

MANUAL ON
LEGISLATIVE DRAFTING

Prepared for the Students

of the

NORMAN MANLEY LAW SCHOOL

PART I

THE MORE USUAL ELEMENTS OF AN ACT OF PARLIAMENT (THE BAHAMAS,
BARBADOS BELIZE AND JAMAICA)

The following are the most important elements in an Act of Parliament:

The number and year of the Act (excluded where the Act becomes part of the Revised Laws)

The long title (excluded where the Act becomes part of the Revised Laws in some jurisdictions)

The date on which the Act comes into force

The preamble (rarely used)

The enacting words (excluded where the Act becomes part of the Revised Laws)

The short title

The interpretation section (when used)

Sections, subsections and paragraphs etc.

Parts and divisions

Headings

Transitional and Savings provisions

Enabling provisions

Marginal Notes

Schedules

1. LONG TITLE

At first Acts of the English Parliament had no titles and according to Gifford the first time that an Act of Parliament was given a title was about 1495.

Today in the United Kingdom, as in Belize, the Bahamas, Barbados and Jamaica, the long title is an indispensable part of a Bill or an Act and is regarded as part of the Act and thus may be referred to as an aid in construction.¹

Unlike the situation in the United Kingdom, however, where the long title must accurately define the scope of the Bill usually with some broad general words capable of embracing a wide range of provisions related to the main purpose of the Bill, in our jurisdictions it need not be as detailed and can be much shorter and more general. Nevertheless the draftsman must ensure that the long title covers all the principal purposes of the Act.

2. COMMENCEMENT

The date on which an Act comes into operation is usually printed in brackets and is usually found immediately before the enacting formula except where the Act contains a preamble in which case it is found immediately before the preamble.

Where no specific provision is inserted in the Act, the date on which it comes into operation will depend on the provisions of the relevant Interpretation Acts - see for example Section 15 Interpretation Act (Jamaica), or other legislation covering this matter.² Often this date will be either the date of assent by the Governor-General, or the date appointed by the Minister and

¹ G.C. THORTON: "Legislative Drafting" pp. 134-137

² R.M.M. KING: "Manual on Legislative Drafting" p.14

published by notice in the Gazette.

N.B. Provisions may be made for different parts of an Act to have different commencement dates.

3. THE PREAMBLE

The preamble like the long title is a part of an Act and may be used as an aid to construction.³ The traditional function of a preamble is to explain the object of an Act or to explain the reasons why its enactment is considered desirable.

Today, however, preambles are rarely used and much of the information that was once placed in a preamble is now placed in the explanatory notes annexed to a Bill on its publication. Where preambles are used it is generally in Acts dealing with constitutional matters or the application of international conventions.

4. THE ENACTING WORDS

Unlike modern acts of the British Parliament, all Bahamian, Barbadian, Belizean and Jamaican Acts contain enacting words, and these are to be found immediately below the commencement date. The usual enacting words used in Jamaica as required by section 61 of the Constitution are:

"BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and house of Representatives of Jamaica and by the authority of the same, as follows:-

³ THORTON: "Legislative Drafting" pp. 137-141

Section 61 of the Constitution of Jamaica also provides for special enacting words in specific circumstances.

As is obvious, the enacting words do not affect the meaning of the act in any way, though they may affect its validity.

5. THE SHORT TITLE

As its name indicates the short title is normally and should in fact always be brief; e.g.

"This Act may be cited as the
Council of Legal Education Act, 1974."

The practice in the Bahamas, Barbados, Belize and Jamaica is for short title to be placed in the first section of the Act. However the practice in the United Kingdom is to place the short title at the end of the Act.

The short title, Though theoretically not necessary, is certainly a convenience. Care should be taken however, that a short title is no longer than the long title.

It is quite common to find the short title being merged either with provisions for commencement or with provisions of construction: in the case of the latter usually where the Act is an amending Act.

JAMAICA

NO. 8 - 1973

I assent,

H.G.H. Duffus
Governor-General (Acting)

26th of March, 1973:

AN ACT for the Incorporation of the Rainbow Healing

Temple and the vesting of a property in the Body so incorporated.

(26th March, 1973)

WHEREAS the persons hereinafter named and other persons inhabitants of this Island have been associated together under the name of the Rainbow Healing Temple for the teaching and spread of the Gospel as taught by them.

AND WHEREAS it is desirable and expedient that this should be a Corporate Body in which may be vested the real and personal property hereafter to be acquired in Jamaica for and on behalf of the church and that such Corporate Body shall have the power to acquire hold deal with mortgage and dispose of the said real and personal property in this Island for the purpose of the Rainbow Healing Temple.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and House of Representatives of Jamaica and by the Authority of the same as follows:-

- | | |
|----------------|---|
| Short Title | 1 - This Act may be cited as the Rainbow Healing Temple (Incorporated and Vesting) Act, 1973. |
| Interpretation | 2 - In this Act unless the context otherwise |
| | "The Church" means the persons for the time being associated in Jamaica under the name of the Rainbow Healing Temple. |

"The Corporation" means the Body Incorporated by this Act.

X X X X X X X X

THE BAHAMAS

No. 9 Land Surveyors Act, 1975 1975

No. 9 of 1975.

An Act to provide for the Registration of land Surveyors, The Regulation and Control of Land Surveys; and for related purposes.

(Assented to 7th May, 1975)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of the commonwealth of the Bahamas, and by the authority of the same, as follows:-

PART I

Preliminary

Short title
and commencement

1. This Act may be cited as the Land Surveyors Act, 1975, and shall come into operation on such date as the Minister may appoint by notice published in the Gazette.

Interpretation

2. (1) In this Act, unless the context otherwise requires -

"Association" means the Bahamas Association of Land Surveyors established by section 8;

"Board" means the Land Surveyors' Board established by section 4;

X X X X X X X X

BELIZE

No. 22 of 1990

I assent,

(GEORGE N. BROWN)
Deputy Governor-General

12th November, 1990.

AN ACT to make new provisions with respect to dangerous or otherwise harmful drugs; to provide for the forfeiture of the proceeds of drug trafficking; to repeal the Dangerous Drugs Act, Chapter 87 of the Laws of Belize, 1990, and for matters connected therewith or incidental thereto.

(Gazetted 12th November, 1990.)

BE IT ENACTED, by and with the advice and consent of the House of Representatives and the Senate of Belize and by the authority of the same, as follows:-

PART IPRELIMINARY

1.--(1) This Act may be cited as the

Short title and
commencementMISUSE OF DRUGS ACT, 1990

(2) This Act shall come into force on such date as the Minister may, by order published in the Gazette, appoint.

Interpretation

2.--(1) In this Act, unless the context otherwise requires --

- (a) "the Council means the National Drug Abuse Control Council established under this Act;
- (b) "analyst" means the government analytical chemist, or any other person appointed as such for the purposes of this Act by the Minister by notice published in the Gazette;

BARBADOS

I assent
R. NITA BARROW
Governor-General
31st January, 1992.

1992-3

An Act to revise and reform the law relating to
sexual crimes.

(13th February, 1992) Commencement

ENACTED by the Parliament of Barbados as follows

1. This Act may be cited as the sexual short title
Offences Act, 1992

2. In this Act Interpretation
"Spouse" means a lawful husband or wife
as the case may be

MANUAL ON

LEGISLATIVE DRAFTING

PART II

7. DIVISIONS OF AN ACT

Enactments in Acts of Parliament may be divided into SECTIONS, SUBSECTIONS, PARAGRAPHS, SUB-PARAGRAPHS and further subdivisions if found necessary.

(1) Parts

(a) Parts are numbered by capital Roman numerals, e.g. Part I, Part VIII etc. (See for example the Companies Act.)

(b) It is usual to assign a heading to each Part.

(c) Care should be taken to ensure that where definitions are used within a Part that they are confined to that Part and likewise when they are intended to operate with respect to the whole Act that they are not confined to one Part.

(2) Sections and Subsections

(a) Sections are numbered by Arabic numerals- 1,2,3, etc. and subsections by Arabic numerals in - (1), (2), (3), etc.

(b) It is perhaps too restrictive to say that a section or subsection should never have more than one sentence. However as a general rule of thumb sections or subsections when confined to a single sentence allow for greater precision.

(c) As far as possible sections and subsections should be self-contained. Words like "such" and "said" should not be used to refer to something outside the section or subsection.

(3) Paragraphs & Subparagraphs¹

(a) Paragraphs are indicated by small letters in parentheses - (a), (b), (c) - and subparagraphs by small Roman numerals in parentheses - (i), (ii), (iii).

(b) Sections and subsections are treated alike when paragraphs or subparagraphs are used.

(c) A paragraph or subparagraph is always a part of a sentence and never a whole sentence.

(d) Paragraphs and subparagraphs should never be used without general words preceding the paragraphs or subparagraphs.

incorrect: 3. (a) Every person who,, and
(b) every person who,
is guilty of an offence

correct: 3. Every person who
(a)
(b)
is guilty of an offence
or

¹ DRIEDGER: "Legislative Drafting".

3. Every person is guilty of an offence who

(a)

(b)

(e) The conjunction and or or should be added at the end of the penultimate paragraph or subparagraph.

(f) It does not follow that a section can be improved merely by dividing it into paragraphs and subparagraphs. Difficulties may arise in the following situations:

(i) Where the case contains two or more elements and an attempt is made to eliminate repetition of a word or phrase common to all such elements.

(ii) Where two or more distinct enactments are contained in one sentence, each following a different case or applicable to different subjects, and an attempt is made to eliminate repetition of a word or phrase common to the cases or subjects.

(iii) Where an attempt is made to avoid repetition of an adjectival expression used in different positions.

The following are a few examples of the incorrect use of paragraphs:

1. Where a person

(a) who has been assessed for the tax imposed,

(b) and to whom a notice has been sent as required

by this Act fails to pay the tax within the time specified in
the notice, the collector may

In this example the case contains two elements, and there is repetition of the words "by this Act". The section must be read twice before the paragraphs can be understood and there is doubt whether the words "by this Act" apply to both paragraphs.

It could be written

Where a person

(a) who has been assessed for the tax imposed by this
Act, and

(b) to whom a notice has been sent as required by this
Act

fails to pay

2. Where the net value of the estate

(a) does not exceed two thousand dollars the
estate shall go to the widow, and

(b) exceeds two thousand dollars the widow is
entitled to two thousand dollars and one-half
the remainder.

In this example two separate enactments are merged in a single

sentence, each following a different case. The one case is "Where the net value of the estate does not exceed two thousand dollars" and the other case is "Where the net value of the estate exceeds two thousand dollars". The words "Where the net value of the estate" are common to both, and in the foregoing example an attempt is made to eliminate repetition. The reader cannot grasp the meaning of paragraph (b) without going back and re-reading the opening words.

This type of section does not lend itself to division into paragraphs and should be written -

Where the net value of the estate does not exceed two thousand dollars the estate shall go to the widow, and where the net value of the estate exceeds (or, where it exceeds) two thousand dollars and one-half the remainder.

In some cases, repetition can be avoided by stating a series of rules, as follows:

The estate shall be distributed according to the net value thereof as follows:

- (a) where it does not exceed two thousand dollars the estate shall go to the widow,
- (b) where it exceeds two thousand dollars...etc

8. MARGINAL NOTES

(1) The purpose of marginal notes is to show the general framework of the Act and to assist the reader in finding the particular provisions in which he is interested. Marginal notes do not form part of the statute although they are sometimes called upon as an aid in the interpretation of the statute.

(2) Sections in statutes must have marginal notes. In Regulations they are also generally used for regulations. In the case of subsections of Acts they are sometimes used.

(3) A statement of the content of a section should be written in the margin and not in the body of the section. An example of the correct way is as follows:

Power to 11. A personal representatives is not bound to
postpone distribute the estate of the deceased before the
distribu- expiration of one year from the death.
tion

(4) A marginal note should not be a summary of the section but should merely point to the subject matter thereof as in (3).

9. HEADINGS

(1) Headings and sub-headings interspersed throughout an Act and particularly in a long Act is of great assistance to the reader. For example, the Companies Act (of Jamaica) has sixteen headings and sixty-nine sub-headings. These contribute greatly to

making the Act more comprehensible.

(2) Headings are regarded as part of the Act. They should therefore be carefully prepared by the draftsman and their language should be consistent with the language of the Act.

(3) Headings should be grammatically independent of the text of the Act. So too the text of the Statute should be complete without reference to the headings.

(10). NOMENCLATURE OF SUBDIVISIONS IN
REGULATIONS, ORDERS AND NOTICES

(1) For Regulations the order is

regulation

paragraph

subparagraph

(2) For Orders and Notices it is

clause

sub-clause

paragraph

sub-paragraph

11. REFERENCE TO SUBDIVISIONS IN ACTS

(1) It was recently decided by the Chief Parliamentary Counsel (Ja) that except in certain circumstances references shall no longer be expressed in the long form.

Example: Sub-paragraph (1) of paragraph (a) of

subsection (1) of section 7.

but rather shall be compounded thus:

section 7(1)(a)(i)

The exceptional circumstances however are:

- (a) where reference is being made in an amending Bill to the subsection or other division of a section which is being amended:

Example: "Subsection (1) of section 13 of the principal Act is hereby amended by deleting from paragraph (e) '

- (b) Where there is need to refer back to a division previously mentioned in the same subdivision:

Example: "In considering an application made pursuant to paragraph (a) of subsection (2) of section (3), the Minister shall have regard to all the matters specified in that paragraph."

- (c) Where reference is being made to a division of a proviso:

Example ".... so, however, that notwithstanding anything to the contrary in paragraph (b) of the proviso to subsection (1)...."

PART III

BASIC DRAFTING GUIDELINES

A draftsman should always endeavour to draft legislation in simple English. He should also avoid long words and wherever possible, long sentences. I say 'wherever possible' because there are circumstances in which a matter may have to be set out at length to avoid obscurity or ambiguity.

In the same vein, a draftsman should not use more words than are necessary to make the meaning of the Act clear. For example:

'Any person who contravenes, violates or fails to comply with the provisions of section 2 is guilty of an offence.....'

could be written -

'Any person who violates section 2 is guilty of an offence.....'

There are circumstances, however, usually when dealing with matters of a technical nature, where technical expressions may have to be used. For example, legislation relating to land registration.

Coode in his Report on Legislative Expression, or The Language of the Written Law at page 58 said that 'That is apparently a notion amongst amateurs that legislative language must be intricate and barbarous' and that 'if it could be made to be generally recognized that the essentials of every law are simple, and that their direct expression is the perfection of law writing, the greatest defects of our statute law would cease.'

Piesse put it another way when he said: 'It is a rule of good writing never to raise even a momentary flicker of doubt in the reader's mind that may disturb him from taking in the easily intended meaning' (E.L. Piesse "Elements of Drafting".)

1. SENSIBLE SCHEME

A chaotic order produces chaotic thought. Frequently a judge is called upon to do mental gymnastics and spring from the front of the document to the back and from the back to the middle¹. Such a situation is obviously most unsatisfactory and will clearly lead to uncertain law. What is needed once the draftsman is satisfied that he understands the instructions is a theme of arrangement capable of being readily discerned.

2. INTERNAL CONSISTENCY

The matter of internal consistency cannot be over-emphasized. One of the best ways to ensure that a legal document, whether it is a statute or not, will be unclear and imprecise is to be inconsistent in the use of language. For example, if in one clause the draftsman uses the word 'motor car' and in another 'motor vehicle' the reasonable reader would correctly assume that he meant two different things. If, however, he had meant only motor car then he should use these words consistently throughout.

Reliance on the same meaning of a term speeds the understanding of the context. The draftsman should therefore try for mathematical consistency for the same terms, expressions and number patterns to the nth degree.²

1. R.C. DICK, "Legal Drafting" p.25
2. R.C. DICK, p.26

3. AVOID AMBIGUITY

Dick has divided his discussion on ambiguity into three basic types:

- (1) Contextual Ambiguity
- (2) Semantic Ambiguity
- (3) Syntactic Ambiguity

(1) Contextual Ambiguity

A good example of contextual ambiguity arises in a document or a statute where a pronoun is used in a situation in which there are two or more persons referred to and so it is unclear as to which person the pronoun refers to. For example -

'In the event of the purchaser giving notice to the vendor of his intention to purchase the property, he shall thereupon deliver to the Registrar all documents relating to the property which are in his possession.'

In this example the he may relate either to the vendor or the purchaser. To remove the ambiguity the intended antecedent should be repeated. (Piessie).

(2) Semantic Ambiguity

This type of ambiguity often arises in the use of words that have multiple meanings in the use of passive past participles, the improper use of mood and the use of proviso. Discussion on the correct use of mood and on the proviso are dealt with separately in this Part of the Manual.

Because so many words in the English language have multiple meanings, the draftsman must always be on his guard to ensure that the meaning he intends is the only meaning that it will be given. Sometimes the context may resolve the ambiguity but not always. For example, the phrase "usual place of abode" could mean "residence" or "domicile".

Dick gives an extreme example of misinterpretation of a multiple meaning word where in a case involving a doctor charged with procuring an abortion his defence was that he was protected by the Statute of Frauds where it was said inter alia that no one should be held liable for the debt, default or miscarriage of another in the absence of a memorandum in writing.³

The ambiguity that can arise with the use of passive past participles is also of great concern to the draftsman. For example, in the sentence -

"Each person who was divorced on January
1st, 1970"

is open to two interpretations. One interpretation is that "divorced" is the passive past participle and that the verb "was" is part of the verb "to be", thus the provision would apply to all persons already divorced on January 1st. The alternative interpretation is that the verb is "was divorced" and thus would refer to persons who obtained their decree absolutely on that day.

3 R.C. DICK, p. 64

(3) Syntactic Ambiguity

This type of ambiguity usually arises from uncertainties of reference or careless use of modifiers.

(a) Misplaced modifier.

This is a well-known and easily identifiable error in sentence structure. A sentence like "Dorine saw the Mayor driving down the street" should be rewritten to read either "Dorine, while driving down the street, saw the Mayor" or "Dorine saw the Mayor, who was driving down the street", whichever of the two meanings is intended.

Frequently the context will resolve the ambiguity, but it does little credit to the draftsman, as in: "He looked at Grouse Mountain sitting in his office."

(b) Series

When the following type of structure is used it is often not possible to ascertain whether one or all items in the series are modified by the antecedent or subsequent modifier: "machinery, circuits and switches deftly concealed."

The use of a series of modifiers can produce ambiguity in the way in which the object is modified, such as: "orange, white and blue flowers". Is there a bouquet of single-hued flowers or is each flower multiple-colored? The problem may be resolved by context, as in "black and white television"

Problems of interpretation are compounded when both structural errors occur simultaneously. Such compound errors are frequently drafted into wills and trust instruments and consequently require court interpretation. For instance, the expression, "each scientific or educational body or foundation" gives rise to numerous interpretations such as:

Each,

- (1) foundation;
- (2) scientific body;
- (3) educational body;
- (4) body that is both scientific and educational;
- (5) scientific foundation;
- (6) educational foundation;
- (7) foundation that is both scientific and educational.

These alternative interpretations may be extremely important for tax purposes and may cause the estate to be taxed at an excessive rate if the draftsman is not alert enough. A structural device, paragraph sculpture, more fully dealt with in rule 14, can be used to resolve the ambiguity in the above example.

Each,

- (1) scientific body;
- (2) educational body, or
- (3) foundation

or

Each scientific and educational

- (1) body, or
- (2) foundation

(c) Sphere of influence of modifiers

Sometimes it is difficult to know whether a certain word is part of the modifier or part of the thing that is modified; the phrase "a clear water container", could potentially mean either a container for clear water or a water container that is clear. Similarly, "a racing car driving" could mean a car driver who is racing or a driver of a racing car. The draftsman should carefully delimit the influence of the modifiers in the document.

(d) Prepositional ambiguity

Prepositional ambiguity commonly occurs where there are two successive prepositional phrases. The expression "each subscriber to a newspaper in Medicine Hat" should be rephrased "Each newspaper subscriber who is in Medicine Hat" (if that is meant), or if the other possibility is intended, "Each subscriber to a newspaper published in Medicine Hat".

Ambiguity may result because a prepositional phrase may be used to modify a noun or a verb. In the sentence, "No person may assault a player on a golf course". the phrase "on a golf course" could modify either of the nouns "person" and "player", or it could modify the very "assault".

(e) Ambiguities surrounding participles and gerunds

A participle is an adjective formed from a verb and a gerund is a noun formed from a verb. However, one may mask as the other. This occurs in the following:

'The statute encourages the lawyer who formulates new documents.'

If we take it that "formulating" is a gerund, then this means:

'The statute encourages the formulation of new documents by lawyer.'

There is another type of participial ambiguity that can cause difficulty as in:

"Every person being over 50 years of age and having been unemployed for more than six months, is entitled to free dental care.'

This can be possibly construed as:

Every person being over 50 years of age and every person having been unemployed for more than six months, is entitled to free dental care.

Either ground alone will qualify the person for free dental care. To avoid this, re-phrase as follows:

Every person who is over 50 years of age and has been unemployed for more than six months, is entitled to free dental care.

or

Every person who is both over 50 years of age and has been unemployed for more than six months, is entitled to free dental care.

4. ELLIPSIS

While it may sometimes be difficult to avoid elliptical expressions in drafting legislation, ellipses should be kept down to a minimum. "A draftsman who relies on absent words to convey his meaning is inviting ambiguity"⁵. For example, verbs are often omitted in

ordinary writing but should be written into legislation.

a person concerned (elliptical)

a person who is concerned (complete)

⁵ E. DRIEDGER: "Legislative Drafting"
27. C.B.R. 291

5. VOICE

The active voice is generally to be preferred to the passive as use of the latter sometimes creates doubt. For example -

'the fine shall be collected' (passive)

Here it is not clear who is to collect the fine, in contrast to -

'the Clerk of Courts shall collect the fine' (active)

6. MOOD

"The imperative should only be used where a command is/being given to a person to do something. If no person is mentioned, or if, although mentioned, the person is not commanded, the imperative form should not be used.

incorrectcorrect

"Minister" shall mean "Minister" means

the contract shall be void the contract is void

he shall entitled he is entitled "6

7. TENSE

Today there is a general convention that a statute is always speaking and therefore the correct tense to use is the present and not the future tense, unless, of course, the future tense is being used in a truly future sense.

⁶ E.A. DRIEDGER: P. 10

incorrectcorrect

if any person shall give notice

if any person gives notice

if any person shall walk on the

if any person walks on the grass

grass

8. DEFINITIONS

1. Definitions should be used sparingly. For example, if a definition merely repeats the dictionary meaning of a word, it should not be defined. "Before he defines a word, the draftsman should carefully consider whether he is in reality adding something to or subtracting something from the ordinary meaning of the word."¹

2. Definitions should not be too artificial. For example -

"motor car" includes bicycle

A better definition would be -

"vehicle" include bicycle

3. Where the natural or ordinary meaning of a word is to be enlarged INCLUDES is the correct word. For example -

"house" includes a shed.

4. Where the meaning of a word is to be confined or restricted MEANS is the correct word. For example -

"animal" means dog

<u>incorrect</u>	<u>correct</u>
if any person shall give notice	if any person gives notice
if any person shall walk on the grass	if any person walks on the grass

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4. Where the meaning of a word is to be confined or restricted MEANS is the correct word. For example -

"animal" means dog

5. "A word never MEANS and INCLUDES since the former is restricting and the latter enlarging."⁸

⁷ E.A. DRIEDGER P. 307

⁸ E.A. DRIEDGER P. 308

6. It is a basic principle of good drafting that the draftsman ought not to begin a draft with the intention that he must use definitions. Rather, it is only after the draft is complete he should consider whether definitions are necessary or not.

7. A draftsman should avoid inserting substantive provisions in definition sections. "A definition section is merely a glossary of terms or a special little dictionary and should not contain substantive matters of law. The insertion of substantive matter in a definition clutters up the definition and makes the law hard to find."⁹

A good example of the problems created by placing a substantive provision in a definition section recently arose in the hearing of the habeas corpus application by persons detained under the State of Emergency Proclamation 1976.

Section 26(4) of the Jamaica Constitution states the following:

- "(4) In this Chapter "period of public emergency" means any period during which
- (a).....
- (b) there is in force a Proclamation by the Governor General declaring that a state public emergency exists;"

⁹ E.A. DRIEDGER: p.308

This provision was severely criticized because the power given to the Governor-General to declare a state of emergency is a part of the definition of "period of public emergency".

9. PUNCTUATION

Punctuation is often a source of ambiguity. Punctuation ought therefore to be used sparingly and with great care and should not be used to convey a meaning. For example -

"The teacher says the inspector is a fool".

"The teacher, says the inspector, is a fool".

"Where the draftsman has to rely on a comma to convey his meaning it is usually an indication that the enactment requires re-drafting."¹⁰

10. WORDS & EXPRESSIONS

(1) While there is generally no absolute rule as to words or expressions that should not be used the following words and expressions should rarely if ever be used in modern drafting either because they are archaic or often ambiguous -

preceding, last preceding

following, next following

abovementioned, aforementioned, before mentioned,

undermentioned

foregoing

herein, hereinbefore, hereinafter

¹⁰ E. A. DRIEDGER: P. 308

heretofore, hereafter

whatsoever, whatever, wheresoever, whosoever
 already
 thenceforth
 thereunto, thereunto appertaining
 therewith
 "It shall be lawful"
 "It is the duty"

(2) Words to be used with great care: Some writers on legal drafting have taken a rather dogmatic approach to the use or non use of the following words:

such
 said, aforesaid
 same
 any

Such

Most lawyers use such to point to a particular person or object already referred to. In many instances such can be replaced by "the", "those", "it" or "them". For example:

Original

"If in respect of the licence granted by this deed for the use of the letters patent above mentioned an additional royalty becomes payable in consequence of the communication by the licensor to the licensee of any improvements in any of the inventions protected by such letters patent, or if such additional royalty becomes payable in consequence of the discovery by the licensee of any improvements in any such invention, such additional royalty shall be paid in respect of such improvements are communicated or discovered as the owners of such letters patent by notice in writing to the licensee may specify."

"Whenever in respect of the licence granted by this deed for the use of the letters patent an additional royalty becomes payable in consequence of -

(a) the communication by the licensor to the licensee of any improvements in any of the inventions protected by the letters patent, or

Revised: (b) the discovery by the licensee of any improvements in any of those inventions,

then the additional royalty shall be paid in respect only of such of those inventions as the owners of the letters patent specify by notice in writing to the licensee."

In addition, "The repetitious use of such tends to make documents sound very stuffy"¹¹ in circumstances where, as we have seen from the above example above, it can easily avoided.

Said, Aforesaid .

The repeated use of these words in legal documents makes the documents "sound terribly heavy and oppressive both to lawyers and laymen."¹² As in the case of such the definite article should be used.

Same

In most circumstances this word can be replaced by "it", "he" "she", "him", "her" or other suitable references. For example:

"I give my house on Great George Street
Sav-la-Mar to my Trustees upon trust to
sell the same..."

¹¹ R.C. DICK: p.137

¹² R.C. DICK, p.138

This should be drafted as:

"I give my house on Great George Street
Sav-la-Mar to my Trustees upon trust to
sell it."

But there are instances in which same is not used in place of a familiar pronoun but is merely a legal superfluity:

".... but the landlord shall use all reasonable diligence to remedy the condition, failure or any interruption of service when not directly or indirectly attributable to the tenant, after notice of same, when it is within his power and obligation to do so."

Any

Dreidger has described any as a tiresome word in legislation for it is very often used when a simple "a" or "an" would be better.

Thornton at page 77 demonstrates both the correct and the superfluous use of this word -

"Any appointed member may be removed at any
time from office by the Governor-General."

The first any could correctly be replaced by "an". The second "any" however, should remain because it is being used to indicate universal application.

11. THE PROVISIO

All modern writers on drafting have been very scathing in their attack on the use of the proviso in legislation. It has been criticized not only for being archaic but also because it often leads to ambiguity. In fact, as far back as 1845 Coode described it as the "bane of good drafting."

The criticisms levelled against the use of the proviso are extensively discussed in all the leading texts on drafting.¹³ It is not intended therefore that these criticisms should be repeated in this manual. Rather your attention is drawn to the case of WEST BANK ESTATES LTD. v. ALEXANDER PHILLIPS (1969) 14 W.I.R. 308. One of the issues that arose in that case was the question whether the proviso in section 8(1)(c) modified the provisions of subparagraphs (i) and (ii) or only that of (ii).

"Section 8(1)(c) of the Workmen's Compensation Ordinance, Cap.III(G) provides as follows:

"Subject to the provisions of this Ordinance, the amount of compensation shall be as follows, namely:

.....
(c) where permanent partial incapacity results from the injury:

13 DREIDGER, p.309
THORNTON, p.61
DICK, p. 90
DICKERSON

(i) in the case of an injury specified in the schedule such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(ii) in the case of an injury not specified in the schedule, such percentage of the compensation payable in the case of permanent total incapacity as its proportionate to the loss of earning capacity permanently caused by injury;

Provided that such compensation may be increased having regard to the nature of the injury sustained in relation to his type of work and other circumstances."

The Court held that the proviso was a proviso to subparagraph (ii) only and gave extensive reasons why they so held. From a drafting point of view however, had the draftsman specifically made an exception to subparagraph (ii) no problem of interpretation would have arisen.