretation clause and any scope or application or purpose clauses. The other Parts will flow from the legislative scheme. The sequence of clauses in each Part should also flow in a logical sequence.

In the laws of most CARICOM Member States the definitions are at the beginning, as in other Commonwealth jurisdictions. So too are the short title and commencement provisions. Note however that in some jurisdictions such as the UK, these provisions are placed at the end of the Bill, on the basis that the text needs to be agreed before terms are defined or the statute is given a title or commencement date.

3.3 Drafting devices

A drafting device that avoids problems when the Bill is finalised is to place clause numbers in square brackets i.e. [1] [2] etc. This makes it easier to identify clause references which can then be changed more readily by the ‘find and replace’ buttons found on most computer programs. The brackets will of course need to be removed before the Bill is published.

3.4. Grouping of provisions

The basic unit of legislation is known as the ‘section’, for an Act (or ‘regulation’ or ‘rule’ for regulations and rules.) But rather than having just a long series of sections, it is usually preferable for a Bill or item of subsidiary legislation of any length to be divided into groups of such units. The terms commonly used are ‘Part’ and ‘Division’. The term ‘Chapter’ is reserved for whole statutes in a law revision (unless the term ‘Title’ is used.)

A Part is usually the larger grouping and might contain Divisions. However, in some jurisdictions a Division is the largest grouping and might contain Parts. The use of ‘sub-divisions’ is rare and is not recommended. Provided there is consistent usage within the statute book of a jurisdiction, it is not necessary to have a fixed rule for all jurisdictions. However, it would be useful if all jurisdictions accepted that the next division above a section (or regulation) is a Part, rather than a Division or Chapter.

In some jurisdictions, the name for a grouping differs depending on whether the Bill is an ‘organic’ or constitutional Bill or an ordinary Bill.

Note also that in some jurisdictions the traditional usage is for each Act to have a Cap. Number, i.e. it is a Chapter of the statute book. This practice is gradually being replaced by a digital numbering system for Acts, so that they become a Title within a digital code. This
Manual does not make any recommendation about the numbering of Acts, but see Chapter 21 on *Codification, Consolidation and Law Revision*.

### 3.5 Cross-headings

A device that avoids the need to provide a name for groups of provisions is the cross-heading. This is usually in italics and centered at the start of a group of sections with a common theme. It usually appears in the contents list and is a useful aid to comprehension of the legislation at a glance.

The one disadvantage of this device is that it does not lend itself to easy reference. For example, a section cannot say that a term is defined ‘for purpose of this group of sections’. This can however be avoided by listing the sections in the group. This device is recommended for consideration by drafting offices in the CARICOM Member States.

An example might be:

"PART 2 – GENERAL PRINCIPLES

*Criminal liability*

3.
4.
5.

*Offences committed outside [the jurisdiction]*

6.
7.
Etc."

### 3.6 Sections and subsections of an Act

An Act is divided into sections which generally deal with one topic. If the section is long, it should be divided into subsections. When these are read together they should convey the same idea.

A subsection is usually a single sentence, unless there is a good reason for breaking it into two sentences. This might happen where the second sentence is integral to the idea being conveyed and does not warrant a separate subsection.

Sections should be neither too long not too short. It is generally preferable for a section to have no more than 8 subsections. If more are needed, consideration should be given to creating a new section. However, it is also desirable not to have a lot of very short sections. If two or more sections can logically be grouped together, this should be done.

Parts of a section are referred to as follows:
(a) section 5(1) and not subsection 5(1);
(b) section 5(1)(a) and not paragraph 5(1)(a);
(c) section 5(1)(a)(i) and not subparagraph 5(1)(a)(i).

Parts of a subsection are referred to as follows:
(a) subsection (1)(a) and not paragraph (1)(a);
(b) subsection (1)(a)(i) and not subparagraph 1(a)(i).

3.7 Paragraphs and subparagraphs

If the section or subsection is long, it is best to divide it into paragraphs that create a full sentence when read with the introductory words and possible concluding words.

Drafters usually try to avoid ‘sandwich clauses’ which have text both before and after a list, for example:

“A person commits an offence if -
(a)
(b)
(c)
and is liable upon conviction to a fine of $50.”

It is preferred in drafting to put the main clause first, as follows:

“A person commits an offence and is liable upon conviction to a fine of $50 if the person-
(a)…;
(b)…; or
(c) ....

Paragraphs in a subsection should be numbered with lower case letters of the alphabet in brackets. Subparagraphs are lettered with small Roman numerals (despite the recommendation not to use Roman numerals) because subparagraphs should preferably not be more than (i) to (iv). If more subdivisions are needed, it is the practice to use ‘A’, ‘B’ etc. But it is better to restructure the section or subsection to avoid this need.

Generally, a provision should be referred to simply by its number. This would depend on the context. For example, to refer back to a previously cited provision, it may be appropriate to use “that section”, “that subsection”, “the section”, “the subsection” etc.

Do not use “the preceding section” or “the section next following” or similar expressions. The following may be used to refer to other provisions depending on the situation:

(a) use “this section” to refer in a section to the same section, similarly use “this
subsection” to refer to the same subsection;
(b) use “this Part”, “this Division” or “this Subdivision” to refer in a Part to the same Part, Division or Subdivision;
(c) to refer to another section (e.g. ‘section 1”) say “section 1”; to refer to a subsection say “section 5(1)”;
(d) to refer in one subsection to another subsection of the same section, say “subsection (3)”, “subsection (3)(b)” and so on.

3.8. Section headings or marginal notes
Clauses should be given a marginal note or section heading. This is to facilitate the creation of a table of contents which in turn helps the reader understand the structure of the Act.

A marginal note or section heading should be brief and to the point. It need not constitute a complete grammatical sentence; often a verb is not necessary. It should not contain a rule, but only indicate the nature of the topic covered.

Section headings should not be in capitals and there is no need for a full stop at end of each heading.

Note that for users of Word or similar desktop publishing systems, the section heading is easier to manage than a marginal note. It also lends itself more readily to creating a contents list and is easier to read on the page.

Note also that in some jurisdictions the Interpretation Act may require use of marginal notes, but the Regional Law Revision Centre in Anguilla is encouraging countries to replace marginal notes with section headings. Consideration should be given to using section headings and if necessary amending the Interpretation Act to provide for this.

3.9 Units of legislation
It is helpful if CARICOM Member States use similar nomenclature for the individual units of legislation.

Bills
Section; sub-section; paragraph; subparagraph
Example: X Bill No. 2 of 2016

4. (1) The magistrate…..(subsection)
(a)……:(paragraph)
(b)……;
   (i)……(subparagraph)
   (ii)...
Acts
(Note that they are not called 'Laws'.) Section; subsection; paragraph; subparagraph (Same comment.)

Regulations
Regulation; subregulation; paragraph; subparagraph
(Same comment for 'subregulation'.)

Rules
Rule; subrule; paragraph; subparagraph
(Same comment for 'subrule'.)

Orders and other statutory instruments:
paragraph; subparagraph (Same comment for 'subclause'.)

Schedules
Paragraphs; subparagraph (Some jurisdiction use 'paragraphs' and 'clauses')

Treaty
Article; subarticle; paragraph; subparagraph.

Constitution: sections; subsections (but some use articles; subarticles. Note, however, that in some jurisdictions the Constitution has sections.

The phrase 'of this Bill' (or 'of this Act' etc.) is not necessary, as the Interpretation Act usually provides that a reference in an Act or statutory instrument to a section, etc. is a reference to a section, etc. of that Act or statutory instrument.

Note also that the provisions of a Bill are referred to as 'clauses' and 'subclauses' in the contents list and in the Explanatory Note or the Explanatory Memorandum and other material up to the point where the Bill is passed. Thereafter, they become 'sections' and should be referred to as such.

Sections are numbered in Arabic numbers consecutively and subsections are also numbered consecutively but in brackets. The standard numbering and lettering practice follows the sequence 1(1)(a)(i).
3.10 Contents list

It is helpful if a Bill or item of subsidiary legislation of more than a few provisions has a list of its contents. In the case of a Bill, this is generally called an Arrangement of sections. For subsidiary legislation it is usually called a Table of Contents or an ‘Arrangement of Regulations/Rules’.) If there are Schedules, their headings should be included in the contents list. An arrangement of sections should also be attached to an amendment Bill.

An Arrangement of sections consists of a sequential table of the section headings or marginal notes of each of the clauses. A Table of Contents is a sequence of the headings or marginal notes to each of the provisions of an item of subsidiary legislation.

A contents list makes a useful overview of the whole legislative scheme. It should tell the reader at a glance what the structure of the legislation is. So it is important to choose good section headings/marginal notes.

Note that it is not the practice among CARICOM Member States to list subsections, as they do not have names.

3.11 Aids to readers

Legislation can contain various devices to assist the reader. They include:

- the use of formulae;
- the placing of defined terms in italics, inverted commas or bold text;
- labeling. This means that if a section refers to another section, the section heading or marginal note of the section is also given, so that the reader knows without looking it up what the section is about. An example might be–

"3. Powers of entry"
This section must be read with section[4] (Power of arrest)."

In fact, if the section referred to is adjacent, or in the same Part, labeling it might not be necessary, but the device should be borne in mind as another way of assisting the reader.

3.12 Additional material

Most jurisdictions also provide some ancillary documentation to assist readers in understanding and following the legislation (See chapter on Explanatory Material). The drafter might therefore also be asked to provide:

- An Explanatory Note or Memorandum;
- A Derivation Table (of sources);
- A Destination Table (of repealed provisions).
CHAPTER 4

DRAFTING STYLE: GENERAL

“The drafter needs to develop an obsession to draft so as to be readily understood. The task is not only to determine the law, but also to communicate it.” (Thornton in ‘Legislative Drafting’ (Butterworths) 4th ed.)

Creating readily understandable law is challenging at both the policymaking and drafting stages. But the goal is achievable, if the policy is well thought out and if the drafting instructions are clear. A legislative draft should:
- express the policy intention;
- be legally sound;
- avoid ambiguities;
- be capable of enforcement and implementation;
- be consistent with the principles of good governance;

4.1 Clarity is the main aim

The law should be expressed in such a way that it cannot only be understood by the well-disposed, but cannot be misunderstood by the ill-disposed. In other words, a draft should be clear and unambiguous. It has to be recognized that there are often people with vested interests in defeating the purpose of legislation if the policy is unacceptable to them. Large corporations can marshal forces to argue that a provision does not mean what the legislators thought it meant, or that it does not apply to the corporation.

The drafter should strive for consistency in the use of the same word to express one meaning. ‘Elegant variations’ should be avoided.

Clarity is not just a matter of using clear words, but involves the structure of the legislation. The drafter should pay attention to the structure of the legislation, especially in a Bill of any length, which should be divided into parts, grouping like matters with like. See the Chapter on the Structure of Legislation.

Clear drafting means the avoidance of archaic expressions and legal ‘jargon’. This requires the use of new phraseology and word economy and the adopting of Plain English principles.

Clear drafting also requires the drafter to have a good grasp of principles of punctuation, spelling, capitalisation, etc. and to use them consistently. See the Chapter on Punctuation, Spelling, etc.

Modern drafting usually involves the adoption of gender-neutral and politically correct legislative language. See the Chapter on Gender, etc.

The sequence of ideas will flow logically, and the Bill will have cross-references and ‘signposting’ (i.e. mentioning related provisions if appropriate).

4.2 Plain English principles

In many countries the modern trend is to use Plain Language (or Plain English) for official documents. Plain English is in fact only an extension of the principle of clear drafting, which
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all jurisdictions accept. It includes directness and simplicity and clarity and consistency in the use of language. This makes the document easier to understand by the ordinary reader. It is particularly important for legislation, which needs to be understood by legislators, legal advisors, the courts, and all those using and administering the law. It avoids some of the ambiguities of traditional drafting and the use of ‘jargon’ and makes the law more democratic and transparent.

There is a belief that archaic and roundabout expressions are necessary to give legitimacy to a legal document, and to avoid ambiguity. However, the courts in many countries are now used to laws drafted in Plain English, and it is often a relief to administrators and others to learn that they can use plain and simple English in drafting rules etc., rather than having to use an antiquated form of words. It has to be accepted that legal jargon is sometimes just a ‘comfort blanket’ for drafters wanting to create an authentic-seeming document but it does not help communication of ideas.

Plain Language drafting is a contentious subject as not all jurisdictions or their legislators accept all its principles, but Plain English principles have been adopted by many drafting offices around the Commonwealth. They have been adopted in several CARICOM Member States and are recommended for use by all drafting offices in the region.

There are various international organisations dedicated to the promotion of plain language in official communications. One of them is the Plain English campaign which can be accessed at www.plainenglish.co.uk.

4.3 Target audience

The drafter should draft for the particular target audience of the legislation. This might be a specialised body with specialised knowledge of a subject. So a Bill to regulate the accountants’ profession, for example, can reasonably use terms that are familiar to accountants, without having to explain them. However, it must be recognised that the users of statutes nowadays are just as likely to be people without any specialised or even any legal qualification. In the absence of legal aid, advice on legal matters is increasingly being given by citizens’ advisory bodies, NGOs and so on. The law is more readily available on the internet, and drafters must therefore expect more non-lawyers to read the legislation.

However, clear drafting does not necessarily mean writing for the ‘man in the street’, since to understand legislation it is necessary to have a basic understanding of some principles of interpretation, such as that the singular includes the plural, and something of the structure of government and the courts.

It is not necessary to refer to ‘the person in charge of a government department’ as the user of a statute can be expected to know the word ‘Minister.’ The so-called ‘demotic’ style of drafting, in which the legislation addresses the reader in the 2nd person as ‘you’, is not necessary to achieve clarity, although this kind of wording might be appropriate for such items as a departmental leaflet explaining a statute.

4.4 The legislative sentence

The legislative sentence is the means by which the drafter translates policy into law. It is an arrangement of words to express a command or state a prohibition or declare a state of affairs or aspiration, and should be precise. A common form of legislative sentence will state:
- the legal subject i.e. the person to whom the law is to apply;
- the legal action i.e. the law which is to apply; and
- the circumstances in which the law is to apply.

The section in which a legislative sentence appears should state:
- how the law is to operate;
- the nature of the legal action;
- the conditions under which the law is to operate;
- the circumstances in which the law will operate;
- the person given responsibility or on whom is placed an obligation or prohibition.

Ideally, the section, or the context, should also state the policy considerations of the law.

4.5 Write easily understandable text

As a general rule, the drafter of legislation should aim to:
- use short sentences which state only one idea;
- use short familiar words and phrases that express one meaning only;
- use only one sentence in a section or subsection;
- avoid long sections (some jurisdictions prefer no more than 6 subsections);
- avoid long subsections (some jurisdictions prefer no more than 5 lines of unbroken text). This means that lengthy, complex or technical provisions should be divided into a series of related sections. If the sentence is more than 5 lines, this should be a warning bell to the drafter to consider using 2 or more shorter sentences to make the text more readable;
- use the positive rather than the negative;
- use the present tense rather than the future, as the law is always speaking;
- say ‘nothing prohibits’ rather than ‘nothing shall prohibit’;
- instead of shall be payable ‘say’ is payable’.
- say ‘commits an offence’ rather than ‘shall be guilty of an offence’.

4.5.1 Voice

Avoid the passive voice so far as possible, unless it refers to a state of affair as in, for example ‘The .... Commission is established’. (Some drafters prefer to say ‘This section establishes the....Commission.’) Use of the passive voice should be avoided because:

- a sentence in the passive voice does not assign responsibility clearly;
- the passive voice places the receiver of the action before the main person;
- passive construction is confusing when used in legislation;
- the passive voice may however be used when the person to carry out the act
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- is unknown, irrelevant or obvious;
- avoid the subjunctive voice, unless to say, for example ‘...must require that it be ...’
- Use the imperative voice only for commands, such as in notes to a form, or similar.

The Interpretation Act usually provides that expressions in the singular include the plural, so that it is not necessary to say, for example ‘a person or persons...’. However, it might be necessary to specify numbers in legislation.

To express numbers, it is common practice to use numerals (figures) rather than words. The exception is to use ‘one’ if the use of ‘1’ might cause confusion.

Some jurisdictions still prefer numbers up to 10 to be in words rather than figures, or sometimes both, as in ‘...within five (5) days.’ However, it is generally agreed that figures are always more appropriate, for example, in formulae, Schedules or tables.

Use Arabic rather than Roman numerals for headings of Parts, etc.. (Some jurisdictions prefer to use Roman for Parts and Chapters).

References to specific dates should be in the form ‘1st day of January, 20xx’ or even simply ‘1 January 20xx’.

Use ‘mm’ for millimetres.

The dollar symbol ($) should be used rather than the word ‘dollar’ if an amount is expressed in figures.

Use '% ' for percentages. (In some jurisdictions ‘percent’ is the preferred form, except in a formula.)

4.5.2 Positive not negative

If an idea can be expressed either positively or negatively, it should be expressed positively. The use of several negatives in one sentence should not be used. In general try to avoid the double negative or implied negatives, such as "It is not the case that exempt persons will never have to pay duty."

4.5.3 Simplifying the text

The more complex the policy and proposed legislation, the less likely it is that once promulgated, the legislation will be implemented properly, if at all. The goal is to avoid having a statute book which is full of legislation that is unenforceable, or difficult or impossible to implement. From a textual standpoint, this means avoiding excessive use of technical and legal jargon unless this is unavoidable. It also means using plain language and keeping sentences as short and clear as possible. See also the Chapter on Plain English Principles.

The article

Use the definite and indefinite article correctly; there is a difference between 'a' and 'the'.

Categories and exceptions

Drafters should state a rule or category directly rather than describe the rule or category
by stating its exceptions. When exceptions are to be used, the rule or category should be stated before the exception.

**Split infinitives**

These should be avoided if possible, although to use a split infinitive might sometimes be the best way to express an idea.

**Nouns: singular or plural**

In legislation, the singular includes the plural and the plural includes the singular. Generally, it is preferable to use a singular noun rather than a plural. This avoids the problem of whether the rule applies to each member of a class or to the class as a whole. If the plural must be used in a compound word, the significant word takes the plural. For example, use ‘notaries public’ rather than ‘notary publics’.

**Abbreviations**

Avoid abbreviations and acronyms. If an acronym must be used, it should be defined in the interpretation section and the name written in full there.

**Couplets**

If words have the same effect or the meaning of one word includes the other, do not use word pairs, such as ‘remove and delete’. Two words should be used only if the second adds something.

**Periods of time**

The words ‘before’ and ‘after’ in relation to a date need using with care so as not to exclude the specified day.

It is better to use ‘after’ [date] rather than ‘from’ which is unclear. The phrase ‘on and after [date]’ can be used when the specified day is to be included.

There is usually no need for the long formula ‘the period that expires at the end of the … day’ etc.

The use of ‘by’, ‘until’ or ‘till’ are not encouraged. If an action is to be taken by a stated date or until a stated date, it is better to say ‘not later than’ or ‘before’.

### 4.5.4 Format

If Chapters and Parts are used they should have headings in capitals. They should be numbered using Arabic numerals, as Roman numerals are no longer readily understood and give the Bill an archaic flavour. (Some jurisdictions do however prefer Chapters and Parts to have Roman numerals.)

The common practice in the CARICOM region is to use sequential numbering (1, 2, 3, etc.) rather than digital numbering (1.1, 1.2 etc.). The practice is also to use indents (a), (b) etc. rather than 1.1, 1.2 etc.

### 4.5.5 References

The Interpretation Acts of most CARICOM Member States provide that a reference to a legislative provision always means the provision ‘as amended from time to time’, so that
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This phrase does not need to be used. If a particular historic text is to be referred to, it would need to be identified.

Similarly, a reference to an Act (including ‘this Act’) includes subsidiary legislation made under it so that does not need to be said.

If a specific reference is needed to regulations made under the Act, they could be referred to as ‘the regulations’ and that term could be defined as meaning regulations made under that Act. This avoids the need to repeat the words ‘made under this Act.’

It is preferable not to refer to ‘the preceding section’ or ‘the section next following’, but to specify the number of the section (or regulation) referred to. This avoids problems if new sections (or regulations) are inserted or deleted. For example to refer to a provision in a previous section, use section 5(1).

If two or more sections are referred to, a phrase such as ‘sections 12 to 24’ is acceptable usage; the word ‘inclusive’ is not needed. That phrase would include any added section such as 13A, for example.

References to numbers of a legislative provision should be in figures, not words. Subsections, paragraphs and sub-paragraphs should normally be referred to as ‘section 4(2)(a)’, not ‘subsection (2)(a) of section 4’. And ‘regulation 16(1)(a)(i)’, not ‘paragraph (a)(i) of regulation 16’.

4.5.6 Schedules

References to Schedules to, or forms prescribed in, a Bill should be shown in the margin thus–

‘Schedule 1 ‘not’ 1st Schedule ‘or’ First Schedule’; ‘Form 1 ‘not’ Form No.1’;
‘Forms 1 and 2 ‘not’ Form 1 and Form 2’.

This means that if inserts are to be made later then 1B, 1C etc. can be added.

If there is only one Schedule etc., there is no need to number it. However, if a further Schedule is added, it requires an amendment to the existing Schedule to call it Schedule 1.

Some jurisdictions for this reason prefer to number a single Schedule as Schedule 1.

4.5.7 Lists

It is common for a Bill to contain lists of objectives, powers, members, qualifications and similar items. There are dangers in ‘legislating by list’, because a list of functions does not itself give the powers needed to perform those functions, but lists can be very useful if properly used.

It is usual that in a list, items are lettered in lower case alphabetical order, with brackets, and that semi-colons or commas are used at the end of each item, rather than full stops. (Some jurisdictions prefer in a list to use commas if the sentence is continuous.) It is also usual practice for the items in the list to be indented.

When listing objects and functions, it is good practice to use a colon (or dash) at the end of the introductory words (known as the ‘chapeau’) and semi-colons at the end of each paragraph. After the penultimate item, use ‘and’ or ‘or’ as appropriate.

It is also good practice for the ‘chapeau’ to be as comprehensive as possible, so as to reduce the repetition of words at the start of each item in the list. Thus–

“A person who–
(a) makes;
(b) buys, etc."
is preferable to-

“A person–
(a) who makes;
(b) who buys, etc.”

There is no need for ‘and’ or ‘or’ in a list until the last but one item. A different view is that this makes it difficult for a reader to know whether the items are cumulative or disjunctive until the end of the list, but it is reasonable to suppose that a person reading a section with a list will read the whole list to get the full picture, and repeating ‘and’ or ‘or’ can be confusing. The result of the above recommendations would be, for example–

“The Minister must ensure that all children are provided with –

(a) xxxx;
(b) yyyy; and
(c) zzzz."

If the list is in a subsection, which already begins with (a), (b), etc., the items will usually be listed with small Roman numerals. If the list is in a paragraph, which already begins in that way, they might have to be listed with capital A, B, etc. But the drafter should endeavour to avoid having to go into A, B etc in a list and should consider redesigning the whole section instead.

4.5.8 Sandwich clauses

Try to avoid the ‘sandwich clause’ which has text after a list– “A person who–
(a) xxx;
(b) yyyy; or
(c) zzzz,

commits an offence.”.

This is because the subject and verb might be a long way apart. It is better to say, for example–

“It is an offence for a person to–

(a) xxx;
(b) yyyy; or
(c) zzzz.”.

Even more important is to avoid the ‘double sandwich’ if possible. An example would be –

“If–

(a) aaaa;
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(b) bbbb; or
(c) cccc,

then–
(d) xxxx;
(e) yyy; and
(f) zzzz,

and this Ordinance is to be construed accordingly.”

4.5.9 Tables

A section (or possibly a subsection) may sometimes need to have a list or enumeration of things attached to it or incorporated in it. This should be called a Table, and not a Schedule. In some jurisdictions such a Table might be included inside a framed box, but in others it might simply be a continuation of the text of the section.

4.5.10 Avoid loopholes

Take care with ‘above’ and ‘below’, as in ‘a speed of above 30 m.p.h.’ and ‘a speed of below 30 m.p.h.’ – what is to happen at 30 m.p.h.?

In number, avoid a gap or overlap in categories. Amounts ‘up to $1,000’ would overlap with amounts of ‘$1,000 or more’ and an amount of ‘$999’ might not include cents.

4.5.11 Use of ‘subject to’

The expression ‘subject to’ should be avoided unless its meaning is clear. Carelessly used, the expression may be ambiguous or redundant. The phrase ‘Subject to this Act’ should not be used, as all provisions are subject to each other. If it is necessary to state an exception, specify the section that creates it. A phrase such as ‘Subject to the Minister’s powers’ should not be used, but the specific powers should be set out.

4.6 Minimise cross references

Cross references often have the effect of interrupting sentence flow and a reader’s chain of thought. It may also force readers to constantly check the references before proceeding with the text. Only use cross references if the absence of them creates an ambiguity. If a drafter is able to draft a clause and avoid the use of a cross reference, then they should do so. This is especially useful if the drafter knows that the particular clause only deals with a particular subject.

4.7 The proviso (Provided that)

Use of the proviso should be avoided as it is a drafting device that has become abused over the years. Sometime a proviso in legislation amounts to a statement of a new rule or a major exception, which makes the meaning of the main rule very unclear.

There are various ways to avoid using a proviso. The most common is to divide the section into two subsections, and begin the first section by saying ‘Subject to subsection (2)…’ or ‘Except as provided by subsection (2)…’; “provided that” can also be avoided by using the word “if”.
In general, the words ‘provided that’ should be avoided because they create ambiguity. They can often be avoided by using the word ‘if’.

4.8 Use of ‘shall’

Most of the above principles are widely accepted as principles of clear drafting. The one usage that distinguishes Plain English from clear drafting generally is the avoidance of the word ‘shall’ as the word of command.

Traditionally, the word ‘shall’ in legislation has been regarded as mandatory, and ‘may’ has been regarded as discretionary. Some Interpretation Acts even make provision to that effect. In most CARICOM Member States the practice is to adhere to the use of “shall” as mandatory and “may” as discretionary. Consequently, the use of “must” or “is to” should be avoided unless permitted in the particular jurisdiction. It is important to note that the word “shall” should not be used where the present indicative tense is appropriate, for example, instead of “the quorum shall be 5”, use “the quorum is 5”.

4.9 Use of “may”

The word ‘may’ indicates a discretion to act. It expresses a power or a privilege and should only be used to enable a person do something, either freely or subject to conditions. In the past, courts sometimes found that the word ‘may’ implied an obligation. See, for example, Attorney General v. Antigua Times Ltd. [1976] A.C. 1.

The word ‘may’ can often be used to shorten a legislative statement, for example:

- The phrase ‘The Minister may ....’ should be used instead of the phrase ‘The Minister is entitled to....’ Or ‘The Minister has the power to...’.
- Instead of ‘...may be used’ say ‘...is authorised to be used’.
- Instead of ‘such roads as may be specified’ say ‘the roads that are specified’ or similar.
- Instead of ‘such conditions as the Minister may consider appropriate’ say ‘any conditions the Minister thinks appropriate’ and similar.

The word ‘may’ can also create ambiguity as it implies that something may not. It is better to say ‘shall not”, or “is not entitled to” rather than “may not”.

4.10 Word economy

- Plain English principles require that verbosity should be avoided and legislative language should be as direct and precise as possible.
- Unnecessary adjectives and adverbs and qualifiers should be avoided.
- Say ‘Head of State’ (or as maybe) alone, without naming the country, if the term is defined in the Interpretation Act.
- Say ‘Government’ alone (ditto).
- Instead of ‘without prejudice to the generality... ’say without limiting...’.Say ‘for as long as needed’ rather than ‘for as long as may be necessary’.
- Say ‘move the vehicle’ rather than ‘alter the position of the vehicle’.
- The phrase ‘Nothing in section [xx] renders it unlawful/shall prevent etc.’ can be rephrased as ‘Section[xx] does not make it unlawful/prevent’ and similar.
Drafting Style: General

- Say ‘the vehicle’ rather than ‘that vehicle’ (unless needed for clarity) and ‘on’ rather than ‘upon’ (a road or similar).
- Say ‘to facilitate’ rather than ‘for the purpose of facilitating’ and similar.
- Omit ‘the provisions of’ (a section etc.). So instead of subject to the provisions of section xx’ say ‘Subject to section xx’.
- Say ‘member member’ alone; not ‘member of the Commission’ (if the Commission is defined).
- Use ‘if not where’: It is better to use ‘If...’rather than ‘Where....’ unless a location is meant as the use of the word ‘where’ conveys a description of a factual situation or location.

4.11 Words to use carefully

- There is rarely any need for the term ‘for the avoidance of doubt’, as doubt is only created by a court case interpreting a provision.
- The phrase ‘from time to time’ is rarely needed as the power to make or amend an Order or similar instrument always exists and amendment can be made at any time. And the law is always speaking, as already mentioned.
- The phrase ‘it is hereby declared’ is rarely needed, as every provision declares the law.
- There is rarely any need to use ‘above’ or ‘below’ unless it is within a section and to avoid ambiguity.
- Say ‘a person who moves a vehicle’ rather than ‘a person moving a vehicle’ and similar.
- Say ‘get on or off (the vehicle)’ rather than ‘board or alight from’.
- Do not use “such in substitution for “the” or “that”.
- Do not use ‘the same’ as a substitute for ‘it’ or ‘them’.
- The words ‘any’, ‘all’, ‘each’ and ‘every’ should not be used if ‘a’ or ‘an’ would do.
- Avoid ‘such’ where possible. Instead of ‘such conditions as may be specified’ say ‘any conditions that are specified’ (and give a power to include conditions.)
- Distinguish ‘by’ and ‘under’ a section or Act. The word ‘under’ implies that something else has to happen.
- The words ‘and’, ‘or’ and ‘nor’ should be used with care and not confused in a sequence or list. The word ‘and’ is conjunctive and means all the items are included or required. The word ‘nor’ is disjunctive and means they are alternatives.
- Never use ‘and/or’ in legislation. Use ‘A or B, or both’ if it is necessary to provide for all 3 alternatives. The term ‘or both’ is not necessary if a power is simply given to do A or B.
- Be careful with the word ‘necessary’ as it implies that someone forms an opinion. The provision should preferably say in whose opinion something is necessary. Other common formulations are ‘reasonably necessary’, or ‘necessary or expedient’, which are more impersonal, but the same comment applies.
- Be careful in using ‘less than’, ‘fewer than’, ‘smaller than’, ‘more than’, ‘greater than’. Correct usage depends on whether the comparison is by object or number. It is not correct to say ‘The members must be less than 20’. It should be ‘...fewer than 20’. But ‘The membership must be less than 20’ is correct.
Be careful of ‘except’ and ‘unless’. If provision is made which is effective unless something happens or except in specified circumstances, consider whether it is necessary to provide what is to happen if that something does happen or those circumstances do occur.

The words ‘existing’, ‘before’ and ‘after’ should always relate to a particular time or the happening of a particular event.

Avoid ‘in pursuance of [section ...]’ and use ‘pursuant to [section ...]’ instead. But note that the phrase implies action that has to be taken, and is not an alternative to ‘in accordance with’ which only means that action complies with certain requirements.

Do not say ‘approve’ (for example, a budget or report) if what is meant is ‘prepare’.

The word ‘each’ refers to two or more in a numerical context where there has been a previous identification, while ‘every’ implies a class. So ‘Each of the members mentioned in section...’ but ‘Every person who applies...’.

In general, the use of ‘every’ is not appropriate in legislation unless for emphasis, as in ‘Every person who attends ... must be given a voting paper’ or similar.

The word ‘all’ is a spurious form of emphasis and should not be used unless the intention is to refer to all the members of a group collectively.

The word ‘any’ as in ‘any person who...’ is not necessary; simply say ‘a person...’ unless there is a need to emphasise that there are no exceptions.

The word ‘which’ can usually be replaced by the word ‘that’, which makes for easier reading.

### 4.12 Words to avoid

- Archaic words and jargon, nominalisations (see Table 1), legalese, jargon and archaic words and phrases that are not used in normal writing, foreign words and a number of other words in Table 2 should be avoided. (A nominalisation is a noun derived from a verb). In formal writing, strong verbs are often replaced by a nominalisation plus a weak verb and the result is often more wordy and less direct. A drafter should remove nominalisations to make the provisions less wordy, shorter and crisper. See the table below for examples that should be avoided and alternative words that could be used.

<table>
<thead>
<tr>
<th>To make application</th>
<th>To apply</th>
</tr>
</thead>
<tbody>
<tr>
<td>To ensure compliance</td>
<td>To comply</td>
</tr>
<tr>
<td>To effect/make delivery</td>
<td>To deliver</td>
</tr>
<tr>
<td>To conduct a hearing</td>
<td>To hear</td>
</tr>
<tr>
<td>To give consideration to</td>
<td>To consider</td>
</tr>
<tr>
<td>To undertake consultation</td>
<td>To consult</td>
</tr>
<tr>
<td>To conduct an investigation</td>
<td>To investigate</td>
</tr>
</tbody>
</table>

**Table 1**
Table 2 provides in the second column some alternatives for the words and expressions in the first column.

**Table 2**

**Other words and expressions which should be avoided**

<table>
<thead>
<tr>
<th>Avoid</th>
<th>Use</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abovementioned</td>
<td>avoid</td>
</tr>
<tr>
<td>Aforementioned</td>
<td>avoid</td>
</tr>
<tr>
<td>Aforesaid</td>
<td>under</td>
</tr>
<tr>
<td>before mentioned</td>
<td>avoid</td>
</tr>
<tr>
<td>construed to mean</td>
<td>means</td>
</tr>
<tr>
<td>deemed – this work can be used to create a legal fiction</td>
<td>but should not be used as an alternative to “think”, “consider” or “similar”</td>
</tr>
<tr>
<td>during such time as, during the time that</td>
<td>while</td>
</tr>
<tr>
<td>during the course of</td>
<td>during</td>
</tr>
<tr>
<td>each and all</td>
<td>each, or all</td>
</tr>
<tr>
<td>each and every</td>
<td>each, or every</td>
</tr>
<tr>
<td>foregoing</td>
<td>under</td>
</tr>
<tr>
<td>forthwith</td>
<td>immediately</td>
</tr>
<tr>
<td>for the duration of</td>
<td>during</td>
</tr>
<tr>
<td>created hereby</td>
<td>use “created by this section”</td>
</tr>
<tr>
<td>herein</td>
<td>in this</td>
</tr>
<tr>
<td>hereinafter</td>
<td>avoid</td>
</tr>
<tr>
<td>hereinbefore</td>
<td>avoid</td>
</tr>
<tr>
<td>Heretofore</td>
<td>avoid</td>
</tr>
<tr>
<td>Howsoever</td>
<td>avoid</td>
</tr>
<tr>
<td>in the case of</td>
<td>for or when</td>
</tr>
<tr>
<td>in the course of</td>
<td>during</td>
</tr>
<tr>
<td>in the event that</td>
<td>if</td>
</tr>
<tr>
<td>is binding upon</td>
<td>binds</td>
</tr>
<tr>
<td>means and includes</td>
<td>means or includes</td>
</tr>
<tr>
<td>notwithstanding</td>
<td>despite; subject to the previous section or subsection</td>
</tr>
<tr>
<td>notwithstanding the fact that</td>
<td>although/even if</td>
</tr>
<tr>
<td>on own motion</td>
<td>on own initiative</td>
</tr>
<tr>
<td>preceding provision</td>
<td>section</td>
</tr>
<tr>
<td>Same</td>
<td>do not use as a substitute for “it” or “them”</td>
</tr>
<tr>
<td>Save</td>
<td>“except”, “but’</td>
</tr>
</tbody>
</table>
A number of other terms that are frequently used in legislation are either not needed or can be simplified.

4.13 Dating old laws

If the drafter is amending an older statute that uses traditional formulations such as ‘shall’ and ‘where’, it might be appropriate, in order to maintain textual integrity, to continue with that usage. The question of ‘new wine in old bottles’ that arises when amending statutes drafted in an older style is one that needs careful consideration, but is beyond the scope of this Manual. See Chapter on Amendment Bills for amendments generally.
CHAPTER 5

GENDER-NEUTRAL AND POLITICALLY CORRECT DRAFTING

Historically, legislation was drafted using words referring to the masculine gender alone. The growth of the gender equality movement has resulted in the need to use more socially inclusive language and to write using gender neutral terms. Of course, this does not mean that gender cannot be specified in the law if there is a need for its specification.

5.1 Gender-neutral drafting

Gender-neutral drafting is not yet adopted by the drafting offices of all CARICOM Member States. It is however increasingly being regarded around the Commonwealth as preferable, for political and plain language reasons.

It is true that most Interpretation Acts in the region provide that expressions in the masculine gender include the feminine. But legislation that constantly refers, for example, to a Minister as ‘he’ is increasingly unacceptable to women and to the community generally. It implies a mind-set that is no longer appropriate and gender-neutral language is therefore increasingly used. It removes any suggestion of male dominance in the holding of office, exercise of power, etc. (and in the committing of crime, for that matter.)

The basic rules of gender-neutral drafting are:

- the pronoun ‘he’ and its grammatical variations should not be used on its own to refer to or replace a noun referring to a person (unless self-evidently male). So, “he should be changed to “he or she” or “person”
- “him” changed to “his or her” or “person’s”
- “his” changed to “his or her” or “person’s"
- gender-specific terms (other than the phrase “he or she” or its derivatives) should not be used if an acceptable substitute is available
- references to offices may be repeated: e.g. the President may if the President thinks fit.

Pronouns

While the simplest way to comply with the first rule is to replace ‘he’ by ‘he or she’, and to change grammatical variations (his, him, etc.) accordingly, this is not always appropriate, as corporate bodies and other legal persons have no gender. And no drafter would want to use ‘he, she or it’. Unless a provision relates to an individual, therefore, it is better to repeat the
noun, such as 'the person', 'the defendant', etc.

A device that is common in journalism is to use ‘they’ to mean 'he or she' but this is not generally acceptable in legislation as it creates confusion as to number.

Even when the provision relates to an individual, it is not always appropriate to use 'he or she' as that usage itself tends to focus thought on the gender of the person, and detracts from the dignity of the office. For this reason, drafters when referring to the Head of State, Chief Justice, etc. prefer to use the title rather than 'he or she' and related pronouns.

Some drafters avoid the use of 'he or she' altogether, but the use can be justified when the provision relates to an individual directly. Examples would be when referring to a person in police detention etc. To use 'the defendant' or 'the person' could be said to impersonalise the act of detention, which might not be desirable. But that is a matter of preference for each jurisdiction.

The constant repetition of 'the person' can also become tedious and drafters are encouraged to find other ways to avoid gender-specific drafting, sometimes changing the structure of a provision entirely.

It might be necessary to repeat words to achieve gender-neutrality; this is one respect in which clarity is sometimes preferable to brevity.

Gender-specific words

Complying with the second rule stated above is equally important. Individual words that have a gender-specific connotation should therefore be avoided if possible, though there are differences of view on this topic.

- The term ‘seaman’ is usually replaced by ‘seafarer’, but the ‘master’ of a ship is still called that.
- The term ‘Chairperson’ is rather cumbersome and also considered to be gender insensitive. ‘Chair’ might be preferable. Or ‘the person presiding’ when no particular officer is meant.
- The term “mankind” may be replaced by ‘humankind’.
- It is often possible to use other terminology, but care must be taken not to create new terms that might not be understood by users of the legislation.

Gender issues generally

Constitutions sometimes require independent institutions and commissions to have a proportion of women members. It is the responsibility of the appointing authority to ensure compliance with this rule, but it is sometimes appropriate to include or restate it in legislation.
that establishes a new body, and the drafter should be alert to remind the policymaker of this possibility.

Note that such a requirement would not normally apply to other bodies, unless stated in the legislation creating them.

Drafters should try to avoid the rather odd formulation sometimes used, that a body of 3 persons ‘must include at least one man and one woman’, as there are other ways of stating the rule.

It is also preferable to avoid a requirement for a given percentage of women members in a body, if there might be less than 10 members of the body. The question then arises as to what happens if there are fewer than 10 members. If the rule is to be that there must be at last one, that should be stated instead.

5.2 Politically correct drafting

As well as gender-specific language, there is other terminology that is no longer used by legislators in many jurisdictions. This is to avoid an inference of guilt, a negative status, or using a term that is regarded as no longer suitable in society at large. Examples are:

- avoid using ‘offender’ except in the case of youth offenders;
- use ‘defendant’ not ‘accused’; ( in Trinidad and Tobago use “the accused” as this is the way in which they are referred to in the court
- use ‘mental disorder’ not insanity;
- use ‘impose a penalty’ rather than ‘inflict punishment’;
- use ‘persons with disabilities’ rather than ‘disabled persons’. 
CHAPTER 6

PUNCTUATION, SPELLING AND CAPITALISATION

The aim of the drafter should be clarity of expression and avoidance of jargon or ‘quirky’ features in legislation. To achieve this, the drafter should use English in a normal way in terms of punctuation, spelling and capitalisation. It is important for the legislation to be internally consistent in these matters, and to be consistent with the rest of the jurisdiction’s statute book.

6.1 Punctuation

- Punctuation is used to assist the reader to understand the text easily
- Use punctuation in the same way as normal prose, such as a comma to mark a pause or subordinate phrase, etc.
- Punctuate sparingly; unnecessary punctuation can be very distracting. Each punctuation mark should serve a purpose.
- Punctuate for structure and not for sound. Test every punctuation mark to see whether it assists in explaining the structure of the sentence.
- Be conventional and adhere to the conventional use of punctuation marks. While most other forms of prose writing admit a measure of individuality, legislative drafting does not.
- Be consistent; inconsistency is the most common error in the area of punctuation. A haphazard use of punctuation marks, especially the comma, can easily destroy the value of punctuation.

The full stop

The following do not need a full stop, as they are not sentences:
- headings of Parts and Divisions and Schedules;
- cross-headings to groups of clauses;
- section headings or marginal notes;
- the section headings or marginal notes in a table of contents/arrangement of clauses.

The comma

It used to be thought that legal documents should not contain commas, but this is not correct for legislation. The use of the comma is particularly important since this form of
punctuation can often be used to remove an ambiguity. Sir Roger Casement was said to have been 'hanged on a comma' (because of its placing in the relevant provision.)

Commas serve two distinct purposes, namely to separate and to enclose.

▪ a ‘separating’ comma should be used:
  - to separate long independent (not subordinate or modifying) clauses joined by co-ordinating conjunctions such as ‘and’, ‘but’, ‘nor’, ‘or’;
  - to separate an introductory modifying clause or phrase from what follows; and
  - to separate a series of items (for example, words, phrases or clauses).

▪ ‘Enclosing’ commas should be used:
  - to enclose non-restrictive (sometimes known as non-defining or commenting) modifying phrases and clauses, such as ‘in this Act referred to as…’;
  - to enclose parenthetical expressions interrupting the main communication in the sentence. Such as 'however', 'as the case may be', 'if any', 'therefore’;
  - to enclose modifying phrases and clauses if the enclosure clarifies the structure of the sentence as in 'the Minister, who may by Order…'; ‘the Board must, within two months of receipt, serve…’ and similar.

The colon

A colon is placed after an expression that introduces a series of items. It is sometimes used at the end of the ‘chapeau’ but in some jurisdictions a dash is used at that point.

The dash

The dash, though not an ‘official’ punctuation mark, has many uses in legislation.

▪ It can be used to introduce a list and is usually preceded by the words ‘as follows’ or ‘the following’. (Some jurisdictions use a colon at this point, as noted above.)

▪ It can be where a sentence is broken for any other reason.

▪ In some jurisdictions, a dash rather than a colon is used before a list.

A use of the dash that is not widespread but can be useful is to indicate contrasting provisions. For example–

“A person must–

(a) in the case of aaaa – do bbbb;

(b) in the case of cccc – do dddd.”.

To use a comma instead of a dash in (a) and (b) might produce too many commas and not make the distinction clear.
The semi-colon

The function of the semi-colon is to show a relationship between elements of a sentence which a complete break into separate sentences may obscure. The semi-colon is also used to co-ordinate a series of paragraphs, subparagraphs or listed items. Some jurisdictions discourage the use of the semi-colon in a legislative sentence except for this purpose.

In some jurisdictions a comma is used at the end of each item in a list, as if it were a sentence and a semi-colon only if each item is disparate. In other jurisdictions, the semi-colon is used after every item in a list, with a comma at the end if the main clause then follows. Either is acceptable, provided it is used consistently in the statute book.

Hyphens

The hyphen should generally only be used when the word’s proper spelling includes a hyphen. There are some exceptions:

- if the second element of the word is capitalised or a figure, such as ‘pro-American’, ‘Pre-1986’;
- to distinguish certain words spelt like others but with a different meaning, such as ‘re-cover’;
- if the second element has more than one word, as in ‘pre-Civil war’ and similar;
- in compound numbers and fractions such as ‘forty-six’ or ‘one-third’;
- in dates representing periods extending over more than one year such as ‘2004-2007’

(though it is preferable to use the word ‘to’ in such cases for emphasis.)

Apostrophes

Apostrophes are used to mark the singular and plural possessive forms in such phrases as ‘the court’s decision’, ‘a bankers’ association’ and similar. Care needs to be taken in such usages as ‘Magistrate’s Court’ or ‘Magistrates’ Court’ as the usage varies among jurisdictions.

The other common use of the apostrophe is to indicate an abbreviation as in ‘can’t’ or ‘won’t’, but it is unusual to use such abbreviations in legislation.

Brackets

There is no firm rule with respect to the use of brackets or parentheses. It is, perhaps, preferable to avoid their use if the part of the sentence in question can equally well be placed parenthetically between commas.
6.2 Spelling

It is common for drafting offices in CARICOM Member States to use the Oxford Dictionary, but nowadays that dictionary recognises both standard American and international English usages. It is recommended that spelling should be standardised as far as possible using Oxford English spelling and not American English spelling.

This means that it is preferable in words such as ‘authorise’ to use ‘s’ instead of ‘z’ and to use ‘to practise’ and not ‘to practice’, but words such as ‘offence’ and ‘defence’ are spelled with ‘c’ rather than ‘s’.

The following are examples of other common usages in the English-speaking CARICOM Member States:

- Use ‘authorise’ not ‘authorize’ and ‘organisation’ not ‘organization’.
- Use ‘connection’ not ‘connexion’ and ‘jewellery’ not ‘jewelry’.
- Use ‘centre’ not ‘center’ and ‘labour’ not ‘labor’.
- Use ‘movable’ not ‘moveable’, but ‘rateable’ not ‘ratable’.
- Use ‘acknowledgement’ not ‘acknowledgment’, but ‘judgment’ without the middle ‘e’ for a decision of a court.
- Use ‘endorse’ not ‘indorse’, but ‘inquire’ not ‘enquire’.
- Use ‘licence’ for a noun and ‘license’ for a verb.

In other cases of permissible alternative spelling, use the first version adopted in the Shorter Oxford Dictionary.

The spelling of ‘programme’ or ‘program’ varies between jurisdictions and no rule can be identified.

The words “subsection”, “subclause”, “subregulation”, “subparagraph”, and “subdivision” are spelled without a hyphen.

6.3 Capitalisation

Drafters should use capital letters sparingly. In general, there is no need for capitals except for first word of a sentence and proper nouns.

The use of capital letters should be restricted to cases where special attention is drawn to particular circumstances. They may also be used where reference is being made to important officials, statutory bodies or administrative bodies.

Capital letters should be used for proper names and titles for example, for ‘Commissioner of Police’, “Auditor General” and “Chief Justice” but not for ‘magistrate’. For generic terms
such as “authorized person” and “assistant commissioners” capitals are not used. The names of private organisations can be capitalised.

When defining a term, unless it starts with a capital letter in the text, do not use capitals for defined words in a list of definitions, because that is how they appear in the text.

Use lower case ‘s’ for ‘section’ as it is a normal noun (unless it is the first word of a sentence.)

The words ‘Bill’, ‘Act’, ‘Part’, ‘Proclamation’, ‘Order’, ‘Schedule’ and ‘Table’ (if referring to legislation) should begin with capitals to indicate that they have a special meaning.

The words ‘Regulations’, ‘Rules’, and ‘By-laws’ also begin with capitals when referring to a collection of provisions, but not when referring to a singular or particular provision, for example:

“These Regulations may be cited as …” but “An application under regulation 4...”.

Section headings apart from the first word do not need capital letters (unless they are proper nouns.)

Also, except when referring to a specific instrument, the word “notice”, “rule”, “order”, “regulation” etc. should be in lower case.

It is preferable not to use capital letters for ordinary nouns except in a title. For example, the terms ‘worker’ and ‘employer’ in labour legislation would not normally need to be capitalised. But capitals are always used in acronyms and initials (e.g. UNICEF) can be used if these are defined terms.

6.4 E-Terminology

The standard terminology to be used for e-terminology is:

- the Internet (as a proper noun) as used to refer to the global network on interconnected computers that is properly known as “the Internet”. It is no longer necessary to preface this with “commonly known as”;
- use “online” instead of “on-line”;
- use “email” instead of “e-mail”;
- use “website” and not “web-site”.

PRELIMINARY PROVISIONS

7.1 Introductory

Before the substantive provisions of a Bill, there appear several preliminary provisions which the drafter needs to consider.

In addition to the provisions dealt with in this Chapter (not all of which will appear in every Bill), a Bill will usually have in its first Part provisions about a start date (see the Chapter on Commencement) and about definitions (see the Chapter on Interpretative Provisions.)

7.2 Explanatory Memorandum

When a Bill is drafted and submitted to Cabinet and ultimately to Parliament, there is a requirement that it be accompanied by an explanatory memorandum setting out the contents and objects of the Bill. The memorandum must be written in language that is non-technical. This is a requirement for principal legislation, amending legislation, repealing legislation and regulations and rules.

The purpose of the memorandum is to assist members of parliament and the public in understanding the law and therefore, must state in clear language what the Bill does and why. Although not law itself, the explanatory memorandum is often relied on for assistance as to the purpose of the law when the law is to be interpreted in court.

Key points to remember when drafting explanatory memoranda:

- The writing must be clear and in simple language
- The objective of the Bill is stated clearly;
- refer to “clauses” of the Bill rather than to “sections”
- avoid overusing “provide”. Use more specific words such as “increases”, “establishes”; “creates”, requires” etc.
- avoid technical or legal terms;
- avoid simply repeating the provisions of the law. Instead, try to paraphrase the provisions;
- if repealing a provision, it is important to state the substance of that provision especially if it is significant to the operation of the law;
- when amending provisions, it is useful to state how the law will change and operate rather than how it will read after amendment.
7.3 Heading

The first thing to consider is the heading to the document. This is usually in the form—

“A BILL for an Act entitled....”.

There is then a sequence number for the Bill, which might be, for example, ‘No. .... of 20xx’. The sequence number should preferably show the year of the Bill’s publication and its position in the list of Bills. The sequence number might be at the top of the page.

It is a good idea for the first page to mention the jurisdiction, as the draft might well be looked at by people outside the jurisdiction. The first page might also have the coat of arms or seal of the jurisdiction, to indicate that it is an official document.

7.4 Long Title

This usually begins with ‘A Bill for an Act to.....’. Note that at this stage it is called ‘...... Bill’ not ‘...... Act’. But the text of the Bill will refer to ‘this Act’, not ‘this Bill’ to avoid the need for textual amendments once the Bill is enacted.

The choice of Long Title is usually left to the drafter. A title that is comprehensive, but not so detailed as to require amendment if the Act is later amended should be used.

The Long Title should indicate the general intention or purpose of the Bill. It should cover the whole ambit of the Bill and be drafted in terms wide enough to embrace the whole of the contents of the Bill, as it may be used as an aid to interpretation by the courts.

It should refer to any repeal or amendment of another Act contained in the Bill (although a general reference suffices if numerous Acts are to be repealed or amended).

If the purpose of the Act is to establish a body, the Long Title should not say that it is ‘to provide for the establishment of xxxx’. It should simply say that it is ‘to establish xxxx’.

Except for a very short Bill, the Long Title should conclude with general words such as—

“and to provide for related or incidental matters.”

The drafter should review the Long Title when the Bill is in final form to ensure that the development of the draft has not rendered the Long Title inaccurate or inadequate.

7.5 Preamble

Like the Long Title, a Preamble (if one is used), is part of an Act and may be used as an aid to interpretation. However, a Preamble is better reserved for those exceptional cases where an explanation of certain facts provides a necessary setting for the proper understanding of the Act. The function of a Preamble is to provide background information only.
Preliminary Provisions

Preambles are normally used in Bills requiring a special majority, in validating Bills, Bills implementing international agreements and private Bills. They are sometimes required by the Constitution if the Bill is to amend the Constitution or is an Organic Law.

7.6 Enacting formula

This is usually provided for in the Constitution under a rule about the words of enactment. A typical formulation reads:

“BE IT ENACTED, by and with the advice and consent of the [legislature] and by the authority of the same, as follows:”

In some jurisdictions a shorter form is used, such as simply – ‘Enacted by [the Legislature]–’.

Note that:
- In a bicameral legislature the legislature includes both Houses. The Head of State is also part of the legislature in some jurisdictions;
- in the case of Money Bills an alternate formulation might need to be used.

7.7 Short Title

All Bills have a Short Title. Subsidiary legislation has a citation. In both cases, there should be a reference to the year in which the legislation is passed or made.

Drafters should be aware that the instructing department might have a preference for a Short Title, and might even have gone public with a title for the Bill. (This should be stated in the drafting instructions.)

Choice of title

Of more practical concern is the need to consider users of the statute book. If an Act is about the rights of persons with disabilities, it could conveniently be called the Disabilities Act, so that it will appear in the Index to the Laws under ‘D’. However, such an Act might equally well be called ‘Persons with Disabilities Bill’ or even, for political reasons, or to match the relevant UN Convention, the ‘Rights of Persons with Disabilities Act’. Searching a statutes index does need some imagination, but the principle of naming Bills to be user-friendly is a sound one.

A Short Title should also keep the statute in its proper place with other statutes on the same subject. So all laws about animals should preferably begin with the word ‘Animals’ rather than words such as ‘Prevention’ or similar. This might mean that brackets will be used in the Short Title which some drafters feel should be avoided; it is a matter of balancing priorities.

The Short Title should indicate what the Act achieves, for example ‘Suppression of Terrorism
Act’, rather than just ‘Terrorism Act’. However, it has to be accepted that there are many Short Titles which do not do this, such as ‘Drug Trafficking Act’ – which is not for its promotion, but its suppression.

For the title of an amending Bill, see the Chapter on Amendment Bills.

**Citation clause**

Every Bill needs a clause conferring a Short Title. In some jurisdictions, the short title is combined with the commencement provision as clause 1, but in others it is a separate clause.

The clause conferring the Short Title should say the Bill ‘may be cited as [xxxx]’ rather than ‘shall be cited as [xxxx]’. This is because the formal name of the Act is the Long Title; having a short title is a concession made by the legislature.

A typical formulation is–

“(1) This Act may be cited as the [xxxx] Act, 20...”

Note that the word ‘the’ is not part of the Short Title (unless, for example, it is part of the name of a body being established.) The heading of the Bill will be, e.g. ‘Theft Act’ rather than ‘The Theft Act’. However, the word ‘the’ does appear in references to the Act, as in ‘The Theft Act provides etc...’; and in the citation clause, as shown above.

When referring to the title of an Act, note that ‘the’ is lower case unless it is at the beginning of the sentence.

Note that in the UK, the Short Title clause comes at the end of the Act, along with the commencement and interpretation provisions. The logic of this is that there is nothing to give a title to until the statute has been enacted. However, it is common practice in most countries of the Commonwealth, and among CARICOM Member States, to have the Short Title at the start of the statute, where it can more easily be found.

**7.8 Authority**

This asserts the constitutionality of the Bill, which might be a requirement of the Constitution and is thought desirable in some jurisdictions. If included, it should refer only to the provisions of the Constitution that are directly relevant, and should use the wording of those Articles, rather than invent new wording.

An example from the Commonwealth is–

"Compliance with constitutional requirements
This Act, to the extent that it regulates or restricts a right or freedom referred to in Subdivision III.3.C (qualified rights) of the Constitution, namely–
Preliminary Provisions

(a) the right to freedom of employment conferred by section 48 of the Constitution;
(b) the right to privacy conferred by section 49 of the Constitution; and
(c) the right to freedom of information conferred by section 51 of the Constitution,
is a law that is made for the purpose of giving effect to the public interest in public order."

(Papua New Guinea Accountants Act 1996)

It is not usually necessary to cite the powers of the Cabinet to introduce legislation, or the power of the Head of State to assent to a Bill.

7.9 Purpose

The Purpose clause (sometimes called the Objects clause) is an optional provision that some jurisdictions like to include if a Bill is complex or controversial. It is not a standard clause and is not an alternative to the Long Title that all Bills should have.

Some Purpose clauses do nothing more than restate the Long Title, for example-

“The purpose of this Act is to establish an independent Law Review Commission, and to provide for its structure, composition, functions, terms and conditions of service and other related matters.”

This ensures that the Long Title is in the text of the Act but otherwise adds nothing.

If there is to be a Purpose clause, it should go beyond the Long Title and summarise the main intentions of the Act. Like a Long Title, it should end with a phrase such as ‘and for related purposes’.

Although the Purpose clause should say more than the Long Title, it should not go into too much detail as to the aims and intentions of the Act, or give political reasons for the Act. As it is part of the text of the Act, it can be taken account of by the courts in construing the Act, and might tie the hands of the courts in interpreting and applying its provisions. This might produce results that were not intended by the legislators or the government that introduced the legislation.

7.10 Application or scope

The application provision, if wanted, should be a separate clause. If it simply says that the Act applies to the whole country, it is not needed, as all Acts so apply unless limited in some way.

An application or scope clause might be useful to remove uncertainties, and is needed if-

- the geographical scope of the Act is limited, for example to only a part of the
country;
- the Act is limited to a particular class of persons;
- the Act or part of it is to be given extra – territorial effect;
- the Act is to extend to circumstances arising before, or pending at the date of commencement, for example, in matters related to taxation or pensions.

Binding the State

Consideration should always be given to whether an Act is to bind the State or Crown i.e. the Government. The Interpretation Act will usually have something to say on this. The generally preferred principle is that legislation does bind the State or Crown, whatever may have been the historic prerogative of the sovereign in person. However, some Interpretation Acts say that legislation does not bind the Crown (or State.)

Whatever the Interpretation Act says, the drafter should take account of it and obtain instructions from the instructing department accordingly, if necessary, advising the instructing officer of the implications. If the rule is that all legislation binds the State unless otherwise provided, and if that is the policy intention, nothing needs to be said in the Bill. However, if any provisions are not to bind the State, they need to say so.

For example, if the legislation is for the control of matters such as building standards, labour practices, environmental pollution etc., it is not appropriate for the government to be exempt, and the drafter should be asked to include a clause to that effect. However, if the rule in the Interpretation Act says the opposite, then the converse applies. If there is any room for doubt, express provision should be made and words to the effect "This Act binds the Crown" (or the opposite) should be included.
CHAPTER 8

COMMENCEMENT PROVISIONS

8.1 Introductory

For a Bill to become law it has to be assented to by or on behalf of the Head of State as an Act. This process is usually governed by the Constitution and is not the concern of the drafter. (For a discussion of the rules governing assent, see the *Manual on the Legislative Process and Drafting Instructions*.)

Once a Bill has become an Act, however, it does not come into force except as provided in the Act or in other legislation. Every Bill should therefore include a provision regarding its commencement (i.e. the start date or date of coming into force) of the Act, unless there is a provision in other legislation that governs the matter.

In some CARICOM Member States the commencement of Acts is governed by a Statutes Act or similar, and in others by the Interpretation Act. It might be governed by the Constitution itself. If commencement is provided for in one of these ways, a Bill does not need to include a commencement provision, unless it is intended to override another statutory provision. (An Act cannot, of course, override the Constitution.)

If there is no commencement provision in the Act, the Act will none the less need to show the date of commencement, either at its beginning or end, but that will be done administratively.

A statute might come into force on:
- the date of assent by the Head of State (i.e. the day on which it becomes an Act);
- the date of its Gazettal or other publication;
- the date specified in the Act; or
- a date appointed by the Head of State or a Minister.

The first two options do not allow for the provisions of the Act to come into force at different times. This might be a disadvantage in the case of a complex Act with many different types of provisions. The first option leaves the commencement date to the discretion of the Head of State, and could mean the public do not know the statute is in force for some time. These are essentially policy matters, but the drafter should be aware of them and able to advise the instructing department if appropriate.

8.2 Commencement on publication

A common provision in Interpretation Acts is that legislation, once enacted or made, comes into force at the beginning of the day on which it is published in the Gazette. This would apply equally to Acts and to subsidiary legislation. If this is stated in the Interpretation Act and is the
intention, nothing needs to be said in the Bill or subsidiary legislation about commencement.

8.3 Appointment by Head of State or Minister

It is common for an Act to provide that it comes into force on a day to be appointed or declared by a specified person, usually the Head of State or a Minister. The power is usually to be exercised by notice, order or proclamation. This allows for different dates to be appointed for different provisions, and the Act might specifically give that power to the Minister.

8.4 Appointment of a day

It is also not uncommon for the legislature itself to appoint a commencement date or dates in the Act. The Act can provide that the Act (or a provision of it) comes into force on a specified day or days. This also allows for different dates to be appointed for different provisions.

A power to appoint a commencement date can be limited to a date within a specified period, such as 6 months from assent or similar. This is not common among CARICOM Member States, but is a device used in some parts of the Commonwealth. It ensures that an Act that has been passed by the legislature is not put on the back burner and not brought into effect for months or years. The legislature rightly assumes that if a government introduces legislation, it is needed as a matter of public policy.

8.5 Deferred or phased commencement

The power to appoint a commencement date, instead of having an Act come into force on assent or publication, gives to the executive the power to decide whether an Act should come into force or not. This can be open to the objection that once the legislature has passed a statute, it should come into force as soon as possible.

The power to appoint a deferred commencement date or dates is justified, however, if machinery needs to be set up to implement the Act or to educate the public about it. It might be necessary to phase-in the new legislation by providing that different dates can be appointed for different provisions in the Act. If the Act is a long and complex one, it might even be appropriate to have a Schedule of dates for the commencement of different provisions. Care must be taken to ensure that the provisions that are brought into force work together. For example, it might be necessary to include the Interpretation section in the commencement of a substantive section.

8.6 Commencement of subsidiary legislation

Every item of subsidiary legislation also needs to have a commencement date. This might be provided for in other legislation as mentioned above, but can also be provided in the primary legislation, or in the subsidiary legislation itself.

There is no general rule that subsidiary legislation comes into force at the same time as the
empowering Act, though this could be provided in that Act, or in the subsidiary legislation.

A common provision in the Interpretation Act is that an item of subsidiary legislation comes into force on the date of its publication in the Gazette, unless another date is specified in the item.

The Interpretation Act usually provides that certain things can be done under the powers in an Act before the statute comes into force. These typically include making subsidiary legislation, making appointments, etc. However, the subsidiary legislation cannot come into force before the enabling statute comes into force.

An Act which has not yet had a commencement date fixed may be deferred for regulations to be put in place even though regulations can be made under the Interpretation Act. Sometimes drafters have to remind Ministries of commencement dates and advise them of other laws that need to come into force.

8.7 Drafting suggestions

A commencement provision should always be stated in a separate clause, regulation, etc.

The power to appoint a commencement date can be given to the Head of State (acting on the advice of Cabinet), or to the Cabinet, but is more often given to the relevant Minister (who will usually obtain the approval of Cabinet). The power can be exercised by Proclamation, by Order or by Notice. It should not be done by regulations.

Commencement fixed by Minister, etc.

If the date of commencement is to be appointed by a Minister, etc., the following could be used:

“This Act comes into operation on a date appointed by the Minister by notice in the Gazette.”

If more than one date for commencement is required, and nothing is said about this in the Statutes Act or Interpretation Act, the above form should continue:

“and different dates may be fixed for different provisions.”.

If different dates for the commencement of different provisions are to be fixed, the following could be used:

“(1) This Act, with the exception of Part 4, comes into operation on [specified date].

(2) Part 4 comes into operation on a date appointed by the Minister by notice in the Gazette, being a date later than the date specified in subsection (1).”.

Commencement on fixed number of days after publication

If the date of commencement is to be a fixed number of days after the day on which it is
published (or receives the assent of the Head of State), the following could be used—

“This Act comes into operation on the 28\textsuperscript{th} day after the day on which it [is published in the Gazette] [receives assent].”.

**Commencement tied to commencement of another Act**

If the date of commencement is to be the date on which another Act is to come into operation, the following could be used—

“This Act comes into operation on the day on which the XYZ Act comes into operation.”

(Or it could be the day following that date.)

This assumes that the XYZ Act comes into operation as a whole on one date. If that Act has two or more commencement dates, however, the above form should be modified by referring to a provision of the XYZ Act that is to come into operation on the relevant day.

**Specified date**

When the day of coming into operation of an Act is to be specified in the Act, the following could be used—

“This Act comes into operation on 1\textsuperscript{st} January, 20xx.”

Alternative formulations are “This Act commences on....” or “comes into force on...”

**Different specified dates**

If different provisions of an Act require different specified commencement dates, the following could be used—

“(1) Subject to subsection (2), this Act comes into operation on 1 January 20xx.

(2) Part 4 and Schedule 3 come into operation on 1 July 20xx.”.

**Retrospective effect**

If it is intended to give an Act retrospective effect, the following could be used—

“This Act is deemed to have come into operation on 1\textsuperscript{st} January, 20xx.”.

But see the comment below about retrospective commencement.

**8.8 Amendment or revocation**

It is arguable that a commencement notice (or proclamation or order) is not legislative in nature but is an executive action, and that once it is made the person making it is \textit{functus officio}.  

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If this is correct, a commencement notice cannot be revoked or amended as if it were an ordinary statutory instrument.

Views differ on this analysis, and on whether a commencement notice can be revoked or amended before the effective date. However, it is generally agreed that a commencement notice cannot be revoked after the effective date, as this would amount to a repeal of the Act, which can only be achieved by an amendment Bill.

8.9 Commencement instructions

If legislation is to come into force on notice or at some date after publication, the instructing department must at the outset inform the drafter of the date it wishes the legislation to come into force.

The drafting instructions should in any event include instructions regarding commencement of the legislation.

The length of time between the passage of a Bill through the legislature and assent by the Head of State is not predictable. It is affected by the workload of the Government Printer (or whoever prints government notices) and staff of the legislature, particularly at the end of a sitting. Drafters should bear this in mind if the date of commencement of an Act is fixed by the Act, so that the instructing department can be alerted to the need for assent to occur before the commencement date.

If commencement of an Act is to be appointed by Notice or Order or Proclamation, the drafter should await specific instructions to draft the relevant instrument. In some jurisdictions, a formal Cabinet minute is required before a commencement notice is drafted.

8.10 Other points to note

An Act can come into force retrospectively i.e. at a time before its publication, but this is usually permitted only in order to confer a benefit. In some jurisdictions, retrospective legislation that does not confer a benefit can be passed with a special majority.

In some cases, the commencement might need to be synchronised with the commencement of another piece of legislation, either one already enacted, or one being drafted in parallel.

For an example of the issues that can arise in relation to the revocation or amendment of a commencement notice, see the article by John Wilson ‘The Commencement Conundrum: How the Fiji Islands banking system was brought to a standstill’ in the CALC Loophole, December 2001 p.11. Also on www.lawdrafting.co.uk.

The following was written by a drafter in a Commonwealth jurisdiction that is not a CARICOM Member State and provides food for thought –
"We have Acts which everyone regards as in force, but which were not even published let alone commenced. Departments are given commencement notices signed by the President, and then forget to publish them. Some Acts have been published up to three times, each in a different version, and although the first or second may have been validly published, only the last is recognized as 'the Act'. We have commencement notices issued for Acts that have already commenced. We have Acts commenced by other Acts, which is unconstitutional. We have Acts amended to resolve commencement issues where the amending Acts are either not retrospectively commenced but are retrospectively applied, or are themselves never commenced. We have Acts amended after their whole repeal, which amendments are then commenced as if the amended Act is still in force. And soon and on..."
CHAPTER 9

INTERPRETATIVE PROVISIONS

9.1 Introductory

After the title and the commencement provisions, a Bill usually has an Interpretation clause. (In subsidiary legislation this provision is sometimes called simply ‘Definitions’.) The clause sets out the definitions of various words and expressions that are used throughout the Bill, and thus informs the reader of any words that are to be given a special meaning.

In the UK, definitions usually come at the end of the Act (together with the title and the commencement provisions.) The rationale for this is that there is nothing to define until the provision in which a word appears has been enacted. However, it is common practice in most countries of the Commonwealth and in all CARICOM Member States to have the definitions at the start of the Bill or subsidiary legislation. This means they can more easily be found and ensures that legislators and readers of the Act know how certain key terms are defined, before getting into the substantive provisions where they are used.

Although the Interpretation clause comes at the start of a Bill, it is usually better to leave the detailed drafting of it until the draft Bill has been completed, making a note of any words and expressions which can usefully be included in the interpretation clause as the drafting progresses.

Once a term has been defined, it should be used consistently throughout the Bill as the drafting progresses, and other terms for the same thing should not be used.

When the final draft is being prepared the drafter should re-check the Interpretation clause to ensure that each defined word is used in the draft. Words are sometimes used and defined at one stage and subsequently omitted.

9.2 Nature of definitions

Definitions are useful to avoid ambiguity and to avoid tedious repetition. There are three main groups of definitions:

Delimiting definition

This type of definition does not alter the conventional meaning of the word but provides a degree of definiteness. This is useful for vague and ambiguous words with different meanings. The definition limits the meaning without altering the normal meaning. It may relate a word of general significance to the subject matter of the legislation. For example–

“‘private practice’, in relation to a nurse or midwife, means practice as a nurse or
midwife outside government employment;”.

**Extending definition**

This type of definition broadens the scope of the ordinary or common usage of the word. For example “‘dog’ includes a puppy;”.

**Narrowing definition**

This type of definition specifies a meaning which is narrower than the common usage of the word, for example “‘fruit’ means oranges, tangerines, lemons, limes and bananas;”.

### 9.3 Interpretation Acts

The Interpretation Act or Ordinance in most CARICOM States (often Cap. 1.) in the Revised Edition of Laws, contains several definitions of terms as well as other provisions of general application. The Interpretation Act is in effect the jurisdiction’s legal dictionary and acts as the primary definition reference point for legislation. It defines several of the more commonly used terms such as ‘public body’ and there is no need for the drafter to define such terms, unless it is intended to give them a different meaning in a Bill.

Other common examples are ‘Head of State’, ‘President’, ‘Government’, ‘Minister’, ‘Ministry’, ‘Permanent Secretary’, ‘Constitution’, etc. The name and extent of the country is usually defined in the Interpretation Act and does not need defining in each Bill.

The Interpretation Act might give general effect to definitions contained in the Constitution. It is not necessary to define an expression used in the Constitution and defined in one of those provisions unless it is intended to give that expression a different meaning. (It is arguable that it is not necessary to define terms used in the Constitution even if they are not in the Interpretation Act, as judicial notice will probably be taken of their meaning.)

Although a term defined in the Interpretation Act does not need to be defined in an Act, it is sometimes done. This is because legislators cannot be sure that readers of an Act know about the Interpretation Act, and they sometimes prefer to spell out the meanings in the Act. This can be counter-productive, as it implies that terms not defined in the Act do not have the meanings in the Interpretation Act. But this is a matter of judgment for each drafting office.

### 9.4 Format

The following are the generally accepted practices among CARICOM Member States in relation to definitions:

- they are listed in alphabetical order;
- they do not include the definite or indefinite article;
Interpretative Provisions

- they are not italicised or put in brackets;
- they are not given numbers or letters;
- they do not commence with a capital letter unless the term as used throughout the legislation commences with a capital letter.

Semi-colons are generally used at the end of each definition except the last, which should have a full stop.

There is no need for the phrase 'the following terms have the meanings respectively assigned to them' or similar. This is unnecessary verbiage and not modern usage. Nor is it necessary to say 'unless otherwise provided' or 'unless the context otherwise requires' as the Interpretation Act usually makes provision to that effect.

The wording for introducing definitions can therefore be –

"In this Act –

'aaaa' means xxxx;
'bddd' means zzzz;

etc.".

Some jurisdictions do however prefer to keep the phrase 'unless the context otherwise requires'.

The use of a capitalised version of the word and a common version of the same word in the same statute should be avoided as far as possible as it is likely to create issues of interpretation. An example would be using both 'Court' and 'court' where 'Court' means the Supreme Court and 'court' means all courts.

9.5 Defining 'Minister', etc.

The term 'Minister' is usually defined in the Interpretation Act to mean a member of the Cabinet or similar. It follows that when 'Minister' is used in an Act it means the Minister with portfolio responsibility for the subject. It is not necessary to say this in the definition clause, or to specify the portfolio, as this might change with each government. When the need arises to refer to a Minister, the reference should be to a 'Minister' rather than a 'member of the Cabinet'.

If it is necessary to identify a different Minister for a particular Part or section, such as the Minister of Finance for financial provisions, this can be specified in the Part or section.

It could be done either by giving the title of the Minister, or by saying–

"In this Part, 'Minister' means the Minister to whom responsibility for finance is assigned.".

The latter is in fact preferable as the title of the Ministry might change.
9.6 Using ‘includes’

The drafter should not use ‘means’ and ‘includes’ in the same definition as this is contradictory; one restricts and the other extends. The phrase ‘means [xxx] and includes [yyyy]’ should therefore generally be avoided. There are exceptions to this rule, and the two terms may be used in a compound definition, but the ‘includes’ phrase should not go beyond the ‘means’ phrase.

If it is necessary to split a definition, or to clarify or remove doubt as to the intended scope of the first part of a definition, it will usually be better to say ‘means-(a) [xxx]; or (b) [yyyy];”.

The term ‘includes’ standing by itself, as in “‘[xxx]’ includes [yyyy]” can be useful to make it clear that a definition is not exhaustive.

9.7 Subsidiary legislation

Terms defined in an Act have the same meaning in subsidiary legislation made under it. There is therefore no need to include the same definition in the subsidiary legislation. However, if new terms are used in the subsidiary legislation that should be defined, they need to be defined there. There is no need to define ‘the Act’ in subsidiary legislation. (This is usually provided for in the Interpretation Act.)

In a Bill it is helpful to define ‘regulations’ as being the ones made under the Act. Then the rest of text does not need to refer to the regulations ‘made under this Act’.

9.8 To be avoided

Substantive provisions should never be incorporated in a definition. It is not correct to say, for example–

“‘Commissioner’ means a person appointed by the President;”

unless there is an appointing power elsewhere in the Act, in which case the definition should refer to it. A better formulation would be –

“‘Commissioner’ means a person appointed under section[xx];”.

Definitions should not leave open questions. Avoid a definition such as –

“financial year” means the period from 1st January in any year to the 31st December in the same year, both days inclusive, or as may be decided;”.

This leaves it unclear as to who makes the decision.

Definitions should not use the terms that are being defined, as in–

“‘public office’ means a person employed by the government as a public officer;”.

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This leaves it unclear as to who makes the decision.

Definitions should not use the terms that are being defined, as in–

“‘public office’ means a person employed by the government as a public officer;”.
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The drafter should avoid over-defining, which can lead to absurdity; for example a definition that ‘table’ includes a ‘chair’. It is better to define ‘furniture’ to include tables and chairs, or not to define such a common term as ‘furniture’ at all.

If reference is made to a definition of a term, for example ‘firearms’, do not refer to “the definition of ‘firearms’” but to “the definition of the word ‘firearms’”.

If the Interpretation clause or Interpretation Act defines e.g. ‘Government’ as ‘the Government of xxxx’, any further reference in the Bill should just be to ‘the Government’ (not ‘Government of xxxx’).

If, as an example, the term ‘Board’ is defined as the ‘xxxx Board established by section …’, the term ‘Board’ should be used alone throughout the Bill, except in the section that create sit.

9.9 Other points to note

Some terms do not need defining. They include:

- technical, scientific or similar terms of art if the meaning is clearly understood;
- words which are to have their ordinary dictionary meaning.

Not all definitions have to be in the general Interpretation clause. They might be in a Part for the purpose of that Part, or in a section for purposes of that section (or a group of sections). In fact, if a term is only used in one Part or section (or group of sections) that is often the better practice, as the reader might not think to refer to the general interpretation clause.

The Interpretation clause should not define terms that are not used. Care should be taken to ensure that after the draft has been amended the defined terms are still in the Bill. The same applies to a Bill after it has been amended in Committee Stage.
CHAPTER 10

APPOINTMENTS, POWERS, ETC.

10.1 Introductory

After the preliminary provisions, including the commencement and interpretation clauses and any purpose and scope clauses, a Bill will contain the substantive provisions which set out the essential features of the legislation. An example of such provisions would be the establishing of a scheme to control an activity, under which people engaged in the activity need to be registered or to have a licence or permit.

The provisions in such an example would need to state the requirement, and establish a body to do the registration or issue the licence or permit. In some cases, it might be appropriate to establish the body and state its functions (i.e. registration, licensing etc.) and then go on to impose the requirement, with appropriate penalties for failure. In other cases, it might be appropriate to state the requirement first, and then establish the body. The sequence will depend on the subject-matter and the preference of the drafting office.

Whatever sequence is adopted in such a case, the Bill would need to provide for the appointment of a body and give it powers and duties. This is a common subject of legislation, and this Chapter looks at such provisions.

10.2 Statutory bodies

A statutory body is an entity created by statute to serve a particular purpose and is designed to function separately from the central government. It might have legal personality as a corporate body (in which case it is usually referred to as a statutory authority) or it might just be an unincorporated commission or board with statutory functions.

In either event, a statutory body is ‘a creature of statute’ and only has the powers given to it by the statute that creates it. (Those powers might be supplemented by powers in the Interpretation Act, or in another statute governing the functions of statutory bodies.)

A statutory authority will employ its own staff, provide its own offices, have power to borrow, and so on. It might be empowered – or even required – to raise its own revenue, but that does not preclude it receiving money from the government through appropriations from central funds. See Chapter on Miscellaneous Provisions

In the case of a board or commission or similar, the staff, etc. of the body are provided by a department of the government, and it is fully funded from central funds. Any revenue it does raise, through fees, etc. will go to the central funds.

Whether a statutory body should have corporate status depends on a number of factors,
**Appointments, Powers, Etc**

including:

- the object of the body and its functions;
- whether the body is to be fully or partly independent of Government;
- whether the body is to be purely advisory.

Whichever kind of body is to be established, the Bill should set out, among other things:

- the name of the body or authority;
- the number of members;
- how and by whom they are to be appointed, etc.;
- the qualifications and terms of office of members;
- how a person ceases to be a member of the body;
- provisions about declaring of interests;
- provisions about alternate members;
- the functions, powers and duties of the body and how they are exercised.

If an administrative or judicial body is being set up, the provisions setting up the body should come before the provisions dealing with its functions.

If a corporate body is being set up, there is no need to list all its powers as a legal person. It is enough to say that it has all the powers that a legal person would have to do what is needed for the performance of its functions.

There is no need to say that use of the seal authenticates a document. Nor is there usually a need to mention a logo; not all bodies have one and it is not a legal requirement for a corporate body.

The Interpretation Act usually contains provisions about corporate bodies, the powers inherent in appointments, powers of delegation, etc., in which case the Bill will not need to spell all these matters out. This is something the drafter needs to be alert to.

Note that it is accepted modern usage to refer to a ‘corporate body’ rather than a ‘body corporate’ which is an archaic term. This is a matter of choice for each jurisdiction, however, and the Interpretation Act will govern the matter where it defines the term.

Whatever the body is called, the Bill will need to set out some procedural rules for it, but these do not all need to be in the body of the statute; it is often preferable to guided by normal procedural practices and to make its own rules.

**Agent of the State**

Consideration should be given to the question whether a proposed corporation, commission
or authority is to be regarded as an agent of the State. Doubt should be removed by a particular provision one way or the other. This is a matter requiring specific instructions.

10.3 Appointments

It is common practice to use legislation to make appointments, bestow powers and create entities. As mentioned above, the Interpretation Act usually contains provisions about the exercise of statutory powers and duties and the appointment of boards and committees and these should be taken account of. They can of course be displaced by express provisions.

When giving a power to appoint, it is preferable not to use the form ‘The [xxxx] may appoint a [yyyy] by notification in the Gazette’. This means the notice in the Gazette is essential for the validity of the appointment, which is to be avoided. The appointment itself will usually be by an official letter. It is therefore better to say:

“The [xxxx] may appoint a [yyyy] and every such appointment must be published in the Gazette.”.

The power to appoint should not be included in a definition, as in –“Commissioner” means a person appointed by the Minister to be a Commissioner’.

It is better to give the power to appoint separately in section [xxx], then to define the Commissioner as a person ‘appointed under section [xxx].’

If a panel of names is to be provided, make it clear whether a person not included in that panel of names may be appointed if the person having the power to appoint so decides.

Deputies

A Bill can provide for the appointment of deputies, but consideration should be given to whether it might be more appropriate to provide for an alternative to serve in specified circumstances, or for the person with power to appoint to have the power to make acting appointments in specified circumstances.

Deputies, alternates or acting appointees should be included, either by definition or by express provision, in any provision for remuneration, indemnity, exercise of powers, etc. As mentioned above, the Interpretation Act might well have provisions on this topic.

Representative appointments

Appointments in a representative capacity should be discouraged because the duties of members to those they represent are unclear. If such appointments are to be made, it should be made clear whether a representative member can act on his or her own initiative or only on
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instructions.

Ex officio appointments

Consideration should be given to appointments where some of the appointees take office by means not common to all, such as a person for the time being holding a specified office. Ex officio appointments (or ‘appointments by virtue of office’) do not require an acting, alternative or deputy appointee, but may be enlarged by providing a power for the ex officio appointee to nominate another person to act in his or her place.

Period of appointment

Provisions on the appointment of board members and similar appointees should normally be drafted so as to ensure that all appointments are made for a fixed term. However, there are advantages in conferring some degree of flexibility with respect to terms of appointment of board members and similar appointees. For example—

“A member of the Board holds office for a period not exceeding 3 years as specified in the instrument of appointment.”.

Such an approach facilitates staggered initial appointments and also enables particular provision to be made for the removal of appointees nearing the maximum age for holding office.

Vacation of office

Care must be taken when drafting provisions for resignation or other vacation of office to avoid ambiguity as to when the office is to become vacant. As a general rule, a resignation should not have to be accepted by the appointing authority, as this puts the appointee in a difficult position. A common provision about resignation is—

“A member of the Board may resign office by notice in writing to the Minister.”.

If special circumstances require that the resignation needs to be accepted to be effective, the above form could continue—

“but the resignation does not have effect until it is accepted by the Minister.”.

It is not necessary to provide that an office is vacated on death as this is obvious.

The form of words used must leave no doubt whether a person has or has not vacated an office. It is therefore undesirable to provide that the office of a member becomes vacant if the member ‘becomes permanently incapable of performing duties as a member’. The level of the member’s capability may be a matter in dispute. It is preferable to give to the Head of State or a Minister or other officer the power to remove the person from office in such circumstances.
Disability, either physical or mental, as a ground for permanent disqualification for office is no longer politically acceptable—see the UN Convention on the Rights of Persons with Disabilities, which some CARICOM Member States have acceded to.

10.4 Powers and duties

Drafters should be careful to distinguish between powers, which confer a discretion, and duties, which impose an obligation.

The usual terminology is that powers are ‘exercised’ and duties are ‘discharged’ or ‘performed’. They both come under the general name of ‘functions’ which are also ‘performed’.

The drafter should distinguish between functions that are objectives, such as to improve the level of education in the country; and functions that are methodology, such as organising meetings, having consultations, writing reports. The latter are not objectives but are incidental functions.

The drafter should also distinguish between the objects of a body, the purpose of a body, the powers and duties of an individual, etc.

Delegation

Both powers and duties may be delegated, but drafters should keep in mind provisions of the Interpretation Act when considering the need for delegation provisions. A delegation provision must be tailored to the particular need. The following points should also be kept in mind:

- a power to delegate with retrospective effect is objectionable in principle as it may amount to a concealed validation;
- if a power to sub-delegate is required, it should be explicitly conferred.

In some circumstances it may be desirable to provide for the delegation to be by Order, or for notice of the delegation to be published in the Gazette. This achieves certainty and public information. In any event, it should be necessary for delegation to be effected by some kind of instrument in writing.

A common form for a provision conferring powers to delegate is—

“The [xxx] may, either generally or to the extent provided by the instrument of delegation, in writing, delegate to a person any of the functions of the [xxx].”.

Note that there is a presumption that a delegated power does not include any judicial or legislative function, or the power of delegation, but it is better to state this limitation in the provision conferring the power.
10.5 Discretionary powers

Discretionary powers, such as the grant, renewal or revocation of a licence or registration, or the attaching of conditions to a licence or registration, require careful watching. Whenever possible, the grounds upon which such a power may be exercised should be specified.

A discretionary power should always involve a duty to give the applicant an opportunity to be heard, a duty to act impartially, and a duty to give reasons for the decision (preferably in writing.) If the discretion has to be at large, it is desirable that there should be provision for appeal, though this is not always acceptable as a matter of policy. In any event judicial review should remain available at common law.

10.6 Exemptions

It is better not to give unlimited exemption powers. In any event, a power of exemption should only be exercised in writing, and with reasons stated. Sometimes the exempting power, for example in revenue laws, can only be exercised on the advice of a specialist body.

10.7 Decision-making

The Bill must be clear as to where the decision-making responsibility lies. Should it be with the Permanent Secretary, a head of department, or with the Minister or even the Cabinet? It is better not to give duties to a Ministry, as a Ministry is not a legal person (unless it has been incorporated by statute, as happens in some jurisdictions.) It therefore cannot be called to account. It is better if the duties are imposed on the Minister, or the Permanent Secretary, who can in turn delegate them, as discussed above.

10.8 Good governance

One of the drafter’s functions is to ensure that a Bill incorporates provisions ensuring good governance, accountability and transparency; matters that the instructing officers might not have considered. Some, but not all, of the requirements have been mentioned above. They can be summarised as:

- require consultation both within and outside government before key decisions are made;
- require decisions to be in writing;
- require reasons to be given for decisions;
- give a right to be heard before a licence or similar item is refused or revoked;
- provide for an appeal against such decisions;
- do not include an ‘ouster clause’ (saying there is no right of judicial review) unless there is a compelling reason to do so.
CHAPTER 11
MISCELLANEOUS PROVISIONS

Whatever the substantive provisions of a Bill, there are usually some miscellaneous provisions to be included, before the final provisions. This Chapter looks at some of them, but is by no means exhaustive as to the kind of provisions that might need to be included.

11.1 Financial matters

A Bill that sets up a new body or administrative scheme might need to provide for how it is to be financed. The primary rules about the administration of public funds and government finance generally are usually to be found in the Constitution, with a Public Finance Act or similar to fill in the details. There are often special provisions about the introduction and processing of ‘Money Bills’ i.e. Bills that deal exclusively or mainly with public revenue and the expenditure of public funds.

The Constitution will usually establish a revenue fund (often called the ‘Consolidated Fund’) into which public revenue is paid (unless expressly excepted) and out of which public expenditure will be met. Special funds might also be established for special purposes. Before the end of each financial year, the Minister responsible for finance prepares and lays before the legislature annual estimates of revenue and expenditure for the following financial year. These estimates are debated by the legislature and the expenditure of money is authorised by an Appropriation Act (or Ordinance). Further expenditure is authorised by a Supplementary Appropriation Act (or Ordinance).

If a Bill other than a Money Bill or Appropriation Bill needs to include financial provision for a statutory body or administrative scheme, it might not be necessary to say any more than that the body or scheme is to be financed out of public funds, and to refer to the Public Finance Act, or similar. All government revenues must be paid into the Consolidated Fund, or similar, if no express provision to do otherwise is made.

If it is intended for public moneys to be dealt with other than pursuant to the regular mechanism, this must be expressly stated in the Bill. If fees are to be charged for a service, the Bill should say whether they will be paid into the Consolidated Fund, or similar, or whether they are to be paid to a statutory body.

11.2 Taxation

If a tax is to be imposed, explicit drafting instructions should be provided, as a tax provision will fail if there is any uncertainty about its effect. The drafter must ensure that clear instructions are given and that specific provisions are drafted which state:
Miscellaneous Provisions

- the amount and scale of the proposed tax, and the method by which it is to be assessed and collected;
- the persons on whom the tax is to be imposed;
- the particular circumstances in which the tax becomes payable;
- the exact time when the tax becomes payable;
- the details of any exemptions from the tax;
- the methods of enforcing payment and the sanctions, criminal or otherwise, for non-payment.

11.3 Fees

If fees are to be imposed for a service, such as the issuing of a licence, they must be commensurate with the cost of providing the service. They must not be a hidden tax measure or a penalty.

Usually, fees are prescribed by regulations, but they can also be prescribed in a Schedule to an Act. In some jurisdictions fees are disproportionately low, not having been increased since the service was introduced. This is because it is not always realised that there are various ways of increasing fees other than by amendments to individual Acts or regulations.

One method of increasing fees is by an across-the-board percentage increase. Another is by a multiplier applied to all fees, where fees are very out of date. One method of increasing fees without legislation is to link them to the cost-of-living index as published from time to time. (This however can produce some rather peculiar fees such as $78.67 for a driving licence.)

11.4 Licensing

A licensing scheme might be required in a Bill that is designed to regulate and control a business or social activity. The drafter should ensure that the following matters are provided for, as appropriate:

- the method of application (this might well be left to regulations);
- the conditions with which an applicant for a licence must comply before the licence can be issued;
- whether the licensing authority is to have a discretion in the issue of a licence;
- the duration and renewal of a licence;
- the imposition and variation of conditions in a licence;
- the revocation of a licence, the circumstances when this can be done, whether it is only the licensing authority that has this power, or whether a court convicting the licensee of an offence has this power;
• whether revocation is to be compulsory in any circumstances;
• the position that arises on the death of the licensee;
• the accidental loss of a licence;
• transitional provisions if the Act imposes a new licensing requirement;
• the effect on existing licences if an Act is repealed and replaced.

Similar considerations apply to a registration or permit scheme.

The drafter should also keep in mind the principles of good governance discussed in relation to the exercise of powers. See the Chapter on Appointments, Powers, etc.

11.5 Appeals

If an Act imposes a licensing or registration requirement or similar, the drafter should seek instructions on whether there is to be an appeal against refusal to issue or renew a licence (or to register a person, etc.), against the revocation of a licence or cancellation of a registration, and against the imposition of conditions. The drafter also needs instructions on whether the appeal is to be to a court or to a special tribunal appointed for this purpose, or to a Minister. If the appeal is to a court, it will usually be either an appeal in the strict sense, or an appeal by way of rehearing.

On an appeal in the strict sense the question to be considered is whether the decision complained of was right when given, on the material before the decision-maker. On an appeal by way of rehearing, the rights of the parties are determined by reference to the circumstances as they exist at the time of the appeal and by reference to the law as it then exists. Such an appeal could be determined:

• on the materials before the decision-maker;
• on those materials plus additional evidence; or
• by a hearing denovo.

Accordingly, to provide that an appeal is to be by way of rehearing is not sufficient. If there are provisions which result in an appealable activity, the drafter should consider what mechanism will be required to satisfy a right of appeal. Alternatively, the appellate court could be given power to determine how it will proceed.

It is not usually necessary to spell out the right of appeal by way of judicial review; but the drafter should avoid if possible including provisions that oust the jurisdiction of the courts in relation to the exercise of a statutory power. Once it has been ascertained what is required, consideration should be given to the extent, if any, to which the desired position is achieved by
provisions of the Interpretation Act.

11.4 Corrections and validating provisions

Once a Bill has been published in the Gazette, it cannot be altered except by:

- amendment at the committee stage;
- a correction being made by the Clerk under the direction of the Speaker during the progress of the Bill through the House;
- a Rectification of Errors order (or similar), usually made by the Attorney General after the Act has been passed.

Note that the latter two ways of altering a Bill can be employed only where the thing to be changed is not substantive, such as an obvious printing error.

If there has been an error or omission in the procedure for enacting a Bill or making subsidiary legislation (e.g. failure to lay on the table of the legislature), an Act might be needed to validate the enactment. The validation is usually to the effect that the relevant legislation is declared to have been validly enacted or made.

As a general rule, validating provisions are not inserted as amendments to the principal legislation, but it may be desirable to do so if the validating provisions are to be of continuing practical effect for some time, or if they alter the effect of the original legislation.
CHAPTER 12
OFFENCES AND PENALTIES

12.1 Introductory
Some statutes, such as a Theft Act or Sexual Offences Act, have as their main purpose the creation of offences. Others create offences as one of the ways of enforcing an administrative scheme, such as failing to return a revoked licence or providing false information. Whenever a Bill requires the creation of offences, the drafter should keep in mind the principles set out in this Chapter.

12.2 Offences
Laws by their very nature are meant to be enforceable. This is achieved through the use of penal provisions. A penal provision should state clearly:

- what must or must not be done;
- who must do it or refrain from doing it; and
- the penalty for failing to do something, or for doing something that is prohibited.

The drafter should check that the penal provision fits into the background of the general law. Consideration should be given to whether:

- it is necessary to create a new offence or the matter can be dealt with adequately under existing legislation;
- there should be a time limit within which a prosecution is to commence;
- the written consent of the Attorney General or Director of Public Prosecutions should be required before a prosecution can commence;
- the new offence falls within the jurisdiction of a particular court or some provision is needed to this effect;
- the offence can be prosecuted only by the police, or by inspectors or other public officers;
- there are any relevant restrictions in the Constitution;
- it is necessary to take positive measures such as seizing contaminated food for public health reasons or to control actions or conduct in the public interest when an act needs to be prevented;
- an administrative penalty could be imposed as an alternative to court proceedings.

Formulation
Penal provisions must be carefully drafted as the courts will strictly interpret them. It should be apparent from reading the section whether a contravention of that section constitutes an
Offences and Penalties

offence. The following formulation is in widespread use–

“A person who ... commits an offence.
Penalty: Imprisonment for [xxxx] or a fine of $yyyy, or both.”.

Whatever usage is adopted in general, it is better to:
- avoid the use of ‘is deemed to’ and ‘is guilty of’ to create offences;
- use ‘contravention’ or ‘breach’ rather than ‘violation’, which is American usage.

Omnibus offences

If it is intended that an act or omission should be an offence, this should be clearly stated. Some Interpretation Acts say that where a written law provides that a person who commits a specified act is liable to a penalty, the act is an offence, but it is preferable if the offence is spelled out.

Similarly, general penalty provisions, which appear to create offences in unspecified sections of an Act, should be avoided because of the uncertainty of their application, as conduct which is intended to be only procedural or directory may unwittingly be made criminal. It is therefore better not to use the form–

“A person who contravenes or fails to comply with any of the provisions of this Act for which no penalty is specifically provided commits an offence.”

Corporate bodies

Special consideration has to be given to the creation of offences that are capable of being committed by a corporation. In some circumstances, it might be appropriate to make directors and officers of a corporation liable for offences committed by the corporation unless they show cause as to why they are not liable.

The following formulation is suitable where the burden is on the officer–

“(1) If a corporate body commits an offence under this Act, every director or other officer concerned in the management of the body commits that offence unless he or she proves that-

(a) the offence was committed without his or her consent or connivance; or

(b) he or she exercised reasonable diligence to prevent the commission of the offence.”.

The drafter should consider the liability of principal for the act of an agent and the liability of an employer for the act of an employee.
The Bill should also provide for the liability of individual officers if that is wanted.

**Failure to comply with a notice**

If it is intended that failure to comply with a notice served by a government department or specified authority is an offence, the following formulation is suitable:

“A person who does not comply with the requirements of a notice served under section...commits an offence...

In this type of case, the time for compliance with the notice may be specified in the statute or left to be specified in the notice. One provision or the other must be made.

A notice may also specify the required manner of compliance. As a general rule, if a time for compliance with a statutory notice or some other statutory requirement is fixed, the offence of non-compliance is complete at the end of that time and the offence is not a continuing offence.

**Categories of offences**

When formulating offence provisions, a drafter needs to be aware of the various different categories of offence, and of the consequences of putting offences into them.

The distinction between felonies and misdemeanours has been abolished in most CARICOM Member States. However, offences can still fall into categories, such as summary or indictable, arrestable or not arrestable, imprisonable or not imprisonable, and the drafter should avoid putting an offence into the wrong category inadvertently. There are also categories of sexual offence and offences of violence, although these are based on the components of the offence rather than the penalty.

In most CARICOM Member States an offence can be brought within the jurisdiction of a summary court (i.e. the magistrate’s court as distinct from the High Court) by providing that the offence is punishable on summary conviction. Sometimes the venue is determined by the maximum penalty and it might not be necessary to say whether an offence is triable on indictment or summarily. The drafter needs to refer to local criminal procedure legislation for guidance on these points.

**Duplicity**

The drafter should avoid duplicity i.e. inadvertently creating two offences in the same sentence. An old example from English road traffic law is the offence of ‘driving without due care and attention or due consideration for other road users’. This created two offences i.e. careless driving and inconsiderate driving; modern drafting style would make that clear.

A well-established exception to the rule against duplicity is the offence of burglary at
common law, which consisted of breaking and entering and stealing. Such a formulation is not recommended unless it is intended that the offence includes every component.

However, note the new UK offence of 'encouraging or assisting' which replaces 'inciting' but which appears to create two offences (and is not very different from the old 'aiding and abetting').

12.3 Penalties

When creating an offence, the drafter should always provide for a penalty somewhere in the legislation. The penalty might be:

- stated in the section;
- put together with the penalties for all related offences at the end of a Part;
- put with all other penalties in a section at the end of the Bill;
- included is a Schedule to the Bill.

(Note that the offences can also be grouped together in a separate section or Schedule.)

The appropriate penalty should generally be prescribed for each offence but if the offences are of similar gravity there can be a general penalty.

The Interpretation Act, or the criminal procedure law, usually provides that a statement of a penalty is the maximum, and the court can impose any penalty up to that maximum. It is therefore not necessary to use the word 'maximum' when prescribing a penalty.

One exception is when power to create offences and impose penalties by regulations etc. is given in an enabling Act. Then the enabling provision should say–

"The Minister may by regulations create offences for which the maximum penalty is [xxxx].".

It is preferable not to specify a minimum penalty, as this ties the hands of the courts. But there are sometimes political reasons why a minimum penalty is to be specified.

In prescribing maximum penalties the policymaker, drafter and AGC should consider:

- the gravity of the offence;
- the prevalence of the offence and the need for a deterrent sentence; and
- the need to maintain a consistent pattern with the structure and scale of penalties in other legislation.

The Interpretation Act or criminal procedure law might provide that the penalty can be stated quite simply, at the end of a section, for example–

"A person who [xxxx] commits an offence."
Penalty: A fine of [yyyy] or imprisonment for [zz] months, or both.”

The advantage of this usage is that it is very clear, and enables the reader of a statute to ascertain easily the range of penalties and whether they are consistent.

**Fines**

In most jurisdictions, fines can be imposed instead of or in addition to imprisonment. It is not always necessary to mention a fine for an indictable offence as at common law a fine of any amount can be imposed for an indictable offence. This might also be stated in the local criminal procedure law.

The fines that can be imposed by summary courts must be stated in legislation. This is usually the statute that creates the offence, although it could be a statute of general application such as a criminal procedure code. It is not usually appropriate to state in subsidiary legislation the fines for an offence created by an Act, although this is occasionally done.

A fine stated in an Act or Schedule can only be changed by an amending Act, unless some other mechanism is provided for amending a Schedule. *See the Chapter on Schedules.*

For this reason, some jurisdictions have created a scale of fines, which can be amended periodically and which will affect the level of fines across the board. As with fees, fines can be increased by a percentage or a multiplier or by linking to the cost-of-living index.

In the case of an offence that can only be committed by a corporation (for example, company law offences) imprisonment is not available (unless individual directors are prosecuted) so the level of fines becomes very important. It is often appropriate for the maximum fine for a corporation to be higher than for an individual. In environmental or safety law, for example, the maximum fine on a corporation might be several times the maximum for an individual.

If a penalty provision provides for both a fine and imprisonment, it is usual to put the reference to the fine first.

### 12.4 Repeat and continuing offences

Single offences may be repeated, or an offence may be a continuing one. The penalty for a second or further offence is usually increased by the court, up to the maximum. However, it is sometimes appropriate to prescribe a higher penalty for a repeat offence, usually of a minor nature. An example might be-

“A person who [does.....] commits an offence.

Penalty: A fine of $200 or imprisonment for 3 months, or both;
for a second or further offence, a fine of $400 or imprisonment for 6 months, or both.”.
Offences and Penalties

If the offence is one that is capable of continuing e.g. a dangerous state of affairs, it might be appropriate for the penalty to prescribe the maximum for everyday during which it continues. An example might be-

"A person who [does.....] commits an offence.
Penalty: A fine of $200, and a further fine of $50 for everyday or part of a day during which the offence continues."

This formulation would be appropriate to an offence that continues up to the date of the charge. If the continuation is after conviction of the act or omission constituting the offence, then a fresh charge would need to be brought.

These examples show that there is a difference between a daily penalty for a continuing offence (which will usually be a percentage of the penalty for the main offence) and a penalty for a second or subsequent offence, which if specified will usually be a much higher penalty.

Note that the limitation period for the institution of prosecutions does not ordinarily begin to run while a continuing offence continues.

12.5 Alternative penalties

The drafter should, where appropriate, invite the instructing department to consider whether a penalty additional to a fine or imprisonment might be appropriate. For instance, the forfeiture of property owned by an offender and used in the commission of the offence might be wanted. Other penalties that could be imposed in addition to a fine or imprisonment are restitution and compensation.

Community service, probation or other alternatives to a fine or imprisonment are usually provided for in the criminal procedure code and do not need to be separately provided for when creating offences. Likewise, the powers of a court to defer or suspend a sentence do not need spelling out in relation to each offence.

When drafting a forfeiture provision, consideration should be given to the need for powers of seizure, detention, disposal and disposal of proceeds of sale. See also the Interpretation Act and the criminal procedure laws on this topic.

In the case of an offence committed by the holder of a licence, it might be appropriate to confer on the courts power to order revocation or suspension of the licence, or power to recommend that the licensing authority revoke or suspend the licence. The Act should make it clear whether these matters are to arise automatically on conviction.
12.6 Clarity in stating the criminal rule

Clarity in criminal law requires a clear statement of the criminal rule. But this is not always easy to achieve. People say the Ten Commandments are simple and clear – ‘Thou shalt not kill’ and ‘Thou shalt not steal’. Yet as soon as Moses came down from Mount Sinai after having written the Commandments (for the second time) scribes and scholars started explaining them.

It should be possible to state a criminal rule clearly; an example would be ‘Keep off the grass.’ But even this begs the question of how the grass is to be cut. Note that these rules – ‘Thou shalt not steal’, and ‘Keep off the grass’, are directed to the potential offender. But that is not the best way to state the criminal law. It would also be rather odd to frame a criminal rule that way – ‘If you break into a house, you will be committing an offence and liable to (prison etc.). This might be how a Ministry leaflet explains the law. But the legislature should not address potential lawbreakers directly.

The criminal rule is often stated in a form such as–

“No person shall cause or permit a vehicle to wait...”
(from UK Traffic Regulation Orders).

However, this is not a good use of the prohibitive ‘shall’ as it cannot be replaced by ‘must’. (The clause ‘No person must...’ would not make sense.) It is therefore not recommended for use.

A preferable formulation is–

“A person who...... commits an offence [and is liable on [summary conviction/ conviction on indictment] to imprisonment for... years or to a fine of $...”.

Note that this formulation separates the verb from the subject and is therefore only suitable for short statements of the offence. If the intervening text is long, and constitutes a list, this becomes a ‘sandwich clause’ and should be avoided.

Another formulation is–

“If a person....... he commits an offence”.

This is gender-specific (as well as risking becoming a sandwich clause). It cannot be cured by saying ‘he or she’ as the person might be a company. Repeating ‘the person’ becomes tedious and confusing. An older formulation is–

“Who so ever shall...... shall be guilty of felony.”

This from the UK Offences against the Person Act of 1861; no further comment is needed.

In recent years new formulations have been used:
**Offences and Penalties**

“No person may...”

“A person must not...”

“It is an offence for a person to......”

“The following are prohibited...” (followed by a statement that it is an offence to do a prohibited thing.)

Sometimes ambiguity is built into the rule. On German Autobahns there are speed limit signs that show a lower number and the words ‘Bei Nasse.’ This means ‘When wet’ and shows that a lower limit applies when the road is wet. There is obvious scope for dispute as to when the road is wet, but it seems to suit Germany.

One of the most useful devices, both to avoid the gender problem and to achieve clarity in other ways, is to use letters. Some jurisdictions use D for defendant, P for plaintiff etc., but others use A, B, C, etc., despite the risk that ‘A’ might be confused with a word.

Section 57 of the UK Offences against the Person Act 1861 reads–

“Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable... to be kept in penal servitude for any term not exceeding seven years...:

Provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.”

(This is still the law in the UK.)

A possible redraft might be–

“57.(1) Subject to subsection (2), a married person (‘A’) who marries any other person during the life of A’s former husband or wife commits an offence.

Penalty: Imprisonment for 7 years.

(2) Subsection (1) does not apply to a person (‘A’) who marries a second time if–

(a) A’s husband or wife has been continually absent from A for at least 7 years up...
to the date of the second marriage and has not been known by A to be living within that time;

(b) at the time of the second marriage, A has been divorced from the bonds of the first marriage; or

(c) A’s first marriage has been annulled or declared void by a court of competent jurisdiction.”. 
13. 1 Introductory

After the substantive and miscellaneous provisions and the rule-making power, if any, a major Bill might need to contain one or more final provisions. These might include the repeal of other laws and resulting savings provisions, transitional provisions and consequential amendments.

13. 2 Repeal

It is usual for this to come at the end of a Bill, as otherwise the existing law might appear to have been repealed before there is a new law in its place. This is not the case, as the Act is to be read as a whole and, with certain exceptions, all its provisions come into force simultaneously. However, in setting the sequence of the provisions of a Bill, it is expedient to present the new provisions before providing for the repeal of the existing law.

A repeal may be of a whole Act or only part of an Act. It could be of only a section or paragraph or even a single word. However, it is usually better to include a partial repeal in an amendment provision. See the Chapter on Amendment Bills

Implied repeal

An implied repeal is when a provision on a topic is inconsistent with a previous provision on the same topic. Implied repeal is a common law principle of statutory interpretation and presumes the legislature to be aware of existing laws. If the legislature passes a provision that is inconsistent with an existing law, it is presumed to have intended to amend or repeal the existing law to the extent of the inconsistency and unless the earlier law is expressly saved.

Rather than relying on the doctrine of implied repeal, however, it is usually better to repeal expressly any provisions that are no longer wanted.

Technique of repeal

If a repeal of legislation is needed, a specific section to this effect should be inserted. A repeal provision should not be mixed up with other provisions and if there are many, it is convenient to insert them in a specific Schedule for this purpose.

A repeal provision should be specific as to what laws are repealed, in whole or part. It is not appropriate for the legislature to say, for example, that all existing law on a subject is repealed.

Among CARICOM Member States, Acts are 'repealed' and subsidiary legislation is 'revoked'. Long Titles, Parts, Divisions, sections, subsections and Schedules are also 'repealed'. Paragraphs, words and phrases are usually 'deleted'. The expression 'omit' or 'strikeout' is not usually appropriate.
For a discussion of ‘delete’ and ‘repeal’ see the Chapter on Amendment Bills.

If a single Part or section or paragraph, etc. is repealed (or revoked) it might be replaced by another Part or section or paragraph, etc. The word often used for this is ‘substituted’ but it must be correctly used. The term ‘substituted by’ is not correct; it should be either–


‘’xxx’ is deleted and ‘yyyy’ substituted’;

OR

‘’yyyy’ is substituted for ‘’xxx’’.

It is better to use the single word ‘substituted’ rather than ‘re-enacted’, ‘re-enacted with amendments’, ‘replaced by’ or ‘inserted in lieu thereof’.

The Interpretation Act usually sets out some legal implications of the repeal of an Act. For example, the repeal of a repeal does not reinstate the original provision.

13.3 Savings

It might sometimes be appropriate to retain the provisions of a repealed Act, either permanently or for a limited time. Savings preserve an existing law or existing rights which would otherwise disappear when the law is changed. They can be used to show that a new Act is not intended to derogate from or impliedly repeal another existing Act.

The use of a Proviso is not a comfortable way of saving action done under repealed laws. It should be done by a separate subsection of the repeal section.

If an Act is repealed, subsidiary legislation made under it ceases to have effect and it may therefore be necessary to include a savings provision in order to preserve subsidiary legislation until it can be replaced by subsidiary legislation made under the new Act. Note, however, that the Interpretation Act usually provides that subsidiary legislation made under the repealed Act and not inconsistent with the new Act continues in force as if made under it, until replaced under the new Act.

Savings might also be needed to preserve the status quo despite the repeal of a law. An example of such a provision is–

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(1) Except as expressly provided in this Act, nothing in this Act affects–

(a) the liability, trial or punishment of a person for an offence against any other law in force in [the jurisdiction] other than this Act;

(b) any of the written laws for the time being in force for the government of [the police force or of the armed forces]."

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(1) Except as expressly provided in this Act, nothing in this Act affects–

(a) the liability, trial or punishment of a person for an offence against any other law in force in [the jurisdiction] other than this Act;

(b) any of the written laws for the time being in force for the government of [the police force or of the armed forces]."
13.4 Transitional provisions

A special provision might be needed to cover the transition from the old law to the new. It applies the provisions of a new Act to situations in existence when the Act comes into force. It might be needed because of a repeal of an existing law (though this can usually be achieved by a savings provision.) It is also sometimes needed because the law introduces a new requirement or mechanism and people should be given a chance to comply.

When an activity is to be regulated by statute for the first time, or an existing regulatory statute is repealed and replaced, the legitimate interests of those engaged in the activity at the transitional time need to be protected. An example would be a new requirement for a licence. A transitional provision might treat an existing licence as issued under the new Act, or it might give a period during which licences are to be obtained.

Other examples might be:

- a person, already practicing a trade or profession, must be registered under the new Act;
- a new corporate body is to replace an existing body and provisions are needed to vest the assets and liabilities of the existing body in the new body, to retain staff and to continue pending actions;
- new requirements for forms for a business activity are imposed;
- new appointments are needed to an existing body.

The transitional provisions are usually grouped at the end of a Bill, although it might be appropriate to include a transitional provision in a Part or section creating the new requirement, etc.

Transitional provisions are a vital component of the drafting, designed to effect a smooth transition between the old and new law. They can be complex and time-consuming. Too often transitional provisions are left for consideration too late in the drafting process and are seen to be a legal problem and not of concern to the instructing department. The drafter should therefore insist that the instructing department consider the need for them at a nearly stage.

The UK and some other Commonwealth jurisdictions also have the concept of a ‘transitory’ provision, but this term has not generally been adopted in CARICOM Member States and is not recommended for use.

13.5 Consequential amendments

An Act of any complexity might well have an effect on other statutes. This sometimes results in the need to make ‘consequential amendments’ to other legislation.
Consequential amendments can be done by various mechanisms, including:

- a clause in the amendment Bill if the amendments are few and simple;
- a Schedule to the amendment Bill for multiple amendments;
- a Miscellaneous Provisions Bill amending several statutes;
- separate amendment Bills.

The amendments might be fairly simple and technical. For example, if a Bill changes the title of a Commission etc., there will need to be consequential amendments to all references in the law to the original body. This can sometimes be done by way of an Order under the Interpretation Act, but if not, it needs to be done by a consequential amendment provision.

In such an example, the consequential amendment could be done by reference i.e. by saying that the name of the ‘Xxxx Commission’ is to be changed to the ‘Yyyy Commission, wherever it occurs’.

If preferred the amendments can be done textually i.e. by separately amending each provision in which the name occurs. For a discussion of these options see the Chapter on Amendment Bills.

It is possible to avoid the need the make specific consequential amendments in an Act, and to give the power to make them to a person or body. The following example is from the Falkland Islands Crimes Ordinance 2014–

“The Governor [after consulting the Criminal Justice Council] may by order make such modifications or adaptations of any enactment as the Governor considers necessary or expedient in consequence of the repeal of the repealed Ordinances...”.

More fundamental consequential amendments might be needed, for example, if the categories of citizenship were to be changed by a statute.

Choice of method

Although making amendments in the main Bill, possibly by way of a Schedule, is the most efficient method of making consequential amendments, some jurisdictions do not like to do them this way. Experience shows that amendments to one Act made in another are not always picked up by practitioners, law librarians and other users of the statute book. It is arguable that legislation is more user friendly if separate amendment Acts are enacted, even if they have a common feature.

For this reason, if a Law Revision exercise is not conducted regularly in a jurisdiction, the use
of a Schedule to list all the legislation which is being amended, or introducing a miscellaneous provisions Bill, might not be the preferred approach. However, the alternative, of consequential amendments being made by a series of amendment Bills, leads to a tedious series of small Bills needing to be drafted, and can clutter up the legislative programme. There might also be political reasons for not introducing separate amendments to statutes, especially controversial ones, as they provide opportunities for repeated debates on the merits of the original statute.

The method of making consequential amendments is for each jurisdiction to decide, but this Manual assumes that they will be done in the main Act, and the suggested list of contents of a Bill in the Chapter on the Structure of Legislation is drawn up on that basis.

For amendment of statutes generally, see the Chapter on Amendment Bills.

13.6 Expiry or ‘sunset’ clauses

Some jurisdictions include in major Bills a provision for the Act to come to an end after a period. This might be, for example, because the Bill is very controversial, and can only be passed by making it temporary. Or it might be linked to an event that will be concluded, such as a national centenary or similar.

A ‘sunset clause’ provides that the Act is to remain in force only for a limited period. This is usually achieved by specifying a date when it will expire, or by providing for its expiry on the occurrence of a specified event. An example would be–

“This Act expires on the date on which the Constitution (Amendment) Act comes into force.”.

In order to achieve uniformity it is suggested that if there is to be an expiry clause, it should always be the final clause in the Bill.

The expiry of an Act operates in the same way as a repeal, and the provisions of the Interpretation Act relating to repeal will apply. There might well be a need for transitional and savings provisions in order to preserve rights accrued or obligations incurred during the operational period of the Act.

13.7 Review clauses

A ‘review’ clause also is only required if the Bill is controversial. It does not affect the duration of an Act but requires the Minister to review and report to the legislature on the operation of the Act after a specified period, with the expectation (though usually not expressed) that the Minister will introduce a Bill for its repeal or amendment if the review leads to the conclusion that this is required.

A possible form of review clause is–
“(1) The Minister must within 12 months of the commencement of this Act review its operation and effectiveness.

(2) In the course of the review the Minister must consider and have regard to—

(a) the effectiveness of the operations of [the Xxx Board, Authority, etc.];
(b) the need for the continuation of the functions of [the Board, etc.]; and
(c) any other matter that appears to the Minister to be relevant to the operation and effectiveness of this Act.

(3) The Minister must—

(d) prepare a report based on the review under subsection (1); and
(e) as soon as practicable after the preparation of the report there of cause it to be laid before [the legislature].”.
14.1 Introductory

If a Bill or item of subsidiary legislation has Schedules, they come at the end, but before the certificate of the Clerk or Speaker. They are part of the Bill and are to be interpreted and applied in the same way. They are usually used to set out material that is too detailed, complex or unwieldy for inclusion in the main body of the Bill, or for temporary matters such as monetary amounts, etc.

Schedules deal with matters of detail or procedure to make an Act more readable and simplify interpretation. They may be used for such matters as:

- forms and fees;
- procedural matters in relation to a statutory corporation;
- the text of international conventions and agreements;
- rates of taxes, duties or other charges;
- a list of endangered species;
- the institutions that are approved for certain purposes.

A Schedule might be the appropriate way to include in an Act a Code of Conduct, a model agreement for a labour dispute, or a similar non-legislative instrument. Such items can often be put in regulations or other subsidiary legislation, in which case they can be amended by the person or body with power to make the subsidiary legislation. They are put into a Schedule rather than in subsidiary legislation because a Schedule can usually be amended only by the legislature, which thus keeps a closer eye on the material.

However, sometimes a Schedule can be amended by resolution, or by a Minister, with or without the express approval of the legislature, but on the authority of the primary statute.

Drafters should consider giving the Minister etc. power to amend a Schedule by Order. This might seem to hark back to the activities of Henry VIII (who liked to amend his own laws) but as an Order is subsidiary legislation it will usually need to be laid on the table of the legislature. If this requirement is not imposed by other legislation, it should be included in the provision giving the Minister power to amend a Schedule.

14.2 Format

A Schedule should state at its head the section of the Act from which it derives its authority, for example –
It is the general practice nowadays for Schedules to be numbered 1, 2, etc. (i.e. in Arabic numerals); not to be lettered A, B, etc.; and not to be called ‘First Schedule’ etc.

If there is only one Schedule, there is no need to give it a number. However, some jurisdictions do prefer to do that, so that if further Schedules are added, the existing Schedule does not need to be given a number.

A Schedule can have Parts and Divisions. It might include tables. It can even consist wholly of material presented in a tabular form, for example, a scale of fees. In this case it is desirable that the items be numbered or lettered for reference. It may be convenient to do this in the first of a series of columns in the Schedule. Enumeration of this kind helps in case of subsequent amendment.

The provisions of a Schedule can be numbered either by Articles or by paragraphs. The practice varies among CARICOM Member States and either practice has its merits. More important is that there should be consistency in the various Schedules to an Act, and in the jurisdiction generally.

When a Schedule consists of separate prose provisions, they should be numbered, lettered and paragraphed in the same way as the substantive provisions in the Act, except that such provisions in a Schedule should be referred to as paragraphs and subparagraphs (or articles and sub-articles).

It is usual to give headings to the main Articles or paragraphs of a Schedule.

It is appropriate for a Schedule to have digital numbering (i.e. 1.1.1 etc.) if that is the jurisdiction’s preference.

A Schedule might have one or more Appendices, with further details on some items, but this should be avoided if possible, as a Schedule is itself an appendix to the Act.

There should be consistency of language between an Act and its Schedules.
Amendment Bills

CHAPTER 15

AMENDMENT BILLS

15.1 Introductory

Amendments to an Act or item of subsidiary legislation are sometime needed. The techniques for drafting amendment Bills are essentially the same as for any other Bill, but there are some special considerations, which are looked at in this Chapter. The principles apply equally to subsidiary legislation, though the terminology might be different.

Amendments to an Act might be needed as a result of:

- a change of policy on a topic on which there is existing legislation; or
- the enactment of a new statute, creating a new body or similar.

The latter kind of amendments are ‘consequential amendments’ and are usually done by way of a clause near the end of the main Bill. They might be in the clause itself, or in a Schedule. Some jurisdictions prefer to do consequential amendments by way of a Miscellaneous Provisions Bill or by separate amendment Bills.

For a discussion of these options, see the Chapter on Final Provisions

Amendments might consist of:

- the repeal of a provision;
- the repeal and replacement of a provision;
- the deletion of a word or phrase;
- the deletion of a word or phrase and substitution of another.
- the insertion of a word or phrase in the middle of a piece of text;
- the addition of a word or phrase at the end of a piece of text.

For each amendment, a separate clause should be used, but if there are several amendments, it is often more convenient if they are in a Schedule. An Amendment Bill could therefore simply read—

“The Acts listed in column 1 of the Schedule are amended in the manner set out in Column 2 of the Schedule.”
15.2 Textual or descriptive?

The two main methods of making an amendment are the referential or descriptive method and the textual. In a textual amendment, the precise location in the statute book of the text to be amended is identified, and the amendment spelled out, whether to delete or insert or replace, etc.

In a descriptive amendment, the nature of the amendment is described, and the necessary changes are then made by users of the statute book. The amendment Act says in general terms how another Act, or a series of Acts, is to be amended. It might say, for example:

- that all powers of a specified kind are in future to be exercisable by a specified official; or
- that all provisions of a specified kind are no longer valid.

This technique is useful if there are a lot of minor changes to be made, such as changing the term ‘Governor’ to ‘Governor-General’ or ‘President’ wherever it appears.

An even more general or descriptive type of amendment is one in which the purpose of the amendment is stated, for example to remove all references to imprisonment in lieu of a fine, or similar.

The risks of the descriptive type of amendment are:

- that some of the changes needed might be missed; or
- that the text might not be correctly amended.

However, the method is sometimes useful, as in this example from the Falkland Islands Crimes Ordinance 2014–

"(2) A reference in any other enactment to the Governor or Chief Justice exercising legislative functions in relation to criminal offences is, to the extent possible, to be read as a reference to the Governor or Chief Justice, as the case maybe, exercising equivalent functions under this Ordinance after consulting the Criminal Justice Council.”.

15.3 Main Bill or Schedule?

Whatever the method of amendment, the amendment can be made either in a clause of the Bill itself, or in a Schedule. If there are more than a few amendments, the Schedule form is usually more convenient, but some jurisdictions prefer to have a series of clauses amending individual sections of other Acts.

One advantage of the Schedule method of amendment is that the Minister can be given the power to add items to a Schedule by Order. See Chapter on Schedules.
Amendment Bills

Note that once an amendment comes into force, it becomes part of the Act and cannot itself be amended; the principal Act would need to be amended. So the Minister cannot, by Order, amend a Schedule of amendments except to add items to it.

15.4 Narrative or tabular?

If there is to be a Schedule, the amendments can either be in a narrative sequence, or in tabular form. The advantages of the tabular form are that:

- the resulting text is clear and easy to understand and draft;
- revision of statutes is easier;
- reference to other legislation is easier.

15.5 Title

An amendment Bill, like any other, will have a Long Title and a Short Title. The Long Title can simply say that it is a Bill ‘to amend the Immigration Act’. But sometimes the purpose of the amendment is included in the Long Title. This is a matter of choice for each jurisdiction.

Note that the Long Title of the Act being amended might itself need to be amended in the light of the amendments to substantive provisions made by the amendment Act.

The drafter of an amendment Bill should ensure that the Act to be amended is properly cited. It might be useful to state the Chapter reference if it forms part of the revised laws, or the citation reference for an Act that is not a part of the latest revision.

The Short Title of an amendment Bill should include the word ‘Amendment’ in brackets. It does not need to include the word ‘Act’ in the reference to the Act being amended; for example ‘Immigration (Amendment) Act, 20xx’ not ‘Immigration Act (Amendment) Act 20xx’. Note that if the Act being amended is a Code, the title formulation would be, for example, ‘Criminal Code (Amendment) Act, 20xx’.

If there is more than one amendment Bill in a calendar year, a number should be given as in ‘Immigration (Amendment) (No.2) Bill 20xx’. It is not usual to number the first amendment, even if expected that there will be more than one amendment to the same Act in the year.

In order to alert the legislature and public as to the nature of the amendment, the Short Title is sometimes given a descriptive term, for example–

‘Immigration (Amendment of Citizenship Categories) Act.’
It is a matter of choice for each jurisdiction whether to adopt this technique. If more than one Act is being amended, and they have a common distinctive feature, the title ‘Immigration Legislation Amendment Act’ or similar might be appropriate.

15.6 Language of new Text

The general rule to be followed in drafting is that the language of an amending enactment must be consistent in style and language with the principal law. In some circumstances though, this might not be so practicable if the principal law does not comply with current drafting practices. Some examples include the use of “shall” as opposed to “must”, the use of gender inclusive or gender neutral language, the use of archaic language and the non-use of standardised language. The general rule is that the drafter should adhere to the drafting guidelines in a manual that promotes the use of simple, clear, gender neutral and standardised language.

15.7 the ‘Principal Act’

In order to simplify the text of an amendment Act, it is usual to refer to the Act being amended as ‘the principal Act’ (or even just ‘the Act’.) In an amendment Bill, the meaning of the term ‘the principal Act’ (or ‘the Act’) can be either:

- included in the Short Title clause; or
- stated in a separate clause.

In either event, the amendment provisions can simply refer to ‘the principal Act’ (or just ‘the Act’). Some jurisdictions rely on context and do not define the term, but it is general practice among CARICOM Member States to define ‘principal Act.’ One way is to say inclause 1–

“1. (1) This Act may be cited as the Immigration (Amendment) Act 20xx.

(2) In this Act, ‘the principal Act’ means the Immigration Act.”

An alternative formulation is for clause 1 to say that the amendment Act “is to be read and construed as one with the Immigration Act (in this Act referred to as ‘the principal Act’).”

Whichever formulation is used, subsequent provisions will refer to the ‘principal Act’ in relation to each amendment rather than recite the Short Title of the Act, for example–

“The principal Act is amended in section 2 by...”

Note that once an amendment comes into force, it becomes part of the Act and cannot itself be amended; the principal Act would need to be amended. So the Minister cannot, by Order, amend a Schedule of amendments except to add items to it.
15. 8 Terminology

The terms ‘repeal’ and ‘delete’ have similar effect in that they remove existing provisions from the Act. The usual practice is that Acts, Long Titles, Parts, Divisions, sections, subsections and Schedules are ‘repealed’, but paragraphs, words and phrases are ‘deleted’. The expression ‘omit’ or ‘strikeout’ is not usually appropriate.

Note that there is an argument for using ‘repeal’ in all cases as this word has a special meaning in the Interpretation Act, and certain consequences flow from a repeal. In most jurisdictions, however, the word ‘delete’ is understood to have the same effect as a repeal of the provision or words in question.

The word ‘substitute’ can be used where an existing provision is taken out (repealed or deleted) and replaced by a new provision. But the term must be used correctly; a term is not ‘substituted by’ another term—it is replaced by it.

The term ‘inserted’ should be used when a new word or phrase is being placed in the middle of a piece of text. The word ‘added’ can be used for the placing of a new word or phrase at the end of a piece of text.

When identifying the position of an insertion or deletion, it is better not to use the word ‘immediately’ as a modifier of ‘after’ or ‘before’. As so used the word is redundant and might be confusing.

Use of the term ‘as to’ in a provision such as ‘is amended as to section…’ is not recommended. It is better to say ‘is amended in section…’.

If punctuation is to be deleted or replaced, it needs to be mentioned. It is therefore sometimes appropriate to refer to a phrase being deleted, rather than just words.

If a large amount of text is to be replaced, say “everything after ‘xxx’” or similar.

15.9 Numbering

The original numbering should not be disturbed in an amending Act. The insertion of additional provisions can cause numbering and lettering complications, particularly when successive insertions of new provisions are made. The general rule, where there are no complications, is straightforward. A new section inserted after section 2 and before section 3 is numbered 2A. A further section inserted immediately after 2A is numbered 2B and soon. Similarly, subsections inserted after subsection (2) and before (3) would be numbered (2A), (2B) and so on, and new paragraphs between paragraphs (b) and (c) would be lettered (ba), (bb) and so on.

If a new section is to be inserted between 2A and 2B, the usual practice is to insert a 2AA in that position and begin there a sequence 2AB, 2AC, etc.
The result of such amendments can be that an Act that has been amended several times has some rather peculiar section numbers, such as ‘section 43AAB’. However, re-numbering of the whole of an Act as a result of the insertion or deletion of a section should not be undertaken lightly, as it will affect references to sections of the Act in other legislation, including subsidiary legislation, and perhaps in forms and explanatory literature, etc. If desired, re-numbering should be left to a law revision exercise. See Chapter on Codification, Consolidation and Law Revision

Likewise, if Parts are repealed or inserted, there is no need to renumber the remaining Parts, as this will be done in the law revision.

A reference to a sub-unit of a section or regulation being amended may be made using a short form such as–

“Section 12 of the Act is amended in subsection (1)(a)(iv) by…..”;  
OR  
“Section 12 of the Act is amended in subsection (1)(a)by deleting subparagraph (iv) and substituting–  
‘(iv) ……….;’.”.

Much of the older legislation refers to particular legislative provisions by the use of words rather than figures; for example ‘section twenty-three’ instead of ‘section23’. When amending such provisions, it is better to use figures rather than words.

15.10 Section headings/Marginal notes

The section heading or marginal note of a section that is being amended does not need amending, as it is not strictly part of the text. However, if the amendment alters the nature of the provision, it is good practice to amend the section heading or marginal note, as otherwise the table of contents will be misleading, at least until the next law revision exercise.

It is also normal practice when replacing a whole section to include a section heading or marginal note for the new text.

Amendment Bills should have section headings or marginal notes like any other Bill. They are usually quite cryptic, such as ‘Section 4 [of the principal Act] amended’ or similar. See below for the resulting Arrangement of Clauses.

15.11 Arrangement of clauses

An amendment Bill of more than a few clauses should, like any other Bill, have an Arrangement of Clauses. (If the amendments are in subsidiary legislation, it will be a Table of Contents.)
Amendment Bills

The Arrangement of Clauses can simply be a list of the section headings or marginal notes, in which case it will read along the lines of–

“- Section 3 [of the principal Act] amended
- Section 4 [of the principal Act] replaced
- New section 4A inserted
- Section 5 deleted
- Etc.”

This is not very informative and does not indicate to legislators or the media or others reading the Bill what is the nature of the various amendments. Some jurisdictions around the Commonwealth therefore adopt the practice of including the section heading or marginal note of the relevant sections of the principal Act in the Arrangement of Clauses of an amendment Bill. It would read along the lines of–

“- Section 3 (Establishment of Xxxx) amended
- Section 4 (Financial provisions) replaced
- Section 4A (Special fund) inserted
- Section 5 (Appointment of trustees) deleted
- Etc.”

Note that the second version does not use the term ‘the principal Act’, but that is a matter of choice rather than a consequence of adopting the practice mentioned.

15.12 Amending definitions

The definitions are usually in section 2 of an Act. They can be amended just like individual sections, but some special features should be noted, as follows.

If new definitions are to be inserted in an interpretation section, it is not necessary to insert each definition in its appropriate position by a separate provision. The definitions to be inserted should be arranged alphabetically in the Bill. The following formulations are typical–

“Section 2 of the principal Act is amended by inserting, in the appropriate alphabetical sequence, the following new definitions–”

OR

“The Act is amended in section 2 by inserting, after the definition of building’ the following new definition–

‘Building Authority’ means....,”.
Note that the reference should be to “the definition of ‘building’”, rather than just to the word ‘building’ or just to the definition. Likewise, if a definition is to be deleted, the whole definition should be referred to, not just the defined term.

If two or more definitions are to be inserted, they do not need to be inserted separately, but it can be done by saying–

“The Act is amended in section 2 by inserting, in the appropriate alphabetical order, the following new definitions–

‘ ‘aaaa’ means ….;

‘yyyy’ means…..;’.”.

A placement of a definition could be achieved by saying–

“The Act is amended in section 2 by deleting the definition ‘xxxx’ and substituting the following definition–

“yyyy’ means……;’.”.

An amendment to a definition could be achieved by saying–

“The Act is amended in section 2, in the definition of ‘xxxx’, by deleting [or inserting][the words] ‘yyyy’.”

15.13 No reference to lines

Amendments should not be made by reference to lines. As soon as a provision has been amended once, line numbers can cause confusion. If an insertion is to be made after a word that occurs several times in a section, the following formulation may conveniently be used–

“The principal Act is amended in section 6 by inserting after the word ‘xxxx’ in the second and third places where it occurs, the words ‘yyyy’.”.

Also acceptable are ‘where it first occurs’ and ‘where it last occurs’. Alternatively, the relevant recurring word should be identified by reference to words adjacent to it.

15.14 Multiple amendments

Immediately succeeding provisions may be repealed or inserted by means of a single provision, for example –

“The principal Act is amended by repealing sections 6 and 7.”

OR

“Sections 6 and 7 of the Act are repealed.”
Amendment Bills

OR

“The principal Act is amended by inserting after section 4 the following new sections–.

‘4A ……..

4B ……..”.

If a word or expression is being deleted or deleted and replaced throughout the Act, the following may be used–

“The principal Act is amended by deleting the word ‘xxxx’ wherever it appears.”

OR

“The principal Act is amended by deleting the word ‘xxxx’ wherever it appears and substituting the word ‘yyyy’.”

15.15 Other suggested formulations

The practice in CARICOM Member States varies with regard to some formulations in amendment Bills. If a section is being repealed, some jurisdictions prefer to use–

“The principal Act is amended by repealing section 6.”

Others prefer–

“Section 6 of the principal Act is repealed.”.

However, if a clause amends a section, it is the general practice to use -

“The principal Act is amended in section 6(2) by...”

NOT

“The principal Act is amended in subsection (2) of section 6 by...”.

The practice is also to begin each paragraph with a reference to the unit to be amended, for example–

“...in subsection (1), by deleting...”

NOT

“...by deleting in subsection (1)...”.

It is also the practice to begin a clause amending a section with a reference to the section number rather than to a subdivision of the section–
“Section 6(2) of the Act is amended by....”.

And in the interests of easier reading, it is good practice to repeal or delete something before replacing it by or substituting something else. For example--

“....by deleting the words ’xxxx’ and substituting the words ‘yyyy’",  

**NOT**

“.... by substituting for the words ‘xxxx’ the words ‘yyyy’".

Note that:

- Care is needed with punctuation and inverted commas to show the precise extent of the new text or of the deletion.

- If the text that is being deleted or inserted includes punctuation or numerals, it is better to use ‘phrase’ or ‘clause’ rather than just ‘the words’.

**15.16 Tabular amendments**

The examples given in this Chapter so far are of amendments in narrative form to linear text. It is also possible:

- to amend linear text by amendments in tabular form;
- to amend a table by amendments in narrative form; and
- to amend a table by amendments in tabular form.

Amendments in tabular form will usually be in a Schedule to a substantive new Bill, or as a Schedule to an amendment Bill. The main body of the Bill might say, for example--

“The provisions listed in column 1 of the Schedule are amended in the manner shown in column 2 of the Schedule.”.

To amend items set out in columns in a Schedule, the following could be used--

“…”The principal Act is amended in Schedule 1--

(a) by inserting, after item 7, in columns numbered (1), (2) and (3), the following new item--

‘8. [xxxx]etc.’.".”.
Amendment Bills

15.17 Keeling Schedule

In some Commonwealth jurisdictions, a device is used to illustrate the effect of amendments proposed in an amendment Bill. It is a schedule that sets out the Act (or a section or Part of the Act) as it will be if amended in the manner proposed by the amendment Bill. It does not have the force of law or other official status, but can be of great assistance to legislators considering whether to support the amendment, and to users of the amended Act once the amendments are passed. It is known as a Keeling Schedule and could be considered for adoption by drafting offices in the CARICOM Member States.

15.18 Repeal and re-enactment

If a section is being extensively amended or a number of previous amendments have been made to it, the drafter should consider whether the meaning of the section can be clarified by the repeal and re-enactment of the whole section. In making a decision on this point, the drafter should remember that the re-enactment of the section may invite debate in the legislature on a matter that may be controversial and politically undesirable.

15.19 Further considerations

- In general, amendments should be kept as limited as possible – it is better not to offer up unnecessary hostages to political or legislative fortune.

- If sections are added to or removed from an Act, the drafter should check the cross-referencing to other sections.

- Once an amendment has been enacted it will be construed and read as part of the principal Act. The drafter therefore needs to be well acquainted with the principal Act to ensure that the overall integrity of the Act is not affected by the amendment.

- The language and style of the amending Act should, as far as practicable, be consistent with that of the principal Act and other Acts on the same subject. However, it is preferable for amendment Bills to be drafted in accordance with the current numbering, lettering and spelling practices of the jurisdiction.

- The effect on other legislation of the amendments should be considered and any necessary consequential amendments included in the amendment Bill, unless that is not the local practice. See the Chapter on Final Provisions.
• Whether a Bill to amend an old Act should be drafted in a more modern style is a matter for each jurisdiction. The problem of ‘new wine in old bottles’ is a perennial one and this Manual does not aim to solve it, as mentioned previously.

• In some Commonwealth jurisdictions, Acts that are likely to be frequently amended are given digital numbering, in groups of sections, so that sections can be inserted or removed more easily. This is not current practice among CARICOM Member States, however.
16.1 Introductory

In most CARICOM Member States the drafter of a Bill is expected to produce explanatory material to assist Ministers and legislators in their understanding of the Bill. It usually comes right at the end of the Bill, although some jurisdictions place it before the text of the Bill.

In some jurisdictions, it is left to the discretion of the drafter and instructing department and Clerk whether to include an Explanatory Memorandum. For example, Order 50(2) of the Belize House of Representatives Standing Orders states that "A Bill may be accompanied by a short explanatory statement of its contents" but does not impose an obligation.

If there is any explanatory material, it is usually called an Explanatory Memorandum, or Explanatory Note. It is sometimes called 'Objects and Reasons.' This document is separate from the Legal Report that the Attorney General is required to produce when the Bill as enacted goes to the Head of State for assent. It is also different from the legal report that has to be sent to the Secretary of State in the case of legislation enacted in a British Overseas Territory.

The material is usually published with the Bill and is intended also to assist the press and public generally in their understanding of the background and reasons for the Bill. In the UK and some other jurisdictions the Explanatory Note is revised once the Bill is passed and becomes an Explanatory Note to the Act as passed. That practice is not common among CARICOM Member States, however.

Explanatory material is not always required for subsidiary legislation. If it is, it is usually called an Explanatory Note. The same principles apply as for material for a Bill.

16.2 Purpose

The purpose of the Explanatory Memorandum is to assist readers to understand the proposed law and to explain its main aims. It provides a summary of the contents of the Bill in non-legislative narrative form. It should state the objects and reasons for the introduction of the Bill, the current legal status and the rationale for the introduction of the Bill. The Explanatory Memorandum is in fact an essential part of the democratic process and helps the legislature and public make informed decisions on the proposed legislation.

In order for them to get the whole picture and to be able to form their own opinion on the proposed Bill, Ministers and legislators need to understand:

- the policy: its aims, reasons etc;
- the intended impact;
why government thinks the law will have the intended impact;
the likely costs of the law;
any necessary changes in administration etc.

The Explanatory Memorandum should aim to include this information, so that it will be useful not only as a formal document, but:
- when the Bill is sent to Cabinet for approval of its introduction;
- at second reading stage in the legislature; and
- as a press briefing document.

Note that the drafter is not responsible for policy, and policy reasons should be explained by the Minister when the Bill is being piloted through the legislature. If they are to be included in the Explanatory Memorandum, they should be drafted by the instructing department.

16.3 Form

The Explanatory Memorandum usually sets out the background to the Bill and mentions any major legal or financial or staffing implications. It sometimes includes notes on the individual clauses.

The Explanatory Memorandum should set out:
- the policy objectives intended to be achieved by the Bill (often a paraphrase of the long title with additional information);
- a clause by clause (or Part by Part) synopsis of the provisions, highlighting the nature of the problems to be dealt with by each provision and the proposed solution.

The style and length of the Explanatory Memorandum will obviously depend on the nature and the extent of the legislative proposals dealt with in it, but it should be comprehensive rather than unduly brief.

In drafting the Explanatory Memorandum the drafter does not need to elaborate on policy, which is a matter for the Minister when explaining the legislation. However, the Explanatory Memorandum should deal with any issues affecting human rights or international obligations, and any major legal issues. In some jurisdictions it is also be expected to mention the financial and staffing implications of the proposed legislation.

16.4 Status

The Explanatory Memorandum does not form part of the Bill but may be used for statutory interpretation. The courts can look at the Long Title, the Explanatory Memorandum, sections of
the Act, etc. in trying to interpret the Act.

The instructing officer should check the Explanatory Note as well as the draft Bill, as it might receive wider circulation than the Bill itself and could well be relied on by the public as an indication of the effect of the Act.

16.5 Other material

A drafter might also be asked to prepare briefing notes/explanatory notes in relation to a Bill for the use of the Minister upon introduction of the Bill in the House, though often these notes are prepared by the Ministry.

It is not uncommon for a drafter at the Committee Stage on a Bill to be asked to provide for the benefit of legislators the information which would normally be contained in an Explanatory Memorandum. It is therefore useful for the drafter to prepare a document similar to an Explanatory Memorandum, even if a formal Explanatory Memorandum is not required in the jurisdiction.

The Explanatory Memorandum relating to an amendment Bill should deal separately with each proposed amendment.

A drafter might also be asked to prepare a Table of Derivations and a Destination Table. A Derivation Table is useful to show the source of the various provisions, if they are based on precedents from the UK or other jurisdictions, or if they replace existing local statutes. A Destination Table is useful in the case of an updating or consolidating statute to assist people familiar with the existing local laws to find out where they appear in the new law.

The drafter might also be asked to produce a Cabinet briefing paper, but that is outside the scope of this Manual. See the Manual on the Legislative Process and Drafting Instructions.
CHAPTER 17

SUBSIDIARY LEGISLATION

17.1 Introductory

It is often the case that a legislative scheme requires the making of regulations or other subsidiary legislation to flesh it out and give it ‘teeth.’ The making of subsidiary legislation is the responsibility of the Minister or other person or body given the requisite power in the primary legislation. The drafting of subsidiary legislation in CARICOM Member States usually falls on the drafting office, although in some jurisdictions it might be done by lawyers attached to subject Ministries or departments.

Note that if subsidiary legislation is drafted by non-drafters in subject Ministries, it should be checked by the drafting office before being made.

17.2 Empowering provision

Subsidiary legislation (or subordinate legislation, as it is sometimes called) can only be made if the power is conferred by an Act. It is the drafter’s responsibility to ensure that if there is to be subsidiary legislation as part of a legislative scheme, there are enabling provisions in the Bill.

The power to make regulations is usually stated towards the end of a Bill. The following is an example of a typical clause conferring power to make regulations –

“The Minister may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or that are necessary or convenient to be prescribed for giving effect to the purposes of this Act.”

This formulation is rather wide and it is preferable to include at least the main topics on which regulations will need to be made. If particular purposes or matters are to be specified, the above form could be continued –

“and, in particular –

(a) providing for ...;

(b) requiring ...; etc.”.

Note that:

- the enabling provision should use the words ‘may make [regulations]’, not ‘shall issue [regulations]’;

- a subjective formula authorising the Minister to make ‘such regulations as he or she may consider necessary’ should not be used;
17.3 Offences

The regulation-making power can confer power to create offences and specify the maximum penalties that can be imposed. If a power to do so is not given, offences cannot be created. If it is anticipated that offences are to be created by regulations, specific authority should be included in the empowering provision. The maximum penalty that can be prescribed by the regulations should also be stated in the empowering provision, for example –

"The regulations may create offences for which the maximum penalty is a fine of $xxxx."

The regulations can then create offences for which the maximum penalty would be up to $xxxx, but could be less. Note, however, that penalties set out in subsidiary legislation should not exceed those in the parent Act.

17.4 Nomenclature

Subsidiary legislation can be in any of a number of forms, but it is helpful if uniformity of usage could be achieved among CARICOM Member States. The general principles are:

- ‘regulations’ are public laws of general application, usually made by a Minister on behalf of the government;
- the term ‘rules’ is used to mean rules of a procedural nature, for example, rules of court or rules of procedure for an inquiry or tribunal. The term is also used for rules of an internal nature such as the rules of a club or association;
- ‘orders’ usually are specific to a particular event, often only short term, such as designating a quarantine area or similar; or conferring an exemption; or amending a Schedule;
- ‘by laws’ are the rules made by a local authority, for example about conduct in a marketplace. They might also be made by a university or a harbor authority or similar body.

The need for subsidiary legislation is usually indicated by the word ‘prescribed’, as in ‘prescribed fees’ or similar phrases. If the item is not to be legislative, it is better to use the word
specification', as in the case of a bus stop or parking bay. Sometimes the word ‘approved’ might be
sufficient, as in the case of a form.

The term ‘notice’ indicates something that is not legislative in nature, such as an appointment.
It is however the term often used for the instrument that appoints a commencement date,
although such an instrument is regarded as legislative in nature.

See the Chapter on Commencement.

Codes of Practice, Guidelines, etc. are not subsidiary legislation but only give guidance in
setting standards against which conduct can be judged. For example, a contravention of a code
of practice for police officers might result in the acquittal of an accused person, but it would not
be the basis for a prosecution. The primary legislation should state who has power to make such
instruments, and their effect and legal status. Such an instrument might be attached to a Bill as a
Schedule (which could be made capable of amendment by a Minister or similar) but is more
usually made later and published separately in the Gazette (thus giving it evidentiary authority.)

It is common for drafters to be asked to draft such instruments and it is often preferable that
they should be drafted by the drafter of the Bill, for consistency.

17.5 Citation/Name

Subsidiary legislation should always be given a title. An example is –

‘PASSPORTS REGULATIONS 20xx’.

In the case of amending regulations, etc., the word ‘Amendment’ should appear in brackets.

In most CARICOM Member States the name is stated in the first regulation, as in the case of
clause 1 of a Bill. It should not be called the ‘short title’ because there is no long title. That is why
‘citation’ or ‘name’ is commonly used instead.

Note that in some jurisdictions outside the region, (notably Hong Kong) there is no citation
provision, but the title at the heading of the item is taken to be the title.

17.6 Authority

Subsidiary legislation should cite the authority for making it. The following are examples–

“In exercise of the powers in section [xx] of the [yyyy] Act, the Minister makes the
following regulations–”;

“Made by the Minister under section [xx] of the [yyyy] Act [and subject to negative/
affirmative resolution of Parliament].”.
Note that it is not necessary to include the phrase ‘and all other powers thereunto enabling’.

The power to make subsidiary legislation can be circumscribed, for example by a requirement to consult or obtain advice from some other body such as an Advisory Council or similar. To help ensure that subsidiary legislation is made pursuant to the empowering provision and any requirement about the making of it, it is good practice to include in the heading to the regulations, etc. the statement that they are made after consulting the person or body. For example–

“In exercise of the powers in section [xx] of the [yyyy] Act, and after consulting the [zzzz], the Minister makes the following regulations–”.

17.7 Definitions

If words are used in subsidiary legislation that are defined in the empowering Act, they will have the same meaning as in the Act and need not be defined again in the subsidiary legislation. Only new words will need to be defined.

Terms that are only used in the subsidiary legislation should not be defined in the enabling Act.

It is the general practice to use the term ‘Definitions’ instead of ‘Interpretation’ for the heading or marginal note to this provision. In other respects, the definitions in subsidiary legislation are governed by the same principles as definitions in a Bill. See the Chapter on Interpretative Provisions

17.8 Attestation

Subsidiary legislation should always identify the person or body authorised to make it, together with the date on which it is made, at the end. The original of the instrument should have the actual signature and, if necessary, the seal of the person or body.

Most subsidiary legislation is made by a Minister. An example of such an attestation is–

“Made by the Minister of Immigration this [dd] day of [mm], 20xx. [Name]
Minister of Immigration.”

If subsidiary legislation is made by the Head of State, the form of attestation will probably be prescribed in the Constitution or in the Interpretation Act.

If persons or bodies other than a Minister are empowered to make subsidiary legislation, the Act might specify the method of making them. Otherwise, the Interpretation Act usually says how documents are to be attested by a corporate body. Typically, the signature of the Chair and
secretary and the affixing of the common seal of the body are required.

If subsidiary legislation is being made by a Board, for example, reference should be made to the passing of a resolution by the Board to make the legislation and provision should be made for the signature of the appropriate officers as evidence of the passing of that resolution.

A suggested form for use by a corporate body if no form of attestation is provided by the Act is–

"Dated this .... day of ....20 ....
The Common Seal of the [xxxx] Board was affixed here to in the presence of - [names and offices]
Passed by a resolution of the [xxxx] Board on [date].
Chairman..... Secretary.....".

17.9 Scrutiny by the legislature

In most CARICOM Member States there is a requirement in the Constitution or in the Interpretation Act for all items of subsidiary legislation to be laid on the table of the legislature for scrutiny by the legislature after being made. They are then usually subject to either a positive (affirmative) resolution procedure or a negative resolution procedure.

In the first case, the item will not come into force until approved by a resolution of each House, while in the latter case it comes into force immediately but may be declared invalid by a resolution. The drafter should bring the relevant procedure to the notice of the person making the subsidiary legislation. For this purpose the following wording could be added at the end of the item–

"Pursuant to section [xx] of the [yyyy] Act, these Regulations are here by laid in the [legislature] and are subject to [negative][affirmative]resolution.".

If the requirement for laying on the table and for a resolution procedure is in the Constitution or the Interpretation Act, there is no need to mention it in the regulation - making clause of the Bill. The relevant provision might however require that the regulation-making section states whether laying and a resolution procedure is needed, and if so which one, in which case the drafter should include a suitable provision.

In some jurisdictions the Clerk has to certify that items of subsidiary legislation have been duly laid and this certification is published in the Gazette.

Doubt is sometimes expressed as to whether every legislative instrument made under delegated powers needs to be laid on the table of the legislature and be subject to a negative or
positive resolution procedure. It might be thought surprising that a legislature has power to strike down the by-laws of a university, for example. However, if there is a general requirement of this kind, it will apply to such items, unless the statute conferring the power to make them displaces it.

If there is no general requirement in the Constitution or Interpretation Act or similar for laying on the table, then it only applies if the enabling Act says so.

17.10 Other points

Generally, rules, orders and by-laws should follow the same format in respect of headings, enacting formula, citation, commencement, etc. as those suggested for regulations.

An order might only have a single paragraph, but rules and by-laws might have many provisions, and be divided into Parts.

The Interpretation Act usually provides that subsidiary legislation is not to have retrospective effect unless:

- it confers a benefit; and
- such effect is essential to achieve its purpose.

The Minister should not make an instrument that infringes this rule.

A reference to an Act includes subsidiary legislation made under it. If an Act is repealed, subsidiary legislation made under it ceases to have effect and it may therefore be necessary to have a savings provision in order to preserve it until it can be replaced by subsidiary legislation made under the new Act. However, this is usually provided for in the Interpretation Act so does not need repeating in the enabling Act.

In small jurisdictions with few drafting resources, it might be appropriate in drafting a Bill to avoid the need for a large number of regulations, as there is a risk that they might never get made. If regulations are required, the drafter should alert the instructing department to the need for instructions to be issued for them to be drafted.
CHAPTER 18

THE INCORPORATION OF TREATIES INTO NATIONAL LEGISLATION

18.1 Introductory

One of the topics that frequently arises in CARICOM Member States is the need for legislative implementation of treaties.

A treaty might be:

- an international convention;
- a regional treaty;
- a bilateral agreement.

Whatever the nature of the treaty, it will usually impose a number of different types of obligations on the States parties—administrative, reporting, financial, etc. The full implementation of a treaty might require action by the government in all these areas.

This Chapter is concerned only with legislative implementation of treaties, and seeks to provide guidelines for the incorporation of treaties into national legislation.

18.2 Need for legislation

Treaty-making involves ratification of a treaty that the government signs as a party when it is drawn up, or accession to a treaty that has already been agreed by other parties. Not all treaty-making requires legislation. Some Constitutions in the region provide that treaty-making itself is a function of the executive and does not require the approval or intervention of the legislature. Some Constitutions do require legislative approval of a treaty, while others only require legislative approval in certain circumstances.

In the UK, treaty ratification was formerly a royal prerogative, exercised by the Queen on the advice of the government, but under the Ponsonby Rule, treaties were usually placed before Parliament for 21 days before ratification. This was put on a statutory footing by the Constitutional Reform and Governance Act 2010.

If legislative approval of the ratification of or accession to a treaty is required, it can be done by resolution and does not usually require legislation as such. The treaty will have effect, in that the government will be bound to comply with it, and courts will construe statutes in a manner consistent with international obligations.
In some countries, usually civil law countries, once it comes into force, a treaty to which a State is a party might automatically form part of the national law and be enforceable by courts and other implementing authorities. In most common law countries, only those provisions of the treaty that are incorporated into national law will give rise to enforceable rights and duties.

In the English-speaking CARICOM Member States, ratification of or accession to a treaty does not itself give the treaty the force of law for domestic purposes, and legislation is needed if the treaty is to have such force. The reasons why a treaty would need to have the force of law, and thus require legislation to implement it, include the need:

- to declare rights of persons in the community;
- to impose obligations on the public at large;
- to prohibit certain behaviour;
- to establish a new statutory body to oversee implementation of the treaty;
- to designate a contact person for purposes of the treaty;
- to authorise the spending of public money.

Some treaties expressly require States parties to legislate in particular ways, and States parties sometimes need to enact legislation in order to be able to finance the administrative implementation of a treaty.

### 18.3 Methods of implementation

There are different methods to give legislative intent to a treaty and several techniques can be identified:

- Legislation implements all or part of a treaty but does not mention it.
  
  An example of this technique might be including the offence of genocide in the Criminal Code, without mentioning the Genocide Convention. If it is apparent that an Act does in fact implement a treaty, the courts will refer to the treaty if necessary for assistance in interpreting the legislation.

- Legislation in fact implements the treaty but it is only mentioned in the Explanatory Notes or other related material.
An example might be regulations on trade in animals which implement the CITES Convention. This would also justify the courts in referring to the treaty for assistance in interpreting the legislation.

- The legislation refers to a treaty in various provisions, such as the definitions, and gives effect to it in substantive provisions, but does not set it out. Examples of this technique might be civil aviation or merchant shipping legislation.

- An Act states in its Long Title or in a purpose clause that the object of the Act is to implement a treaty, but does not set it out or give it the force of law.

- An Act implements parts of a treaty by substantive provisions and sets out the text of the treaty (usually in a Schedule) for reference purposes.

- An Act sets out the treaty as a Schedule and gives it, or part of it, the force of law.

For practical purposes, these possibilities can be reduced to four main options that will need to be considered by a drafter:

- The treaty could be attached as a Schedule to a short Bill which gives effect to the treaty as part of the law of the country, and authorises the necessary funding. This is a simple solution, but not usually very satisfactory, as treaties are framed in treaty language rather than legislative language, and include provisions that are purely administrative, such as reporting requirements, etc. It is also not satisfactory if the treaty imposes a number of specific obligations on the Government, which the Bill should identify and declare.

- The drafter could identify those things which the treaty requires the Government to do by legislation and draft provisions accordingly, without mentioning the treaty. This is also not satisfactory if the treaty states principles of interpretation and construction and sets out a conceptual framework for the application of its provisions. It is also desirable that the country should tell the region and the world that it is legislating to implement a treaty.

- The Bill could create a number of obligations on the Government and public, and set up an administrative machinery, then attach the treaty as a Schedule and say that the obligation and machinery are to implement it. This is not wholly satisfactory, because
The Incorporation of Treaties into National Legislation

the language of the treaty and of the obligations might not be the same, and there is a risk of duplication in the statement of the obligations and the treaty. Also, the conceptual framework in the treaty needs to be linked to the obligations.

- The Bill could set out the main provisions of the treaty, such as the rights of persons with disabilities, link them to obligations on the Government and public, and set up a machinery for administration and enforcement. This is probably the most satisfactory way of implementing a treaty. The definitions in the Bill should be based on definitions in the treaty and there should be a provision that the courts are to look to the treaty for guidance in interpreting the Act. The text of the treaty can then be referred to, and can even be published in the Gazette, but it does not form part of the Act.

Whichever option is chosen (and different options might be appropriate for different treaties) it should be noted that legislative implementation:
- can be spread among a number of items of legislation;
- can be by amendments to existing laws or by new legislation;
- can be by subsidiary legislation;
- if in a single Act, might require the use of a Preamble to explain the background to the treaty;
- might need to allow for future amendments to the treaty.

The drafter should also be alert to the fact that treaties are not drafted in a modern legislative style and the terms in them might need to be adapted in legislation.

18.4 Identifying what is needed

Instructing officers in CARICOM Member States, advised by their AGC and drafters, need to identify:
- the legislative requirements of treaties binding on their governments;
- the issues arising from those requirements; and
- various options available to the government for legislative implementation.

To ascertain what provisions of a treaty need to be implemented, it is usually sufficient to look at the text of the treaty. A typical implementation Article of a UN Convention might read–
"Implementation of the Convention

Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention."

It must be remembered that the Member State might have entered reservations to a treaty, in which case the legislation need only implement the treaty as ratified by the Member State.

It should also be noted that the text of a UN Convention might well be subject to interpretation and ‘glossing’ by a committee of experts, such as the UN Human Rights Commission. The drafter needs to decide, in consultation with the government, whether to incorporate or reflect those interpretations and glosses in the implementing legislation, or just to incorporate or reflect the text of the treaty as originally ratified or acceded to by the government. Legislation by expert committee should not be a substitute for legislation by an elected legislature.

18.5 UN Guidance

In the case of most UN Conventions, the Secretariat issues a Handbook for Legislators which is a useful tool in deciding what needs legislative implementation. These Handbooks usually set out the basic requirements of the Convention as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider. They list items that are mandatory or optional for States parties and relate each article, provision or chapter to other regional or international instruments and to examples of how States with different legal traditions might address provisions of the Convention.

UN Handbooks rightly point out that caution is needed in incorporating provisions of a Convention verbatim into national law, which generally requires higher standards of clarity and specificity to achieve integration with the wider legal system and tradition and enforcement in the country. They also rightly recommend that drafters check for consistency with other offences and definitions in existing domestic legislation before relying on formulations or terminology used in a Convention.

18.6 Local variations

A UN Convention usually allows national legislatures to implement the provisions of the Convention in conformity with the fundamental principles of their own legal systems. A typical UN
The Incorporation of Treaties into National Legislation

Convention will allow for local variation in how its provisions are implemented in domestic law. For example—

"Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law."

The Handbook for Legislators usually emphasises that implementation may be carried out through new laws or amendments of existing ones. Parties to a treaty might be already in partial compliance with some provisions of the Convention. Existing domestic offences that implement the terms of the Convention might correspond to offences under the Convention. The offences might be different in scope (such as two or more domestic crimes corresponding to one crime covered by the Convention) especially if they reflect pre-existing legislation or case law, but this does not mean new offences have to be created.

The Handbooks emphasise that the mandatory provisions of the Convention serve as a threshold that States must meet for the sake of conformity. Provided that the minimum standards are met, States parties are free to exceed those standards and, in several provisions, are expressly encouraged to do so.

Other typical provisions of a UN Convention that are of interest to drafters relate to:

- the need for bodies established to implement a Convention to be independent;
- the right of the public to have information about the functioning and decision-making processes of the administration;
- the protection of the sovereignty and territorial integrity of the States parties;
- the duty to periodically evaluate relevant legal instruments and administrative measures.
CODIFICATION, CONSOLIDATION AND LAW REVISION

19.1 Codification of laws

As well as drafting stand-alone Bills that introduce new law or amend existing law, the drafter might be required to draft codifying legislation. Codification involves a restatement of the law on a subject from several sources, including statute law, the common law and case law. In a codification exercise, the opportunity is usually taken to revisit some policy issues, particularly those arising out of case law.

Among CARICOM Member States there are not many examples of codification, except for the Civil Code in St. Lucia and a few Criminal Codes. However, drafters should be aware of the various advantages and disadvantages of codification.

Among the advantages of codification are that it can:

- achieve consistency of policy approach over the whole range of the topic;
- achieve clarity in the statement of legal rules on the topic;
- enable the law on a topic to be stated in more modern language;
- make the law on the topic more readily accessible and easier to follow;
- remove inconsistencies and duplication and gaps in the law;
- put all the definitions in relation to the topic in one statute;
- enable penalties to be more readily compared so as to achieve consistency.

There is the additional consideration that codification, if it includes common law principles and case law, removes the uncertainty of not knowing whether there might be a common law rule or a judicial precedent on a subject in addition to statute law. For example, the offences of murder, manslaughter and kidnapping are not statutory in the UK and their scope can only be as curtailed by studying case law or text books. They are statutory in countries which have a Criminal Code.

However, codification of laws does have a number of possible disadvantages. For example:

- the resulting statute might be a large and possibly unwieldy document;
- the statute might be more difficult to renumber if sections are inserted or deleted by amendments;
Codification, Consolidation and Law Revision

- there might be a risk that too many aspects of a topic are covered in the same document, which could lead to confusion;
- codification could result in an unintended change to the meaning of previously defined terms or the legal effect of some existing provisions.

There can sometimes be difficulty in connection with the commencement of a code. Should all its provisions come into force at the same time, when it is such a large statute? Would it be better for the changes to be incremental?

Some commentators object to codification on the ground that it can tend to set the law in stone and make it difficult to incorporate new thinking on a subject. Others feel that that is precisely one of the reasons for having a code.

19.2 Consolidation of statutes

In the UK and some other Commonwealth jurisdictions, the term ‘consolidation’ means a statement of the statute law on a topic, combining all the statutory provisions over a number of years. It involves the bringing together of several amendments to a statute into one document. It does not change the law, but tidies up the statute book and makes it easier for people to access legislation. Instead of having to look up several Acts covering a number of years on a particular matter, the user has to look up only one Act.

Among CARICOM Member States, if a topic is to be restated, it is usually done by a new statute, rather than by amalgamating existing statutes. The term ‘consolidation’, following the practice in Canada, is used for the amalgamation of an original Act with its amendments into a single Act. Such an exercise is usually carried out in the course of a law revision during which all new legislation is incorporated in the statute book in a consistent and coherent manner.

19.3 Law revision

In order to maintain the rule of law, a democratic government should accept a responsibility to make the country’s legislation readily accessible to those governed by it.

There are difficulties in achieving that, because:
- over time, the statute book becomes disorganised;
- statutes and items of subsidiary legislation accumulate and the law becomes difficult to find;
- provisions might become ‘spent’ or out of date;
- changes of names and terminology might have occurred;
Furthermore, the absence of consistency in format, language and drafting styles used across the statute book might make it quite impenetrable for readers.

For these reasons, most Commonwealth jurisdictions periodically undertake generalised revisions of the entire body of their Acts and subsidiary legislation. These exercises aim to consolidate and update the law, correct errors and make all the laws accessible to those who are subject to them.

Law revision is actively pursued in most CARICOM Member States. Its main aims are:

- to update the statute book to include laws passed by the legislature in the time since the last revision;
- to incorporate amendments to existing laws (i.e. ‘consolidation’ in the sense that term is used in the region.)

Law revision has several other purposes, however. The process is usually governed by a Law Revision Act or Ordinance, under which a Law Revision Commissioner is appointed to do the work. In most Caribbean jurisdictions, the Attorney General is designated Law Revision Commissioner.

The Law Revision Act or Ordinance usually gives the reviser the authority to:

- make technical corrections and remove obvious errors;
- renumber parts and sections and subsections as a result of additions or deletions;
- alter section headings and marginal notes;
- remove spent provisions;
- simplify the drafting and make language more consistent.
Conclusion and Summary

CHAPTER 20

CONCLUSION AND SUMMARY

As stated in the Introduction, this Manual is not intended to teach the basic skills needed for law drafting. Rather, it is intended to achieve some uniformity in legislative style and practices among the drafting offices of the CARICOM Member States, so that drafters can move freely around the region, and the laws of one country can be readily understood and possibly copied in another country of the region.

- The Manual should cause drafters in the region to ask themselves:
  - For whom is the legislation intended?
  - Does the legislation have a logical structure and tell a coherent story?
  - Does it communicate the policy intentions in a clear manner?
  - Is the language of the draft consistent and free from jargon?
  - Is the drafting gender-neutral and politically correct?
- The Manual should also help to ensure that Bills in the region:
  - contain the necessary preliminary provisions (long title, enacting formula, short title, commencement and interpretation provisions);
  - confer all the necessary powers (as supplemented by the Interpretation Act);
  - create offences in an appropriate manner and prescribe appropriate penalties or other sanctions;
  - deal with ancillary matters such as finance, adjudication, regulation-making powers, etc.;
  - contain the necessary final provisions (repeal, savings, transitional provisions, consequential amendments);
  - have all necessary explanatory material attached.

It is hoped that the Manual will lead to legislation in the region that:

- is free of grammatical errors, spelling mistakes and wrong references;
- is consistent with the Constitution of the respective jurisdiction;
- does not contain provisions inimical to the rule of law (such as ouster clauses);
- promotes transparency, accountability and good governance generally;
- facilitates harmonisation of laws among CARICOM Member States.
20.1 Further resources

Drafters who are demonstrably able to draft clear, unambiguous and relevant primary and secondary legislation, consistent with government policy and in accordance with the legislative drafting programme established by each jurisdiction, will never be short of work among CARICOM Member States. To assist them in this aim, drafters might wish to make contact with various organisations dedicated to clear drafting in the Commonwealth.

- One is the Commonwealth Association of Legislative Counsel – CALC – which publishes the ‘Loophole’ magazine and which holds conferences in parallel with the Commonwealth Law Conference. Its website is at www.opc.gov.au/calc.

- Another relevant organisation is ‘Clarity– the Campaign for Plain English’. This is an international association promoting plain legal language. Its website is at www.clarityinternational.net.

- In the UK, the Statute Law Society publishes the Statute Law Review, and presents talks and seminars, usually at the University of London. Its website is at www.statutelawsociety.co.uk.

The references listed in the following Bibliography should also be of assistance to drafters in the CARICOM Member States.
This Manual is based on material prepared for a Workshop on Legislative Style and Practices held in Barbados in November 2014, and on the views expressed by participants. It has been supplemented by reference to the following materials. This list is not exhaustive but it does indicate where further guidance can be found on each of the topics.


‘Drafting Legislation in Hong Kong – A Manual on Styles & Practices’. Law Drafting Division, Department of Justice, Hong Kong SAR, 2012.


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