Modernising the Public Administration

The Legislative Drafting Manuals of the Palestinian Authority

ASSESSMENT REPORT

OECD

Summary

This report provides an assessment of the legislative drafting manuals which are currently being revised in the Palestinian Authority. Based on international good practice examples, this assessment report identifies options to improve the existing two manuals, for primary and secondary legislation. A combined and improved manual will:

- promote coherent and consistent legislative drafting techniques across legal departments that adhere to international standards
- improve the quality of legislation
- support clear laws for citizens and businesses

The assessment analyses the structure of the manual, its content, status and gives a series of recommendations for improvements. It presents methods to enhance the value of the manual and reinforce its successful implementation. It also asks the question of the relevance of Interpretation Acts in the PA's legislation.

Impact

- **Improved co-ordination** between key stakeholders in charge of revising the Manual which will allow for harmonised actions undertaken by different institutions
- **Increased awareness** of the Manual among users in different legal departments
- **Standardised** and **consistent drafting techniques** in the PA
- **Improved quality** of legislation
- **Better understanding** of laws and regulations

Relevance

The report has direct relevance for the following national and sectoral policies:

- Ministry of Planning, Palestinian Reform and Development Plan 2008-10;
- The Justice and Rule of Law National Strategy 2011-13;
- PA, First year programme of the 13th Government of the Palestinian Authority: "Ending the Occupation, Establishing the State, 2009;
- PA, Second year programme of the 13th Government of the Palestinian Authority: "Homestretch to Freedom", 2010.
- Palestinian Reform and Development Plan, 2008-10;
- Council of Ministers Decision 01/86/12/M.W/S.F/ of 2008 ratification of the Government's legislative plan of 2009.

Foreword

The Assessment of the Legislative Drafting Manuals was conducted within the first phase of the MENA-OECD Initiative to Support the Palestinian Authority (PA). The PA is in the process of revising its legislative drafting manual and secondary legislative drafting manual. Based on international good practice examples, the assessment report identifies options to improve the existing two manuals. A combined and improved Manual can foster coherent and consistent legislative drafting techniques across legal departments in the public administration of the PA that adhere to international standards.

The Manual is addressed to Palestinian officials in charge of legal drafting and regulatory policy. It addresses: preparation of drafting instructions and plans for drafting legislation; the structure and elements of a law; the principles of drafting style' drafting of specific provisions, such as amendments and penal provisions; and reviews of the completed draft. Advice on the preparation of notes on the draft published with the draft law is also included.

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Table of Contents

Preface

Since its establishment in 1994, the Palestinian Authority (PA) has adopted a reformist approach for its legislative process. The PA was not constituted in a legal vacuum, but inherited an extremely complicated legal environment that comprised a mixture of historical legacies associated with several political regimes.[1] A significant legislative effort was necessary to reform the PA's legal system.

The complexity of the legal system in the PA poses major challenges to the effectiveness of its legislation, meaning that many of its provisions may not fully achieve the respective policy objectives. This is partially the result of the deficiencies in the preparation and drafting of legislation. Poorly drafted legislation reduces legal certainty and security, which are essential preconditions for advancing economic reform and improving the living conditions of the Palestinian people. Inefficient rules may not achieve their objectives, or may achieve them expensively, or may lead to expensive litigation to resolve textual ambiguities. Furthermore, the unsuccessful implementation of legislation reduces citizens' acceptance of government, or could even have a negative impact on their lives. Unsatisfactory implementation of new legal norms may also disorient the people, the courts and the public administration and thus undermine the rule of law.

Law drafting techniques and procedures play an important role in ensuring success of legal reform. This has been recognised in recent national strategies, *i.e.*, the Palestinian National Plan, the Government's Legislative Plan and the Justice and Rule of Law National Strategy.

High-quality legislation is part of sound regulatory policy, which can contribute to economic development and societal well-being. Reliable regulatory frameworks are a precondition for economic growth and security for businesses and citizens. In the context of the economic and financial crisis, regulatory reform has an even more important role to play; there is strong evidence that regulatory reform leads to enhanced long-term productivity and resilience, contributing to sustainable growth. Principles of good regulation can also help governments to balance the roles of the state and of markets in the current climate (OECD, 2010a).

The OECD Checklist (OECD, 1995) for regulatory decision making provides guidance to improve regulatory quality, based on principles of good regulation (see Box 1). The checklist includes important questions to be answered when drafting laws. Question number 8 explicitly refers to the important role of clear, consistent, comprehensive and accessible regulation.

Box 1. The 1995 OECD Reference Checklist for Regulatory Decision-Making

1. Is the problem correctly defined?

The problem to be solved should be precisely stated, giving evidence of its nature and magnitude, and explaining why it has arisen (identifying the incentives of affected entities).

2. Is government action justified?

Government intervention should be based on explicit evidence that government action is justified, given the nature of the problem, the likely benefits and costs of action (based on a realistic assessment of government effectiveness), and alternative mechanisms for addressing the problem.

3. Is regulation the best form of government action?

Regulators should carry out, early in the regulatory process, an informed comparison of a variety of regulatory and non-regulatory policy instruments, considering relevant issues such as costs, benefits, distributional effects and administrative requirements.

4. Is there a legal basis for regulation?

Regulatory processes should be structured so that all regulatory decisions rigorously respect the "rule of law"; that is, responsibility should be explicit for ensuring that all regulations are authorised by higher-level regulations and consistent with treaty obligations, and comply with relevant legal principles such as certainty, proportionality and applicable procedural requirements.

5. What is the appropriate level (or levels) of government for this action?

Regulators should choose the most appropriate level of government to take action, or if multiple levels are involved, should design effective systems of co-ordination between levels of government.

6. Do the benefits of regulation justify the costs?

Regulators should estimate the total expected costs and benefits of each regulatory proposal and of feasible alternatives, and should make the estimates available in accessible format to decision-makers. The costs of government action should be justified by its benefits before action is taken.

7. Is the distribution of effects across society transparent?

To the extent that distributive and equity values are affected by government intervention, regulators should make transparent the distribution of regulatory costs and benefits across social groups.

8. Is the regulation clear, consistent, comprehensible and accessible to users?

Regulators should assess whether rules will be understood by likely users, and to that end should take steps to ensure that the text and structure of rules are as clear as possible.

9. Have all interested parties had the opportunity to present their views?

Regulations should be developed in an open and transparent fashion, with appropriate procedures for effective and timely input from interested parties such as affected businesses and trade unions, other interest groups, or other levels of government.

10. How will compliance be achieved?

Regulators should assess the incentives and institutions through which the regulation will take effect, and should design responsive implementation strategies that make the best use of them.

Consistent with the fundamental provisions of the OECD's *1995 Recommendation on Improving the Quality of Government Regulation*, the 1997 *Policy Recommendations on Regulatory Reform* and the 2005 *Guiding Principles for Regulatory Quality and Performance*,[2] the Regional Charter for Regulatory Quality was endorsed by MENA and OECD countries during the Ministerial Conference in Marrakesh in November 2009. The Charter provides guidance to help policy makers in MENA countries translate principles of good regulations into practice. Improving law drafting capacities is at the core of the Regional Charter and one of the central recommendations of the recent OECD Better Regulation in Europe[3] project. Sound regulatory systems and high-quality legal drafting processes make a critical contribution to support economic and social welfare prospects, underpinning growth and strengthening the Rule of Law.

Law drafting manuals help to ensure coherent and consistent legislative drafting techniques. This assessment report provides recommendations for an improved manual that meets international standards and that can be used across legal departments in the public administration of the PA.

Notes

1. For a comprehensive account of the legal framework in the Palestinian Authority, see OECD, 2010b and the OECD "Practitioners' Guide for Regulatory Consultation in the Rule-Making Process", produced within the context of the MENA-OECD Initiative to Support the Palestinian Authority.

2. The principles include policy coherence and multi-level co-ordination, *ex ante* assessment of policy proposals, competition policy for network utilities that meet public needs, market openness, risk awareness and implementation. This agenda calls for a cross-sectoral, proactive approach to make regulations both more responsive and more standardised.

3. The project, carried out by the OECD in partnership with the European Commission, assesses capacities for effective regulatory management across the EU. It is based on individual reviews of 15 member states, covering half the OECD membership. The concluding synthesis report highlights key conclusions and maps out a path for effective regulation in support of key public policy goals.

Introduction

1.1 This report seeks to assess two legislative drafting manuals prepared in the Palestinian Authority in the context of international good practice, and to make recommendations for both revising their content and making them operationally effective.

1.2 The first manual, which is mainly concerned with the drafting of primary legislation, was published in 2000; the second, published in 2004, deals with the policy development and drafting of secondary legislation. There is naturally some overlap between the two, but as the focus of the two manuals – and also, apparently, the process of their preparation – are distinct, it is appropriate to treat them separately in the report.

1.3 The manuals must also be considered against the complex and changing political, domestic legal and administrative context of the Palestinian Authority, and of its developing legislative drafting capacities. An account of this context is beyond the scope of this report, but can be found in Chapter 5 of the *MENA-OECD Progress Report* (2010b) and the *Practitioners' Guide on Regulatory Consultation in the Rule-Making Process in the Palestinian Authority*, produced within the context of the MENA-OECD Initiative to Support the Palestinian Authority.

1.4 The report considers the manuals in an English translation prepared by OECD. However competent the translation, there is always the possibility that some nuances are lost. It should therefore be recognised that some aspects of the assessment might be based on such information.

Legislative Drafting Manual

2.1 This manual was developed by a Legislative Assistance Unit, established under a 1997 agreement between the Bureau of Legal Counsel and Legislation (*Diwan al-Fatwa wa' Tashri'*)[1] within the Ministry of Justice, and the Institute of Law of Birzeit University. The Unit commissioned research on aspects of legislative drafting from researchers in the Bureau and the Institute. This work was considered in a series of workshops in 1998, in which members of the Legal Department of the Palestinian Legislative Council also participated. From these activities, and with the assistance of two experts from Egypt and the United Kingdom, the Unit prepared the manual which was published in 2000.

2.2 The manual, which runs 114 pages, addresses: the preparation of drafting instructions and the plan for drafting legislation; the structure and elements of a law; the principles of drafting style; the drafting of specific provisions, such as amendments and penal provisions; and reviews of the completed draft. It also includes advice on the preparation of notes on the draft published with the draft law.

2.3 A significant and very valuable element of the manual is that it contains examples of drafting, some hypothetical, which should be followed and which should be avoided. Providing such examples greatly adds to the operational utility of a drafting manual.

2.4 Finally, it should be noted that although the manual was developed as a co-operative venture between an academic institution and an agency of the government – with the participation of the staff of the Legislative Council – it does not appear to have been formally adopted by the Legislative Council or to have achieved a mandatory institutional status.[2] As a matter of practicality, there are quite persuasive arguments against giving the contents of a drafting manual legislative status, although there should be a formal declaration that it be followed in drafting legislation.[3]

Secondary legislative drafting manual

3.1 This document appears to have been developed in a manner similar to that of the first manual; it was also the product of co-operation among the Institute of Law at Birzeit University, officials in the Bureau of Legal Counsel and Legislation (*Diwan al-Fatwa wa' Tashri'*) within the Ministry of Justice, legal consultants in various ministries,[4] and members of staff in the Legal Department of the Palestinian Legislative Council. It was again informed by the preparation of a series of research papers; and also, in this case, by focus groups of representatives of civil society organisations specifically organised for the purpose. In preparing the manual, the Institute had the benefit of a consultant from the Bureau of Legal Counsel and Legislation, and also of the practical experience of participating in the development and drafting of various pieces of secondary legislation. Nevertheless, the preamble to the manual seems to imply that, unlike the previous manual, responsibility for its preparation was essentially undertaken by the Institute of Law itself. The manual was published in 2004.

3.2 The manual is slightly shorter than the first,[5] and its focus and intended readership appears to be rather different than that of its predecessor.

The introduction and the first of the four substantive chapters ("Preliminary Chapter") contain a sustained critique of the shortcomings of the Amended Basic Law 2003[6] in its treatment of secondary legislation, and of language confusion in some contemporary primary legislation when referring to secondary legislation.

Second, the manual intentionally addresses both matters directly related to the drafting of secondary legislation and the procedure for preparing drafting instructions for such legislation ("the secondary legislation document"); the latter is considered in the first third of the final substantive chapter and encompasses cost/benefit analysis and, more generally, regulatory impact assessment.

Finally, the manual recognises that principles of drafting style are equally applicable to both primary and secondary legislation and refers to the first manual on this topic. However, there is inevitably other material in the manual which essentially replicates material in the earlier manual.

3.3 Like the earlier manual, this manual is enhanced by examples of drafting which could be followed and also of drafting which would be best avoided. And, again like its predecessor, it does not appear to have been formally adopted by the Legislative Council or to have achieved a mandatory institutional status.[7] However, as with the first manual, there are persuasive arguments against giving the contents of this manual legislative status, although there should be a formal declaration that it should be followed in drafting legislation.[8]

Notes

1. The Bureau was initially established by Presidential decree in 1995, with one of its functions being to prepare a formal draft of proposed and draft legislation from referred Government ministries, without altering the substance or purpose of the measures.
2. *Secondary Legislative Drafting Manual* (Palestinian Authority: 2004), *Preamble.*
3. This is a matter that may be complicated by Interpretive Law No. (9) of 1945 and the Law No. (4) of 1995, on the processes for preparing legislation.
4. It is not clear from the preamble to the manual whether the consultants were on the staff of the ministries or external consultants under contract, or both.
5. It runs 104 pages, of which 20 pages consist of a detailed account, by way of illustration, of the preparation and drafting of a specific piece of secondary legislation.
6. The Basic Law was further amended in 2005, but those amendments are not germane to this report. It is not known whether the shortcomings in the Basic Law related to secondary legislation identified in the manual are currently being addressed.
7. *Secondary Legislative Drafting Manual* (Palestinian Authority: 2004), *Preamble*.
8. And see FN. 3.

Legislative Drafting Manual (2000): Analysis[1]

Introductory chapter

4.1 The first substantive element of the chapter describes in rather general terms a hierarchy of legislation: (i) provisions of a constitution; (ii) primary legislation; (iii) decrees in the form of primary legislation enacted by the Government in exceptional, necessary or urgent circumstances when the legislature is not in session, which are of the same status as primary legislation, but which require to be presented to the legislature when next in session, and which no longer have legal effect if presented and not approved, or if not presented; (iv) secondary legislation, of various categories; and finally (v) legislation enacted by various Government bodies, explicitly empowered to do so by a constitutional provision [Intro.II.(4)–(6)].

4.2 There are a number of issues. First, it is doubtful whether such a descriptive element is required in a manual designed as a practical reference document for those drafting legislation. To the extent that it is required, it would fit better in the section advising drafters how to consider the drafting instructions they receive. It could help them consider whether the form of legislation which they are instructed to draft is appropriate, given the instructing authority and the subject matter.

Second, the descriptive analysis should be more closely related to Palestinian law and presented in a more practical manner. For example, category i) should specifically refer to the Basic Law. In category (iii) there should be statements of what is legally considered "exceptional, necessary and urgent circumstances" which require decrees, and whether there is the possibility of judicial review of whether those circumstances existed at the time the decree was adopted. There should also be clear statements of when the decrees cease to have effect. For example, do they cease to have effect on the first day of the next session of the Legislative Council, or after a specified period which allows them to be presented to the Council by the Government? If the law is unclear on these matters, it should be clarified.

Third, as will be discussed later in the report, there may be a case for amalgamating this manual with the *Secondary Legislation Drafting Manual*. If that proposal were adopted, it would perhaps be repetitive to analyse the forms of secondary legislation here.

4.3 The next element of the chapter [Intro.III.(7)-(9)] deals with what is described as "Legislative Policy", and addresses policy matters underpinning both primary legislation and secondary legislation.

Again, there are matters which require further consideration.

First, like the descriptive element, to the extent that it is required, it would be better to include this material in the section advising drafters how to consider the drafting instructions which they receive.

Second, although there is mention of "the Constitution" in the introductory consideration of policy relating to primary legislation, none of the rather disparate policies considered are related specific provisions of the Basic Law. Such imprecision is not of direct practical help to the drafter. For example, before listing examples on the rights and freedoms of the individual [Intro.III.(8).2.A], the manual states, "these are basic rights and freedoms that the Constitution, agreements and international agreements ensure that individuals and groups enjoy". The relevant provisions of the Basic Law are not specified. Nor does the manual consider to what extent rights that are not included in the Basic Law but are contained in a treaty to which the PA is a party –or specified in the Basic Law but more broadly expressed in such a treaty – have legal force. As a matter of practicality, drafters must be fully informed in these areas before drafting.

Third, the policies related to primary legislation are of somewhat diverse character, and not all are directly relevant to the immediate task of drafting legislation. This may be the case with unifying legislation between the Gaza Strip and the West Bank [Intro.III.(8).2.C]. This is a political matter on which the drafter will be bound by instructions received and clearly not one on which the drafter may take an independent position. It must therefore be questioned whether it is necessary to include it in a drafting manual.

Fourthly, as indicated in paragraph 4.2, it will be recommended later in the report that there may be a case for amalgamating the manuals on primary and secondary legislative drafting, and so the consideration of the policy underpinning secondary legislationmight be better addressed elsewhere.

4.4 The final element of the introductory chapter considers "the legislative policy note" [Intro.IV.(10)-(13)], referred to internationally and in this report as "the drafting instructions".

Although such advice is needed by those preparing drafting instructions, it does not seem to be necessary or appropriate to include it in a manual advising drafters of legislation itself. All that is really required in the drafting manual is to make it clear that the drafter is bound by the instructions received, but should be free to consult on any ambiguities in the instructions and to draw attention to any weaknesses in them. That said, drafters should be party to the preparation of formal advice on preparing drafting instructions; in some jurisdictions drafting units themselves prepare such advice.[2]

4.5 Although the recommendation is that the preparation of the drafting instructions be omitted from the drafting manual, for the sake of completeness some brief comments on preparing drafting instructions, and on other elements which might be included, follows.

The manual indicates correctly that the drafting instructions should draw the attention of the drafter to relevant treaties to which the PA is a party, but also adds that treaties which the PA expects to become a party should be considered. This may require some qualification. There should be no difficulty where the treaty will be ratified prior to the enactment of the legislation. However, if the PA may become a party to the treaty after that, the final form of the treaty may not be known, or it may not have been decided whether PA will ratify a multi-lateral treaty with reservations, the terms of which may not have been decided. Thus the drafter would be placed in the position of implementing, or avoiding conflict with, an international legal norm which is as yet imprecise.

The manual also rightly emphasises that drafting instructions should not be presented as draft legislation, or include proposed drafts of legislative provisions. Instructions partly in the form of general instructions and including proposed draft legislation to comply with those instructions is in itself a further source of ambiguity. If there is a conflict between the general instructions and the proposed draft, the drafter does not have clear drafting instructions.[3]

Some reference might be made to other aspects of preparing drafting instructions. Such preparation must necessarily be adapted to the resources of the jurisdiction and to the manner in which lawyers are distributed between government ministries and those directly responsible for legislative drafting. Ideally, drafting instructions should provide all the relevant and other background material. This would include copies of, or full reference to, relevant existing law, both primary and secondary legislation and also judicial decisions. It would also include how the existing law is interpreted and applied by the instructing ministry, which might be unknown to the drafter. With respect to the instructions themselves, it would include the

history of their development, for example any commissioned reports, and the results of any consultation undertaken by the instructing ministry. It might also include any legislative models from other jurisdictions which had been influential in the development of the instructions.

Some further reference is made to these matters in the analysis of the next chapter.

Chapter 1 Work plan

Drafting instructions

4.6 The first of the two elements of this chapter is advice to the drafter for addressing the substance of the drafting instructions [I.I.(1)-(18)]. However, before considering that, some comments follow on the need to advise the drafter on the procedural implications of drafting instructions, in the interests of consistent and effective government.

Drafting instructions: Procedure on receipt

4.7 The manual assumes that drafting instructions will come complete and in written form. This may well be the norm, as it should be. Yet there may be circumstances in which drafting instructions are received by drafters in other ways, and there should be clear guidance on how they should respond.

First, drafters must receive written instructions to operate effectively. However, from time to time, oral drafting instructions may be received. Drafters should be advised that they should not proceed solely on the basis of oral instructions. Even in cases of urgency, no formal drafting action should be undertaken until at least the oral instructions are confirmed by a signed formal minute from the instructing authority. The same principle applies to receiving amendments to instructions which were in themselves comprehensive. Such late amendments may arise where the instructing ministry decides to change a policy as a result oflater consultation or lobbying (for example), or when there is a political decision to amend draft legislation after criticism in the legislature in order to ensure the enactment of the draft legislation.

Second, there may be circumstances where drafting instructions come in instalments rather than in complete form. This is undesirable, but it may arise. For example, when the drafting is urgent some written drafting instructions may be received before all the instructions have been fully formulated to allow drafting to begin. In such circumstances, the drafter is

entitled to proceed, but should be aware that further instructions received later may invalidate the drafting already undertaken on the basis of the initial instructions. Those preparing instructions should be advised that sending drafting instructions by instalments is a procedure of last resort in circumstances of urgency. Even then, if recognised but unresolved policy flaws remain, or aspects of the policy are not fully settled, this should be indicated in each installment of the instructions. Such indication should prevent later unnecessary and avoidable alteration of the draft legislation by the drafter.

Drafting instructions: Categories of advice to the drafter

4.8 An introductory general observation on the manual's advice to drafter for how to address drafting instructions follows.

The advice falls into various categories: (i) identifying the policy to be enacted [I.I(1)-(3)]; (ii) recognising policy-related parameters [I.I.(15)-(17)], such as the manner in which the legislation will be implemented and the cost of implementing it; (iii) determining the legal context of the proposed legislation [I.I.(6)-(13)]; and (iv) procedural matters [I.I.(4)-(5),(18)], such as consulting with those who prepared the instructions to clarify ambiguities in the instructions, and distributing and timetabling the drafting work.

These various pieces of advice would be better presented if they were more clearly differentiated.

Drafting instructions: Policy and policy-related parameters [I.I(1)-(3),(15)-(17)]

4.9 The manual suggests that the drafter must research the technicalities of the matter which is the subject of the drafting instructions, and "resort to specialised technical consultancy" if necessary [I.I.(2)]. This is an error in approach. It is not the function of the drafter to undertake such research. On the contrary, the necessary technical information should be provided in drafting instructions in a style and language which can be readily understood by a reasonably educated lay person. The manual states this elsewhere [Intro.IV.(13).1]. Also, the example to illustrate this approach is perhaps not well chosen. It relates to instructions to draft legislation to regulate insurance. However, it is reasonable to expect that lawyers might know the essentials of the insurance industry in a way which they might not know the basic principles of other areas (such as managing water irrigation, or health and safety issues within a chemical factory).

Otherwise, the advice in this category is sound and well-presented.

Drafting instructions: Determining the legal context [I.I.(6)-(13)]

4.10 The manual accurately describes the legal context which the drafter must establish before beginning to draft in accordance with instructions. However, the advice does raise a more general issue.

While a drafter would always be expected to test and confirm legal statements in drafting instructions, in well-resourced jurisdictions much of what the manual requires the drafter to undertake on receipt of instructions would be included in the instructions received (see Paragraph 4.5). Examples include: identifying treaty obligations relevant to the proposed legislation; identifying existing primary and secondary legislation relevant to the proposed legislation and which may need to be amended or repealed therein; identifying judicial decisions directly bearing on the legislation to be drafted; and also perhaps identifying parallel legislation from other jurisdictions which might be used as a template in drafting the proposed legislation.

It may be that the legal resources currently available to PA executives, or the distribution of lawyers between those in ministries and those drafting legislation, do not allow for this level of detail to be provided in drafting instructions. However, ideally the drafting instructions would provide this legal information, with copies of the relevant documents, and the task of the drafter would be to check and evaluate it before preparing to draft; rather than the drafter having to undertake *de novo* this preliminary research before establishing the legal context in which the legislation is to be drafted. If appropriate, this division of labour between those preparing drafting instructions and the drafter could be reflected in the advice on the preparation of the instructions which, as has been suggested, should be in a separate document from the drafting manual.

Drafting instructions: Procedural matters [I.I.(4)-(5),(14),(18)]

4.11 The manual's advice to drafters on consultation with those who prepare drafting instructions, and on distributing work within the drafting team and timetabling the work, is generally sound and well presented.

However, two issues merit further consideration.

First, the advice on the distribution of work strongly recommends against shared drafting of legislation [I.I.(18).1]. This is on the grounds that it is necessary to maintain a consistent style in the draft. While that is a persuasive argument, other factors might lead to the recommendation being expressed in less absolute terms. It is not uncommon in other jurisdictions for teams of two or more drafters to draft legislation. In some cases, one drafter creates a first draft, which is reviewed by another; after consultation

between the two drafters, the second drafter writes a second draft. In other cases, the drafting of a substantial piece of legislation is shared between drafters so that it can be completed within the required timeframe; when draft legislation will consist of relatively self-contained elements the drafting can also be shared. Maintaining consistency of style in shared drafting is naturally more easily achievable where there is a comprehensive and practical drafting manual.

Second, the advice that "if the nature of the subject matter of the legislation required to be drafted need the consultancy of experts, the drafter must not hesitate to consult with them" [I.I.(14)] requires at least some qualification and would probably be better omitted. If experts must be consulted to determine the appropriate scope of the legislation or how it should be implemented, the consultation should be undertaken by officials within the instructing ministry, preferably before preparing the drafting instructions. It is not the function of the drafter to conduct independent consultation on such matters. This may be illustrated by one of the three examples cited in support of the principle: "if the subject of the legislation relates to banks, specialised experts in the field of economics could be consulted". Clearly, officials in the Ministry of Finance, or other instructing ministry, should undertake such consultations, and it would be quite inappropriate for the drafter to conduct independent discussions of that nature.

Preparing a drafting plan

4.12 The second element of the chapter concerns the preparation of a drafting plan, and its importance for the drafter [I.II.(19)-(22)].

Again, this is well presented. Although it is dealt with in some detail later in the manual, there would be merit in adding the following to the list of matters to be included in the plan: consequential amendments, and repeals and savings of provisions in existing primary or secondary legislation.

Chapter 2. The general structure of units of legislation

7.1 This chapter deals with the common features of the structure of legislation: (i) preliminary elements, such as its title; (ii) introductory elements, such as the definition provision and the scope of its application; (iii) substantive provisions and their organisation; (iv) concluding elements, such as repeal, saving and transitional provisions, the enabling provision and the entry into force provision; and (v) the use of appendices (schedules or annexes). In general, this is coherently and systematically presented, with helpful illustrative examples. Comments and suggestions to enhance the chapter follow.

Preliminary elements [II.I.(1)-(2)]

7.2 This part of the chapter deals with the title and the preamble (including the formal words of enactment) of primary legislation.

These elements of legislation tend to become less elaborate and more utilitarian over time; this trend is more pronounced in jurisdictions where the institutions of the state, particularly the parliament, are well established and settled.[4] For example, in many common law jurisdictions the preliminary elements of primary legislation consist of a brief title, short formal words of enactment[5] and a reference number. Certainly, elaborate preambles are less frequently used in primary legislation, although in some jurisdictions there is not only a short title, used for purposes of citation, but a "long" title of a single sentence which is a brief description of the contents of the legislation. A further alternative is to draft a "purpose provision" which concisely describes the objectives of the legislation.[6]

7.3 In revisiting the advice on drafting the title, the Palestinian authorities may wish to consider the use of a "long" title, or similar device. In addition to informing the reader and interpreter of legislation, it may control the content of the legislation to ensure that its stock remains coherent. A simple hypothetical example: a long title which states that the Act is to regulate sheep would not include provisions about cattle. Often, parliamentary procedural rules do not permit amendments to draft legislation outside the description in the long title. Coherence in the stock of legislation not only makes extant legislation easier to use – because provisions appear where they would expect to be found – but it also greatly assists repeals, amendments and consolidation of legislation.

7.4 Similarly, consideration might be given to simplifying the advice on drafting preambles. Taking the example cited in the manual [II.I.(2).5], the references to the existing law could be satisfactorily placed in the interpretative note to the legislation rather than the preamble, along with reference to the parliamentary session in which the law was adopted by the Legislative Council (this information is also easily accessible by reference to the formal parliamentary record).

Introductory elements [II.II.(3)-(7)]

Definition provisions

8.1 The advice on drafting definitions would benefit from some restructuring and the inclusion of some general introductory advice.

The general introductory advice might state more clearly: (a) that over-defining in legislation is a common failure of inexperienced drafters; (b) that a definition should be limited to one word or phrase;[7] and (c) that the function of a definition is simply to define, and should not include any substantive legislative element.[8]

It would also be useful at this early stage to indicate that a definition drafted "X means Y" has a closed effect (*i.e.*, X means Y and nothing but Y) and a definition drafted "X includes Y" is open-ended (*i.e.*, X includes Y, but may also include X and Z).

Similarly, early reference might be made to choosing a word or phrase for the purposes of definition. It should be one which embraces the scope of the definition and does not leave the reader surprised by its content. An example from a later reference to this approach in the manual [II.II.(5).5.B] illustrates the point: "'vehicle' includes a motor vehicle, bicycle and a wagon pulled by an animal" is an acceptable definition; but "'motor vehicle' includes a bicycle and a wagon pulled by an animal" is not.

It would also be useful in the introductory advice to encourage the drafter to check the definition provision carefully during drafting. The drafter should to ensure that each time a defined word or phrase is used it falls within the existing definition; and when a defined word or phrase is removed from the draft it is also deleted from the definition provision.

8.2 The advice on the various uses of, and the various limitations on, the definition [II.II(5).4-5], might be amended to include the following.

A definition used to summarise and shorten the legislative text may also include definitions labelling other legislation, or a concept within the draft legislation itself.[9]

Definitions may be limited not only to an individual article, but also to an individual section of legislation.[10] Drafters should be alert to using such defined word or phrase elsewhere in the legislation without transferring it to the general definition provision if they wish to rely on the definition for that use. It is also good practice to include a definition with limited application in the general definition provision for general reference.[11]

8.3 Consideration should be given to adding further advice on drafting definitions.

First, attention might be drawn to other definition styles and appropriate advice. For example, a definition may be drafted as an interpretation instruction: "'X' when used in this legislation shall be construed as meaning 'X-Y'". This may be a useful technique where the drafter seeks to use a concept rather than an individual word or phrase. The definition may be presented as a "tag word" in parentheses: "The Commissioner for Racial Equality ("the Commissioner") shall…". Although this technique is seen as a convenience for the reader, its weakness is that the reader may not encounter the expression at the first place that it is used and defined in this way. For that reason, the definition should also be included in the general definition provision, where the reader would expect to find it.

Second, it would be helpful to offer advice on referential definitions,[12] which should be used sparingly. It has the advantage of maintaining consistency within the stock of legislation, but it does oblige the user to refer to other legislation to understand the meaning of the legislation. It also demands that the drafter make sure that the definition applied by reference from other legislation is effective every time that the defined word or phrase is used in the draft legislation.

Finally, some advice might be included on the "tiered" definition; this is a definition which itself relies on one or more other definitions to be understood. The result may be a definition section reading:

" 'A' means xxxx

'B' means yyy

'C' means zzz

'X' means ABC"

Where 'A', 'B' and 'C' are only defined to allow 'X' to be defined; and it in some cases the definitions of 'A', 'B' or 'C' may themselves be referential definitions.

The drafter should be advised to avoid such complexity wherever possible.

8.4 It may also be noted that some of the difficulties in drafting definitions can be alleviated by enacting an Interpretation Act, as is often found in common law jurisdictions. The various advantages of such legislation will be considered later in the report.

Substantive provisions and their organisation [II.III.(8)-(12)]

9.1 This advice is sound and presented very much as practical advice to the drafter, but two matters might be reconsidered.

9.2 First, the general principles on the organisation of legislative provisions [II.III.(9)-(10)] are presented in a rather absolute form; in reality,however, while sound, they are no more than good practice guidelines which the drafter adopts in appropriate circumstances. This may be demonstrated by comparing the guidelines at II.III.(9).A and E; following one might make it impossible to follow the other. It is suggested that the principles be presented in more qualified terms.

9.3 Second, drafters are advised to place the number of each Article in brackets [II.III.(12).1]. Although this appears to follow current practice, it seems an unnecessary typographical addition, and does not follow the contemporary practice in most jurisdictions. There is no reason to believe that placing the Article number in brackets draws the reader's attention; and if there is such evidence, it is difficult to see why the practice would not also be adopted for book, chapter and section numbers. It is suggested that this advice be revised.

Concluding elements [II.IV.(13)-(22)]

10.1 A number of aspects of this advice might be simplified for the drafter if an Interpretation Act with the scope and content found in many common law jurisdictions were enacted, as recommended later in the report. For examples, general rules on repeals could include: (i) the repeal of legislation which itself contained repeals of earlier legislation does not revive that earlier legislation and bring it back into force; and (ii) the repeal of primary legislation does not of itself repeal secondary legislation made under its authority.

10.2 The advice on explicit repeals [II.IV.(14).3] is sound, but the examples use a style (also found elsewhere in the manual) which deviates from common international practice. This is the reference to legislation "and its amendments", and the repeal of legislation "and its amendments".

As a matter of principle, amendments made to legislation A by legislation B become part of legislation A; if legislation A is repealed, the repeal includes the amendments made to it by legislation B. There is therefore no reason to refer separately to the amendments in the repeal. The manual style could be amended as such.

As a matter of convenience to the user, a general reference to amendments is of limited utility: it alerts the user to the fact there have been amendments, but does not identify them. The best practical approach to help the user keep track of amendments is regular republication of legislation with the amendments included.

10.3 This part of the manual includes advice on drafting provisions which enable executive bodies to make secondary legislation; described in this report as "enabling provisions". This is an area where, as argued in the manual and reflected in the report, Palestinian law appears to be uncertain and in need of revision. Setting legislative issues aside draws attention to one piece of pure drafting advice. The manual observes [II.IV.(18).2.B]: "it is permissible to state the enforcement of the legislation articles on different dates, but this method must be avoided and not used unless in absolute necessity, because it will lead to facing difficulties in using the legislation". While it is true that different commencement dates for primary legislation can cause confusion, there are circumstances in which it is necessary and desirable. The most obvious is where secondary legislation is required before specific provisions in primary legislation can become effective; for example, secondary legislation detailing administrative arrangements underpinning a provision of the primary legislation. In this case, one solution may be to delay the entry into effect of the primary legislative provision until the secondary legislation has been enacted.

However, there are other ways to address this situation. One would be a legislative rule, commonly included in Interpretation Acts, that secondary legislation may be enacted on the authority of primary legislation which is not yet in force, on condition that the secondary legislation does not come into force before the primary legislation comes into force. This allows necessary secondary legislation to be made so that the primary legislative provision is effective when it is brought into force.

An alternative is to empower secondary legislation to set the date when specific provisions of primary legislation come into force, so that the relevant executive body may make the necessary implementing secondary legislation before making the secondary legislation bringing the primary legislative provision into force. It should be noted, though, that this alternative allows the executive rather than the legislature to determine when provisions of primary legislation enacted by the legislature actually come into force.

Use of appendices [II.V.(23)-(27)]

11.1 Three comments may be made on this element of the manual.

First, the manual comments on the use of appendices in primary legislation. They are commonly used in many jurisdictions for matters that are not mentioned in the manual. Separate appendices include not only repeals (as suggested in the manual), but also consequential minor amendments of other legislation, and details of transitional arrangements between the existing legislation and the legislation being enacted.

In determining whether to place material in an appendix, the drafter should first consider whether it is sufficiently significant to the substance of the draft legislation to merit inclusion in the main body of the legislation to alert the user; and, second, whether a general reference in the body of the legislation with the detail in an appendix or in secondary legislation would enhance the structure and flow of the meaning of the legislation. An instruction to create a statutory agency as an element of the legislation would allow the drafter to exercise this discretion. If the agency is central to the substance of the legislation, it may be necessary to include both the creation and membership of the agency in the body of the legislation, placing details of its competences and working practices in an appendix. If the agency is more peripheral to the substance of the legislation, it may be sufficient to provide for the creation of the agency in the body of the legislation, with its membership and competence being placed in an appendix, with other details of its working practices to be provided in secondary legislation.

11.2 Second, it is not advisable to place matters which are likely to require regular revisal in appendices of primary legislation. Amending primary legislation is not a swift process and it is not efficient to use the process for regular amendments to provisions which could be, for example, included in secondary legislation or which an executive agency could be empowered to address by more informal means. For that reason, contrary to the advice in the manual, in most jurisdictions the texts of most forms would not be placed in appendices of primary legislation; scales of fees, salaries and the like would also be included elsewhere.

11.3 Finally, there is a minor drafting point. The modern practice in most jurisdictions would be to number appendices sequentially, just as other elements of the legislation are identified, and not use words for the purpose. So, the more desirable style would be “Appendix 1” rather than “First Appendix”.

Chapter 3. Legal expression

Introductory comments

12.1 Before turning to the detail of the advice in this chapter, it may be helpful to refer to the manual's lack of emphasis on four aspects of drafting style.

12.2 First, the manual offers advice on clear drafting. It would be helpful to introduce this advice with some comment on the importance of the drafter accurately reflecting the drafting instructions in the draft legislation. While it is important to draft clearly and simply, the overriding task of the drafter is to draft accurately. One of the many difficulties facing the drafter is that some drafting instructions contain complexities that cannot always be reduced to simple, easily absorbed language; they must nevertheless be expressed accurately. In other words, the first task of the dafter is to draft accurately, and the second is to draft as clearly and simply as accuracy permits.

12.3 Second, unlike many drafting manuals, little or no attention is paid to achieving clarity and simplicity by careful use of word order in sentences, particularly the placement of modifying words and phrases. Although this may be more of an issue in Romance and Germanic languages than in Arabic, it should be addressed, as these matters commonly lead to ambiguity in legislative drafting.

12.4 Third, the manual appears to make no reference to "narrative" drafting, a technique which is now widely used in many jurisdictions to aid understanding without creating ambiguity, and without sacrificing accuracy. The approach assumes that a general reference will be presumed to be to the matter which was referred to immediately prior to the general reference. This assumption would be intuitive in most writing and in conversation. Used wisely in drafting it simplifies the text, particularly by dispensing with much referencing to other provisions.

The following simple hypothetical example illustrates the technique between paragraphs of a provision; and it can be used, with caution, between consecutive provisions relating to the same matter.

Instead of:

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

(2) Subject to sub-section (3), where a person applies for a licence under sub-section (1) the application must be in triplicate.

(3) Where a person, who is under sixteen, applies for a licence under sub-section (1), four copies of the application must be submitted.

Draft as:

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

(2) The application must be in triplicate.

(3) But a person who is under sixteen must submit four copies of the application.

12.5 Fourth, the manual does not contain any systematic analysis and advice on the complexities of linking legislative provisions to each other. A provision may *relate* to another,[13] a provision may *apply* to another[14] and a provision may *prevail* over another;[15] each of these situations requires its own drafting technique. There would be value in including a general analysis of the matter, as well as occasional reference to it.

Clarity in sentence construction and in the use of words [III.I.(1)-(2)]

13.1 In general, this element of Chapter 3 is sound in content and, other than issues mentioned in the introductory comments, comprehensive in scope. There are a number of matters which could, nevertheless, be developed or reconsidered.

13.2 Before turning to these matters, it may be appropriate to note that some examples, both here and elsewhere in the manual, do not always fully illustrate the principle that they are intended to illustrate. In many cases, the examples could be enhanced by indicating how they might be more satisfactorily drafted. It would lengthen the report beyond its utility to evaluate each example on these criteria. One example may provide guidance to those who are considering the appropriateness of the manual's examples and how they might be used more creatively.

In III.I.(1).1.C it is suggested that, although the drafter should seek to draft in short sentences, there may be occasions where a long sentence will convey meaning more effectively. The related example is: "The provisions of this law are applicable to every higher education institution existing in the PA and approved in the Higher Education registries when this law was issued".[16] First, this is not a particularly long legislative sentence. Second, it might be suggested that if the provision were redrafted its meaning would be even more readily understood by the user. For instance, it might be re-drafted: "This law applies to the institutions of higher education in the PA which, at the time it comes into force, are approved in the Higher Education registries." Or, if the scope of the law were intended to extend not only to

such registered institutions which existed at the time of enactment but also any that were established at a later date: "This law applies to the institutions of higher education in the PA which are approved in the Higher Education registries".

13.3 III.I(1).4 of the manual advises the drafter to draft in the present tense to ensure the greatest clarity, as legislation is "always speaking" from its entry into force until its repeal. This advice might be expanded to offer advice on provisions which contain time relationships.

So, where there is *past time relationship*, the drafter should present the *operation of the law* in the *present tense*, and facts precedent to its operation in a *past* tense; for example: "any person who *has been convicted* of an offence *is* disqualified from …".

Similarly, where there is *both a past and future time relationship*, the drafter should still present the operation of the law in the present tense**,** perhaps using a technique such as this: "Any person who, *before or after this legislation comes into force, has been convicted* of an offence *is* disqualified ….".

13.4 III.I.(1).5 of the manual advises on drafting using a conditional form. It might be added that while the conditional form may in some circumstances assist understanding, it can also often be avoided to ensure even greater clarity. For example, the first of the illustrative examples in this paragraph, "if the company wants to rent a real estate, then this article is applicable", could be re-drafted in more direct style as "this article applies to a company that seeks to rent real estate".

13.5 III.I.(1).6 of the manual advises on referencing other legislative provisions. It states that vague references to the position of provisions should be avoided. Similarly, references to an article being above or below the article are usually also unnecessary; for example, in drafting Article 8, references to "Article 6" and "Article 12" are sufficient, it is unnecessary to draft "Article 6 above" or Article 12 below". The only exception would be if there could be uncertainty as to whether the reference was made to the Articles 6 and 12 in that legislation or in other legislation. This might be added to the manual.

As discussed in paragraph 12.4, adopting a "narrative drafting" style reduces the need for referencing.

13.6 III.I.(2).3 of the manual wisely counsels the drafter not to use synonyms for the same legislative concept. It might be added: not only will this create ambiguity, but courts commonly assume in legislative interpretation that if a different word or phrase is used it is intended to mean something different.

13.7 III.I.(2).6 of the manual advises the drafter to use neutral rather than emotive descriptive terms, as legislation should not engage the emotions of the user. To this may be added that emotive language may engage members of the legislature adversely when considering the enactment of the legislation, and this may well prejudice those promoting the legislation. Also, as courts usually adopt the principle that all legislative words must be given interpretative effect, emotive words may create interpretative uncertainty. This may be illustrated by adopting an example used in the manual; the judicial interpretation of "barbaric rape" is more uncertain than of"rape committed with threats or use of violence to the victim".

Clarity in specific cases [III.II.(3)-(8)]

14.1 III.II.(3).4.A of the manual advises on the use of "every" and "any" in legislative drafting. This advice could be revisited. These words do not necessarily indicate what is intended,[17] and they are best avoided to ensure that there is no ambiguity.

Using the examples in that paragraph, the introductory words in the first example, "Every person who does the following is punished by imprisonment from one to six months..." could be more directly drafted as: "*A* person who does the following commits an offence and is on conviction punishable by imprisonment for a minimum of one month and a maximum of six months...". Every person who does the prohibited acts commits the offence, but only those prosecuted and convicted will be liable to the punishment. The second example, "If any party breaks its contractual commitment he is obliged to compensate the other party", could be more directly drafted by removing both the conditional clause and "any" as: "*A* party in breach of a contract must compensate the other parties to the contract".[18]

14.2 III.II.(3).4.B of the manual advises on the use of the conjunctions "and" and "or". This advice could be further developed.

The standard view is that "and" is conjunctive while "or" is disjunctive, but, at least in English, the matter is grammatically more complex. Each of the words has a variety of effects, which may overlap. So, for instance, "A **and** B may do X" may be construed: (i) A and B may *jointly* do X; (ii) A may do X; B may do X; *both* A and B may do X. While, "A **or** B may do X" may be construed: (i) either A or B may do X, but *not both* of them; (ii) A may do X; B may do X; *both* A and B may do X. Thus, the second attributed interpretation is the same in both cases.

In addition, in judicial consideration, the standard view of the effect of the words may be overridden by the purpose of the legislative provision in which it is used. So, for example, a provision that a person may bring legal action "for damages **or** such other relief as the court thinks appropriate" would be unlikely to be interpreted as a right to sue for damages or to seek an injunction against future action, but not both.[19]

Finally, care must be taken in words used to relate elements of a legislative provision, usually paragraphs. Best practice is to include "and" between (all or the final two) paragraphs: (i) if the paragraphs indicate a series of things and *all* of them must be done; (ii) if the paragraphs contain cumulative elements or requirements.[20] Include "or" between (all or the final two) paragraphs: if the paragraphs indicate a series of things and a choice must be made to do or apply one of them.[21] Avoid combining a series of paragraphs using both "and" *and* "or"; this may arise where it is necessary to do all of one sub-series and to choose between alternatives in another sub-series. In such circumstances either re-draft the provision as two separate provisions, or use another relative terms such as "but" or "unless". Omit entirely relating words between paragraphs: (i) if the paragraphs list a series of things that may be done, but there is a discretion to do or apply any number of them;[22] (ii) if the paragraphs contain alternatives which exclude each other or contain elements of a concept.[23]

14.3 III.II.(3).5 of the manual offers advice on the use of punctuation in drafting.

Here it would be beneficial to review the advice on the use of brackets [III.II.(3).5.E]. The advice to bracket the number of an Article where the Article appears in the text, and also when making reference to it elsewhere, is repeated. It has already been suggested that this style is unnecessary and does not conform to common international practice. In addition, here and elsewhere,[24] the manual suggests that numbers, such as the amount of currency, should also be placed in brackets. Again, this appears unnecessary and may indeed be confusing; it also does not correspond with standard international practice.

The correct use of brackets, at least in English, is to include information which is useful but peripheral to the sentence in which it appears – and not for emphasis. This raises the final issue on the use of brackets in this paragraph of the manual: that brackets should not be used to include words clarifying meaning or providing additional information. It is now a common drafting practice when referring to other provisions, particularly provisions in other legislation, to include after the formal reference a brief indication of the content of the provision to which reference is made, as helpful guidance to the user. For example, "...Article 6 of the XYZ Act (declaration of interest by holder of public office) applies to this provision". In revising the manual, this practice might also be considered.

14.4 This paragraph of the manual also recommends that the semi-colon should be avoided [III.II.(3).5.F]. Unlike the other punctuation signs which are recommended to be avoided, the semi-colon may sometimes have a value in drafting as it provides a more pronounced separation in a sentence than a comma. In many jurisdictions, it is used instead of a comma to separate paragraphs in a legislative provision. Perhaps, the rather absolute recommendation in the manual against its use might be revisited.

14.5 Finally, the advice on clarifying measurements and periods of time, and (to an extent) on gender-neutral drafting, could benefit from the enactment of an Interpretation Act; as previously indicated, this will be considered in the report conclusions and recommendations.

Chapter 4. Certain legislation and special provisions

15.1 The final chapter of the manual considers drafting amending legislation [IV.I.(1)-(7)]; drafting secondary legislation [IV.II.(8)-(10)], which been replaced by a second manual on this subject so that text is not addressed here; drafting penal provisions [IV.III.(11)-(29)]; and reviews of the completed draft [IV.Recmds.(1)-(4)], on which comment was made earlier in respect to establishing the drafting team.

Drafting amending legislation [IV.I.(1)-(7)]

15.2 The advice in this part of the chapter addresses repealing, substituting and adding to existing provisions. On the whole, the advice is sound in scope and content, although more specific reference might be made to saving provisions. However, the recommended styles for making amendments are somewhat over-elaborate and cumbersome by contemporary international drafting standards. This could be considered in revising the manual.

15.3 Take first the total or partial repeal of provisions. The examples in IV.I.(I).2.B show an over-elaborate drafting style to achieve repeals. It is assumed that "the original law" referred to in each is defined elsewhere in the repealing legislation, but another style of achieving the repeal would be to place them in an appendix with a heading and an introductory phrase: *e.g.*

"XYZ Law 16 of 1999

In the XYZ Law, the following provisions are repealed:

Article 9

Article 14(7) [*or* Article 14, paragraph 7]."

The same style can be used for a repeal provision in the body of the text, by simply adding the reference to the legislation in the introduction and dropping the heading.

15.4 The same approach may be taken to substituting provisions: *e.g.*

"XYZ Law, no. 16 of 1999

In the XYZ Law:

for Article 6(3) [*or* Article 6, paragraph 3] substitute:

"(3) The Commission may xxxxx"

Again, the same style can be used in a substitution provision in the body of the text, as described in paragraph 15.3.

15.5 The style can also be used for adding text to existing provisions, either in an appendix, as in the following illustration, or, with adaption, in the body of the text:

"XYZ Law, no. 16 of 1999

In the XYZ Law:

after Article 10(3) [*or* Article 10, paragraph 3] add:

"(4) The Ministry may xxxxx"

after Article 14(2) [*or* Article 14, paragraph 2] insert:

"(2A) The contractor shall report xxxxx."[25]

15.6 A less elaborate style might also be used in drafting the titles of amending legislation. As an alternative to the advice in IV.I(3), those examples could be drafted:

The Law on Reforming Regular Courts Act 1999 (Amendment) Act 2000.

The Law on Reforming Regular Courts Act 1999 (Amendment No. 2) Act 2000.[26]

15.7 The drafter is also advised here that a provision should be included in amending legislation to the effect that the amendments and the original legislation should be read as one [IV.1.(5)]. As indicated, in principle an amendment to legislation becomes part of the original legislation and therefore would naturally be read together with it. For that reason, the recommended provision – which is an over-elaboration – is not used in standard international drafting practice. The same would apply to amendments to legislation which has previously been amended. It is suggested that this advice be reconsidered.

15.8 Finally in this part of the chapter, there is an implied recommendation [IV.I.(6).2, second example] that amendments should not reference existing words in the provision to be amended. There is no doubt that this is an unwieldy style, but sometimes it may be justified. However, the drafter should be reminded that if complex amendments to a provision prove necessary, it is often more satisfactory to repeal the provision completely and replace it with another provision incorporating all the necessary amendments.

Drafting penal provisions [IV.III.(11)-(29)]

Introductory remarks

16.1 The manual here provides wide-ranging and detailed advice on drafting penal provisions. However, before considering aspects of that advice, it may be helpful to address four related matters on which advice could be included under this heading.

16.2 First, the drafter may have to consider providing defences to the commission of the offence, in addition to any general defences contained in the Penal Code.

One common such defence is that the accused exercised due diligence.[27]

Other examples are that the action taken which amounted to the offence was taken in response to an emergency[28] or that the accused was under the age of majority.[29]

16.3 Second, some advice might be offered on the onus of proof in offences. The law of evidence applies to proceedings based on legislation, like other proceedings. The drafter must therefore be aware of the implications of the law of evidence, but does not necessarily have to address them. The features of the law of evidence with which the drafter will be most commonly concerned are: the standard of proof; the burden of proof; judicial presumptions which may bear on evidence adduced; and possibly claims of public interest immunity for not disclosing documents.

Ostensibly, issues of standard of proof are straightforward. The generally recognised principles are that the standard of proof in criminal proceedings is proof beyond reasonable doubt, and in civil proceedings it is proof on the balance of probabilities. However, one area of some difficulty for the drafter is that some statutory schemes, or proceedings arising from them, may contain elements which could be characterised as proceedings of either a criminal nature or of a civil nature. This can be illustrated by a brief reference to English case law.

Where proceedings which could be characterised as civil proceedings relate to criminal proceedings, the courts are likely to require the criminal standard of proof. So, for example, where the issue was a confiscation of proceeds from drug trafficking, it was *held* that whether the proceeds came from trafficking in drugs attracted the criminal standard of proof.[30]

Where proceedings, whether formally criminal or civil, may lead to a person being penalised, courts may require facts to be proved to the criminal standard. For example, in civil proceedings (binding over to keep the peace) which might result in imprisonment (if there was a failure to comply with it), it was held in the proceedings that behaviour of the person concerned had to be proved to the criminal standard.[31]

In consequence of this judicial approach, the drafter may be required to specify the standard of proof, not only in offences but in a variety of related proceedings. This should be done precisely, simply and directly.[32]

Although the burden of proof is usually relatively straightforward, there may still be matters which the drafter has to consider. The usual principles are that in criminal proceedings with a legislative basis, as a consequence of the presumption of innocence, the burden of proving the commission of an offence lies on the prosecution. Once the prosecution has presented a *prima facie* case, a persuasive burden of proof falls on the defence to establish exculpating facts, or to establish that the accused falls within a statutory exception, or to raise sufficient doubt that the criminal standard of proof has not been met. However, where an element of an offence is peculiarly within the knowledge of the accused, the burden is on the accused to prove the fact.[33]

However, in some circumstances, the drafter may need to alter these principles in respect of an offence,[34] or to establish a conclusive[35] or rebuttable[36] presumption in respect of certain evidence adduced in criminal proceedings. Consequently, the drafter must be well informed on the law relating to the burden of proof.

16.4 third, it would be helpful to include some further advice in the manual on procedural issues relating to offences which occasionally be included in draft legislation.

For example, although a Penal Code may provide general or specific time limits within which a prosecution may be brought in respect of an offence, there may be circumstances in which the drafter may have to provide for this. In such instances the time limit may be absolute,[37] or a specified time limit with a procedure to extend it.[38]

Another procedural requirement for which the drafter may have to provide is that a prosecution for the offence may only be brought with the consent of some authority, commonly the senior government law officer.[39]

16.5 Finally, this advice would be enhanced with some reference to drafting procedures for appealing convictions and sentences for an offence. If they are not addressed in the Penal Code, the drafter may have to consider time limits for appeal, and also such matters as the court to which an appeal may be made, whether there should be a procedure for a further appeal of the judgment of the initial appeal court, whether the appeal can be on the facts or on a point of law or both, and whether there should be a procedure for the prosecuting authority to appeal on grounds of the inadequacy of the sentence imposed.

Advice in the manual

16.6 The manual emphasises that where the drafter addresses a crime not included in the Penal Code care should be taken to ensure that the sanctions for committing the crime be proportionate and consistent with sanctions for comparable offences. When reviewing the manual, officials might consider a technique adopted in some jurisdictions to address these matters. This is to provide within the legislation general categories of minimum and maximum sanctions, usually fine or period of imprisonment, or both. In creating a new offence, the drafter assigns it to a specified category. This serves to ensure a degree of consistency and relieves the drafter from including the details of the sanctions in the draft legislation, as they are provided in the generally applicable legislation.

For example, the (UK) Criminal Justice Act 1982, section 37, established a standard scale of *five* levels of fines for summary offences, which may be altered by secondary legislation. This allows the level of fines to be easily adjusted, in response to inflation, for example, without the necessity to indvidually amend numerous pieces of legislation. This would be beneficial even where, as in the PA, direct amendment of primary legislation was required rather than amendment of the primary legislation by secondary legislation.

16.7 The manual recommends the elements to be included in drafting an offence [[IV.III.(15)-(20),(27)]. The text is somewhat repetitive and could be revised in that respect, and also by further elaboration of what the drafter should consider in drafting an offence.

This may be achieved by first setting out, as the manual does, the basic drafting elements of an offence: to state the prohibited act, omission or course of conduct, that a breach of which is an offence, and the sanction for such a breach; and indicating that an offence is commonly drafted in one of three styles: declaratory, conditional or directory.

More elaborate advice on identifying who may commit the offence should follow. The following information might be included, if not addressed in the Penal Code.

If the offence may be committed by an *unlimited category of persons* it should still preferably be drafted in the direct singular: "A person who does x commits an offence".

The offence may be committed by *an unlimited category of person and also an associated category*, in which case a style such as the following might be used: "Where the commission by any person ("A") of an offence under Article 7 is due to the act, or failure to act, of some other person ("B"), B also commits the offence, whether or not A is prosecuted for the offence".[40]

If the offence is *limited to a category or categories of person*, that should be clearly stated: *e.g.* "*An owner or occupier of a factory* who does x commits an offence"; "*A company* which fails to do x commits an offence"; "*A person specified in Article 29* who is in breach of this article commits an offence".

If the offence may be committed by *a limited category, and also derivative categories*, such as a company and its directors and officers, it might be drafted in this manner: "(1) Where an offence under this Part committed by *a company* is proved to have been committed with the consent or connivance of, or is attributable to any neglect by, *a person specified in sub-section (2)*, that person as well as the company commits the offence…"[41]

It may be necessary to create *vicarious liability* for the offence, in which case language such as this might be adopted: "Where an offence under this article is committed by the agent or employee of another person ('A'), without prejudice to the liability of the agent or employee, A is to be treated as also having committed the offence, it if is proved that the acts constituting the offence were committed with the consent or connivance of A".

There may be a need to extend the offence to include *secondary or ancillary categories of actors* within the scope of the offence, in which case they should be clearly identified, *e.g.*, a person who counsels or procures another person to commit the offence; a person who forms a common purpose with another person to commit an offence; a person who does or omits to do an act for the purpose of enabling or aiding another person to commit the offence; a person who aids or abets another person in committing the offence; a person who, after its commission, aids or abets a person who has committed the offence. Penal Codes often provide for these circumstances in general terms, in which case the drafter should ensure that the Code extends to the offence being drafted and that such general provisions in the Code fit the scope of the offence. The same considerations apply to attempts to commit an offence.

16.8 In IV.III.(27) the manual draws attention to the importance that the drafter provide for the mental element (*mens rea*) in drafting an offence. Further elaboration could be beneficial.

Direct reference might be made to a common judicial presumption when interpreting legislation: where an offence is silent on *mens rea*, it is nevertheless an element of the offence. Unless the offence relates to such matters of general social regulation as hygiene or other aspects of public safety, where is it reasonable to suppose that an absolute offence was intended. Consequently, the drafter should draft with that judicial presumption in mind.

It might also be observed that where the drafter ignores the mental element, the offence may become ambiguous. For instance, suppose an offence were drafted as: "A person who requires a person under sixteen to do x commits an offence". It would be unclear from that language whether the person had to know, reasonably suspect, recklessly or negligently assume, that the person was under sixteen to commit the offence.

Again, attention could usefully be drawn to the fact that, while there are a host of adverbs[42] which may be deployed by a drafter to convey the mental element of an offence, they should be chosen with care; not only do they convey different meanings, but many carry an extensive interpretative case law.

The mental element may, of course, be conveyed in more specific form: *e.g.* "A person who, *with the intent to evade tax*, does x, commits an offence". However, the drafter should be conscious that such specificity tends to increase the burden on a prosecutor seeking to prosecute the offence successfully.

Alternatively, the drafter may wish to create an absolute offence. In this case it is highly desirable that this is specifically stated. A New Zealand provision demonstrates a straightforward way to do so: "In a prosecution for selling food contrary to this Act it is not necessary to prove that the defendant intended to commit the offence" [(NZ) Food Act 1981, s. 30(1)].

Appendices

17.1 The subject of the first appendix is the preparation of the index of provisions, which is placed before the legislative text in the legislation as published (in legislation of a length that merits an index). Apart from its general value as an index, it has a particular utility for the user as it includes a concise description of the content of each chapter and provision.

Consideration might be given to drafting such concise descriptions as titles to the structural elements and individual provisions within the legislative text. This is a common drafting practice in many jurisdictions, and is seen as helpful to the user.

As the index is placed before the legislative text and is prepared after the legislation is enacted, it is assumed that Palestinian courts do not refer to it as an aid to interpretation. Concise descriptive titles within the legislative text might be useful to the courts as a minor aid to interpretation. However, in some jurisdictions where such titles are used, there is a legislative provision excluding their use by courts in interpretation.

17.2 The second appendix concerns the preparation by the drafter, and content of, illustrative and interpretative notes on draft legislation.

The illustrative note appears to be intended as an executive summary of the background and content of the draft legislation, whereas the interpretative note seems to be a more elaborate presentation of the content and legal effect of each provision which may be used by the courts as an aid to interpretation.

App2. (1) suggests that the illustrative note, but perhaps not the interpretative note, be made available to members of the Legislative Council. It is desirable that both documents be made available to those who formally enact the legislation, as they should be as well-informed as possible of the provisions which they are enacting into law.

Notes

1. The manual has five substantive chapters (an introductory chapter and chapters 1-4), which are each subdivided into "branches" with Roman numerals, and the branches further subdivided into paragraphs with consecutive Arabic numbering. For convenience, these elements are designated in the report as, for example, "Intro.II.(6)"," II.IV.(16)". In addition the manual has two appendices with Arabic numerals, subdivided into paragraphs with consecutive Arabic numbering; they are designated here as, for example, "App.2.(7)"
2. See "Working with Parliamentary Counsel", which is advice on drafting instructions prepared by the Office of Parliamentary Counsel (OPC), the office responsible for drafting much UK primary legislation; it may be found on the OPC website [www.parliamentary-counsel.gov.uk].
3. However, like most aspects of drafting, this principle may have its exceptions. A lawyer, or even a non-legally trained administrator in a ministry may have acquired very detailed practical knowledge of legislation applied by the ministry and could, for instance, offer the drafter helpful approaches to amending existing legislation in the drafting instructions.
4. The principal modern exception to the trend is perhaps European Union legislation, where extensive preambles are the norm, but this may be

explained by its multinational structure and aspects of its constitutional structure.

5. In New Zealand this is simply: "The Parliament of New Zealand enacts the XYZ Act 20xx"; in Scotland, the Parliament has dispensed with enacting words entirely.

6. Although purpose provisions are not commonly used in the UK, the (UK) Legal Aid Act 1988, s.1 provides an example of this type of provision: "The purpose of this Act is to establish a framework for the provision….. of advice, assistance and representation which is publicly funded with a view to helping persons who might otherwise be unable to obtain advice, assistance or representation on account of their means".

7. The following definition in the (UK) Zoo Licensing Act 1981, s. 21, for example, was not good practice: "'animals' means….and 'wild animals' means animals not normally domesticated in Great Britain".

8. The following hypothetical example would be inappropriate: "'offence' includes a motoring offence and a person convicted of such an offence shall not be entitled to apply for a licence under this Act".

9. *E.g.* " 'the 2001 Act' means the 'the XYZ Act no 3 of 2001'"; " 'State enterprise' means an enterprise established under Part III of this Act".

10. *E.g.* "*In this Part, 'X' means 'Y' "*

11. *E.g.* " 'X' when used in Part III, means 'Y' "

12. *E.g.* "Expressions used in this Chapter that are also used in the Constitution of the Marshall Islands in relation to the judiciary have the same meaning as in the Constitution" (Marshall Islands Revised Code 2004 §202 (2)); "'pet shop' means premises for whose keeping as a pet shop a licence is in force, or is required, under the Pet Animals Act 1951" ((UK) Zoo Licensing Act 1981 s. 21).

13. Many legislative provisions relate to each other but sometimes the drafter wishes to draw attention to this for the guidance of the reader. These provisions may just relate to each other in a neutral way, for instance a section introducing a Schedule (appendix), *e.g.* "Schedule 1 makes provision about the policing of aerodromes designated by the Secretary of State for the purposes of Part 3 of the Aviation Security Act 1982 (c.36)" [(UK) Civil Aviation Act 2006, s. 6].

14. For example, when one provision is co-ordinated with another, it is good practice to refer to the co-ordination in the first of the provisions; *e.g.*

"(1) An individual or firm is eligible for appointment as a statutory auditor if the individual or firm….

(2) *In the cases to which section 1222 applies*…a person's eligibility for appointment as a statutory auditor is restricted as mentioned in that section,"

[(UK) Companies Act 2006, s. 1212]

15. Where one provision ("Y") is to prevail over another provision ("X"), one drafting technique is to state in Y: "*notwithstanding* X, …". Alternatively, state in X: "*subject to* Y, ….". For absolute clarity, the relevant statement can be included in both Y and X.

16. Higher Education Law, No. 11, I998, Art. 26.

17. In English at least, "any" is in many contexts synonymous with "every" – but there may instances where using "any" creates ambiguity. So, in the legislative provision ""Before making an industrial training order, the Minister shall consult…..*any* organisation or association of organisations appearing to him to be representative of substantial numbers of employers engaging in the activities concerned…" [(UK) Industrial Training Act 1964, s. 1(4)] , the word was interpreted as , in the context of the provision, meaning "every" [Agricultural, Horticultural and Forestry Training Board v Aylesbury Mushrooms

[1972] 1 All ER 280, 284 (Donaldson J)]

18. The re-draft refers to "other parties" rather than "other party" as there may be more than two parties to a contract.

19. For examples of UK decisions where this approach was taken see: Federal Steamship Navigation Co Ltd v Department of Trade and Industry [1974] 2 All ER 97 (HL); The Banco [1971] P 137 (CA); Re H (a minor) [1994] 1 All ER 812 (Fam Div).

20. *E.g.* " An application under section 109 shall be submitted with:

(a) a scale map of the area relating to the application;

(b) a statement of the adjacent landowners who have been notified; *and*

(c) the administrative fee required under section 110."

21. *E.g.* " A person found guilty of an offence under this section shall be liable to:

(a) a term of imprisonment not exceeding six months;

(b) a fine not exceeding £15,000; *or*

(c) both."

22. *E.g.* "An order under this section:

(a) may impose duties and restrictions on any person having control of a slaughterhouse,

(b) may restrict the cutting of carcasses before they are marked,

(c) may require records to be kept relating to dealings with carcasses,

(d) may authorise the Minister to give directions to the Commission as to the operation of the scheme."

23. *E.g.* " A licence may be issued to:

(a) a person domiciled in the state;

(b) a citizen resident abroad;

(c) a body corporate registered in the state;

(d) a local authority."

24. III.II.(5); in passing it is noted that the comparative examples in III.II.(5).B appear to be duplications.

25. Here the style in paragraph (i) would be used to add text at the end of the Article; and the style in paragraph (ii) would be used to add text within the existing Article, where the use of "(2A)" avoids disrupting the serial numbering of subsequent paragraphs.

26. The original legislation could be more fully identified in a definition provision within the body of the text of the amending legislation.

27. A hypothetical example:

"(1) A person who, without authorisation, does x is guilty of an offence.

(2) In proceedings for an offence under sub-section (1) it is a defence for the accused to show that: …

(e) he took all reasonable precautions and exercised all due diligence to avoid committing the offence."

28. *E.g.* "In any proceedings against a person for an offence under Section 4....consisting in the carriage of goods or persons to or from a ship or aircraft it shall be a defence for him to prove –

(a) that the ship or aircraft was, or was believed to be, wrecked, stranded or in distress, and that the goods or persons carried were carried for the purpose of preserving the ship or aircraft, or its cargo or apparel, or saving the lives of persons on board of it....." [(UK) Marine &c, Broadcasting (Offences) Act, s. 7(1)]

29. A hypothetical example:

"It is a defence for a person charged with an offence under this section to show that at the time the alleged offence took place he or she was under the age of 18 and was not acting in the course or furtherance of a business."

30. R v Dickens [1990] 2 QB 102, 106 (*per* Lord Lane CJ).

31 Percy v DPP [1995] 3 All ER 124, 133, 134 (*per* Collins J).

32. *E.g.* "The standard of proof required to determine any question arising under this Part of this Act as to—

(a) whether a person has benefited from terrorist-related activities engaged in by him or another;

(b) the value of his proceeds of those activities;

(c) any matter of which the court must be satisfied under subsection (5) above; or

(d) the amount to be required to be paid under a confiscation order made in his case,

shall be that applicable in civil proceedings."

33. For example, in an English case where the accused was charged with driving a car without a driving licence, it was held that the burden of proof fell on the accused to establish that he had a licence and not on the prosecution that he did not [Tynan v Jones [1975] RTR 456, 469 (*per* Lord Widgery CJ)].

34. *E.g.* "(1) This section applies where a person charged with an offence under this Act relies on a defence under any of sections….

(2) Where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not."

[(UK) Tobacco Advertising and Promotion Act 2002, s. 17]

35. *E.g.* "A certificate of a veterinary inspector to the effect that an animal is or was affected with a disease specified in the certificate shall, for the purposes of this Act, be conclusive evidence in all courts of justice of the matter certified" [(UK) Animal Health Act 1981, ss. 63(7)].

36. *E.g.* "A document that purports to have been issued or signed by or with the authority of the Commissioners –

(a) shall be treated as having been so issued or signed unless the contrary is proved, and

(b) shall be admissible in any legal proceedings."

[(UK) Commissioners for Revenue and Customs Act 2005, s. 24(1)]

37. *E.g.* "A prosecution….may not be instituted later than 2 years after the time when the subject matter of the prosecution arose" [(Canada) Motor Vehicle Safety Act 1993, s. 18(2)].

38. *E.g.* "Notwithstanding anything in any other Act, proceedings for the summary prosecution of an offence against this Act may be brought at any time within the period of three years after the commission of the offence or, with the consent in writing of the Attorney General, at any later time" [(Australia) Insurance Act 1973, s.129].

39. *E.g.* "Proceedings for an offence under section 47 or 50 shall not be instituted—

in England and Wales, except by or with the consent of the Attorney General …"

[(UK) Anti-terrorism, Crime and Security Act 2001, s. 55]

40. This example also illustrates the technique of "labelling" categories of person or of circumstances, which can simplify the legislative text.

41. Where subsection (2) would usually specify: the directors of the company, the company secretary, and maybe categories of senior management of the company.

42. *E.g.*, "knowingly", "maliciously", "wilfully", "negligently", "fraudulently", "dishonestly", "recklessly". Penal Codes sometimes specifically provide for the effect of such words.

Secondary Legislation Drafting Manual (2004): Analysis[1]

Introductory remarks

18.1 It may be helpful to make some preliminary observations before commenting on the specific contents of this manual. The observations and comments both use the internationally more common term of "enabling provision" in preference to "assignment", the term used in the English translation of the manual.

18.2 Although it is an area of some legal uncertainty, as explored in the preliminary chapter, the manual must contain a more systematic exposition of the legal relationships between the Amended Basic Law and primary legislation, and between primary legislation and secondary legislation made under its authority, in respect of the three categories of secondary legislation (executive regulations, ministerial decisions and instructions). Such an exposition would enhance the utility of the advice in the manual for the drafter.

18.3 With regard to the legal relationships between the Amended Basic Law and primary legislation, a multi-strand exposition could be helpful.

First, it should specify the provisions of the Amended Basic Law which regulate the making, approval and issuing of each of three categories of secondary legislation. In doing so, it should indicate: (i) whether the Amended Basic Law provides that these functions should be exclusively undertaken by a prescribed authority and, if not, the legal implications of this omission; and (ii) whether the Basic Law specifically or, by implication, allows a prescribed authority to delegate its powers with respect to secondary legislation, or does not indicate whether there may be such delegation and, if so, the legal effect of such lack of indication.

Second, it should specify the provisions which limit the Legislative Council when it enacts primary legislation containing enabling powers to make secondary legislation. The limitations may usefully be divided into procedural limitations (such as limiting the authorities enabled by primary legislation to make secondary legislation) and substantive limitations (such as limiting the matters on which primary legislation can enable secondary legislation to be made).

18.4 The exposition of the legal relationships between primary legislation and secondary legislation made under its authority might also contain a number of strands.

First, it might detail any legal restraints, other than restraints in the Amended Basic Code, placed on the Legislative Council in enacting primary legislation which provides for secondary legislation to be made. For example, to what extent, if any, do the provisions in the Interpretive Law No. (9) of 1945 and the Law No.(4) of 1995, on the processes for preparing legislation, impose such restraints?

Second, are there any legal limitations on the Legislative Council imposing procedural requirements in enabling provisions? For instance, may the Council require consultation with specified authorities or civil society before the secondary legislation is made? Or may it require the authority empowered to make the secondary legislation to present it to the Legislative Council within a specified period prior to it being issued and brought into force? Or may it provide for the Legislative Council to annul secondary legislation presented to it? Or may it require the Legislative Council to approve it before being brought into force?[2]

Preliminary chapter

19.1 This chapter consists of: (i) a general review and critique of the constitutional and legislative bases for the enactment of secondary legislation; (ii) the forms of enabling provisions in primary legislation and their use; (iii) the mechanisms for supervision of the preparation and enactment of secondary legislation; and (iv) the procedures for developing policy which is implemented by secondary legislation.

Critique of constitutional and legislative bases for enactment of secondary legislation

19.2 In the first four pages of the chapter, the authors of the manual identify shortcomings in the amended Basic Law, and subsequent draft constitutional documents, relating to the preparation and formal issuing of secondary legislation. At their heart, the shortcomings are said to flow from terminological confusion over the three categories of secondary legislation and inconsistencies in the declared authority and the procedure for approving and issuing such legislation.

19.3 Three proposals are offered to address these problems. First, there is "a need to hasten the presentation of a proposition for amendment of the Basic (Amended) Law regarding the bases of legislation and the legislative process". Second, a review of the compatibility of existing primary and secondary legislation with the constitutional requirements, followed by systematic corrective amendment, is recommended (although it would be wise to delay undertaking the review until the recommended amendments have been made to the Basic Law). It is also recommended that the review be conducted by a national committee including representatives of the legislature and the executive, together with "experts in the field of legislation". third, it is suggested that the situation could be enhanced by enacting legislation on the legislative process to replace existing legislation dating from 1945[3] and 1995,[4] both of which were found to be outdated and to have their own inherent weaknesses.

19.4 It is beyond the scope of this report to evaluate or comment directly on this analysis, and it is not known to the author of the report whether there have been further relevant developments since the manual was published in 2004. However, *ex facie* the analysis appears well founded; on that basis, some observations can be made on its implications for drafting secondary legislation and on the preparation of a formal authoritative manual on the subject.

Clearly the task of the drafter of secondary legislation is made more onerous if there are unresolved uncertainties over constitutional provisions relating to secondary legislation and which, in turn, affect the terms of the enabling primary legislation providing the immediate legal authority to make the secondary legislation. The drafter is tasked with building a structure without a secure foundation.

The creator of a manual on drafting secondary legislation is faced with something of the same dilemma. Guidance can be offered on the structure and drafting style of the legislation, but authoritative guidance on determining the form of delegated legislation to be drafted and the scope of the enabling provision under which it is drafted can at best be only tentative.

Additionally, a drafting manual should to the greatest extent possible offer well-founded guidance and not raise issues to which no sound solutions are offered. To that extent, despite any legal uncertainties, this element of the manual would need to be presented in a more practical, rather than purely analytical, manner in order to be of immediate utility to the drafter consulting it.

Enabling provisions in primary legislation and their use

19.5 Seven pages of the chapter address the types of enabling provisions in primary legislation and their use.

The advice distinguishes specific enabling clauses from clauses granting a general power to make secondary legislation, and rightly recommends circumspect use of the latter. The example from the Employment Law, Article 39, in paragraph titled *Types of assignment* illustrates the point nicely: "The Council of Ministers, can by delegation from the minister, issue the necessary regulations to implement the provisions of this law". Not only does this style grant the Executive unconditional power to make secondary legislation on employment, effectively subject only to it not being in conflict with the Amended Basic Law and the enabling law,[5] but it also leaves the scope of the use of the power to the absolute discretion of the Executive, perhaps subject only to not legislating irrationally.

Clearly, the fundamental and sound advice is that the drafter should in most circumstances draft the enabling provision so that it states clearly: (i) who is to make and issue the secondary legislation; (ii) on what matters the secondary legislation may be made; (iii) any conditions imposed on the making of the secondary legislation and (iv) whether the making of the secondary legislation is mandatory or discretionary.[6]

19.6 The manual then proceeds to consider general limitations on the content of secondary legislation [*Assignment controls*, paras. 5 – 9].

19.7 It states that, by virtue of the Amended Basic Law, Article 88, it is constitutionally incompetent for an enabling provision to empower, or for secondary legislation to be enacted to levy, amend or repeal "fees or general taxes".[7] In the English translation of the Amended Basic Law available to the author of this report, Article 88 reads: "Public taxes and duties shall not be imposed, amended, and repealed except through law. No one shall be totally or partially exempted from paying these taxes, except in circumstances prescribed by law". Thus, the prohibition appears to be rather different than is described. It relates to "public taxes and duties", regardless of whether the taxes are general or imposed on a section of the community. It does not extend to "fees". These could apply, for example, where an order was made to demolish a building not in compliance with building regulations, the owner failed to comply and a public authority then demolished the building and charged the owner a fee for doing so; or, more simply, a fee for issuing a public document such as a passport. Arguably, there is no constitutional prohibition on such fees being imposed by secondary legislation. The prohibition does, however, extend to making an exemption from paying public taxes and duties, as well as levying, amending or repealing them.

More fundamentally, there is the question of the nature of the prohibition in Article 88. It is not evident, at least in translation, that the prohibition is directed to secondary legislation; it could equally be read, and more easily so, simply as a prohibition on taxing without legal authority, if "law" is read generically and not as primary legislation.

Aside from this constitutional issue, there is a widely recognised constitutional principle that secondary legislation cannot be used to impose, alter or exempt taxes and duties unless the enabling provision of the primary legislation under which it is made expressly provides for this.

It also states that including penal provisions in secondary legislation is probably limited to providing for the maximum sanction where the enabling legislation includes a general penal provision.[8] A limited competence to provide for penal provisions and sanctions in secondary legislation contained in the Interpretive Law No. (9) of 1945, still considered valid in the West Bank and Gaza Strip, is now considered unconstitutional, as it conflicts with the Amended Basic Law, Article 15.

In the English translation of the manual provided, Article 15 reads: "Penalty is individual, collective penalties are prohibited, there is no crime and no penalty except through a legislative text, no penalty is inflicted without a legal provision, and there is no penalty except for actions subsequent to the law coming into effect". Neither this translation, nor the slightly different one in the English translation of the Amended Basic Law available to the author,[9] suggests that the Interpretive Law is in conflict with the Article. Neither does Article 15 appear to prohibit penal provisions or related sanctions from being enacted by secondary legislation. Again, however, there is a generally recognised constitutional principle that their enactment by delegated legislation requires an express authorisation in the enabling provision in the primary legislation.

19.8 The manual appears to advise that secondary legislation may be used to repeal or amend secondary legislation[10] but not primary legislation.[11] No authority is cited for this proposition. In principle, in the absence of any prohibition within in the Amended Basic Law, primary legislation might include an express enabling provision for secondary legislation which repeals or amends primary legislation to be made and issued.

Chapter 1. The essence of secondary legislation

20.1 A review of the manual might well consider that the material in this chapter could be distributed elsewhere in the manual, or in some cases deleted.

20.2 Some of the material in the chapter is of a rather abstract analytical character, and while no doubt jurisprudentially interesting, it does not have an obvious place in a manual offering direct practical advice to legislative drafters.

20.3 A significant proportion of the material replicates analysis in the introductory chapter; it would be more effective to amalgamate the material into a single analysis.

20.4 Some of the recommendations, while in themselves sound, might fall more appropriately for implementation at other stages of the legislative process.

For example, the paragraph *Multi-lateral cases* observes and suggests that:

"When legislators are confronted with a provision that addresses a complex and difficult problem that involves more than one party and as a result of which they fail to determine the necessary elaborate rules, legislators may then delegate the Executive Authority to delineate the elaborations on the basis of studies and researches conducted for that purpose until it arrives to the facts relating to the problem. In cases such as this, legislators tend to determine the general framework within which the Executive Authority should work but it is up to the Executive Authority to decide upon the role of each party involved."

A more effective procedure might be for the research to be undertaken, and to become the basis of decisions, as part of the policy development leading to the preparation of instructions to draft the enabling legislation. Rather than leaving this until after the enabling legislation has been enacted as "framework" legislation and secondary legislation to give it substance is required.

The same might be said in respect of a later recommendation in the chapter that the Legislative Council should estimate cost of making and implementing the secondary legislation, as one criteria when determining the appropriate authority to empower to make secondary legislation. Such cost/benefit analysis should be conducted in developing the policy leading to the primary legislation, and not at this later stage.

Chapter 2. General structure of secondary legislation

21.1 This chapter addresses the general structure of secondary legislation. It divides it into: (i) preliminary provisions, such as its title and preamble; (ii) introductory provisions, for example the definitions provision and application provision; (iii) the substantive provisions; (iv) final provisions, including amendment and repeal provisions and (v) appendices. Inevitably, some of this advice on structure replicates the advice on the structure of primary legislation in the earlier manual. These observations are therefore restricted to aspects of the advice in the manual which is particular to secondary legislation.

Preliminary provisions

22.1 The manual advises that secondary legislation should be numbered serially, but that there should be a separate series for each issuing authority. This advice should be reconsidered. International experience suggests that in the interests of categorising, identifying and managing secondary legislation it is better to have a centralised and centrally managed numbering system, divided only by the category of secondary legislation. In the PA, this would suggest a system where regulations, decisions and instructions were each numbered serially by year. In addition to that over-arching identification system, there could also be a parallel indicative identification system for each issuing authority so that it could similarly manage the secondary legislation it created.

An additional advantage of such a system is that its application and management would provide a further administrative check to ensure that the appropriate category of, and appropriately described, secondary legislation was being made and issued by the relevant authorities.

22.2 The advice on drafting the preamble for delegated legislation perhaps results in a preamble that is somewhat over-elaborate in style; it might be reconsidered.

The hypothetical example provided in the manual on the basis of the drafting advice it contains could, without loss of effectiveness, be re-drafted as follows:

"The Council of Ministers on the authority of the ABC Law No....of 20xx, Article 15,

issues

Regulations on.....

No. R [for regulation series] xxx of 20xx".

Introductory provisions

23.1 The advice that definitions provided in the enabling legislation should not be replicated in the secondary legislation, on the basis that a word or phrase used in the secondary legislation will be interpreted by the courts in the same way as it is interpreted in the enabling legislation, is sound.

To the exceptions to that general advice listed in the manual might be added a practical reason, rather than one of technical drafting, for repeating a definition from the enabling legislation. If the secondary legislation is such that it is likely to be regularly consulted as a general code by those to whom it applies, repeating definitions will allow it to become a more self-contained document; this may have a real practical value for the user, as it would save reference back to the enabling legislation. This might apply, for example, to health and safety regulations for the construction industry.

23.2 The manual also offers advice on drafting an article stipulating the application and extent of the secondary legislation, both in respect to the legal and natural persons to whom, and also the geographic area to which, it applies [paragraph entitled *Jurisdiction article*]. One aspect of this advice is, rightly, that the terms of the article must be consistent with any provisions on the matter in the enabling legislation. However, the first example of enabling legislation used in this paragraph is exceptionally vague in content and perhaps should be replaced with another, or at least reference made to its shortcomings.

The example is the Palestinian Labour Law [No. 7 of 2000], Article 80 which states:

"With a regulation issued by the Council of Ministers, and based on the proposal of the minister in coordination with the concerned parties, the farmers and *some other* private professions shall be excluded of *all or some* of the provisions of this section". The two vague areas are italicised.

Substantive provisions

24.1 The manual observes that the provisions of secondary legislation "are mostly procedural orientated rather than subject orientated". While this may well be an accurate reflection of the current use of secondary legislation in the PA, international experience suggests that the use of secondary legislation develops over time. The common experience is that secondary legislation is increasingly used to enact substantive law, sometimes quite significant substantive law, as well as purely addressing procedural aspects of the enabling legislation. This experience should be kept in view in preparing advice on the structure and style of secondary legislation.

Final provisions

25.1 It might be helpful to note that, if repeal and savings provisions are likely to be extensive, it might be more efficient and advantageous for the user if the secondary legislation were entirely repealed and enacted with the new provisions. The drawbacks of doing this are less extensive for secondary legislation as they are for primary legislation. However, like primary legislation, often the most structurally efficient way to provide for repeal provisions, minor consequential amendments and transitional provisions is to place them in appendices.

25.2 The manual suggests that, on the basis of existing practice, secondary legislation should include a provision in the following terms: "All competent parties, each party in their own field of specialisation, shall execute the provisions of this legislation". This advice could usefully be reconsidered. The provision appears to be largely declaratory, and declaratory provisions should as a general principle be avoided. In any event, if its terms (at least in the English translation) are not read as declaratory, they would imply an obligation to exercise the powers and functions in the legislation; this would be inappropriate if some were discretionary rather than mandatory. If they are mandatory, the obligation has already been created in the specific provision and does not need to be repeated in this type of general provision.

Chapter 3. The mechanism for enacting secondary legislation

General remarks

26.1 The first five pages of this chapter are devoted to the creation and contents of a "secondary legislation document", referred to in this report as drafting instructions for secondary legislation. There is, of course, value in providing standardised advice in this area, but it is not necessary to place it in a manual to advise the drafters of secondary legislation. It is sufficient, as the manual does, to advise the drafter on how to analyse such instructions and, if necessary, how to clarify them with those who prepared them.

26.2 The remainder of the chapter is largely devoted to: advice on analysing and clarifying the drafting instructions; designing the structure of the secondary legislation; and procedures for reviewing the finished draft secondary legislation. This material mainly follows the advice given on these matters with respect to primary legislation in the earlier manual. There are no further observations to be made on the material here that has not already been made on the advice in that manual.

Notes

1. In this manual, it is not always possible to give the reader as precise citations as those given in the first manual, as this manual is somewhat more informally structured.
2. It may be noted that in a significant number of jurisdictions, secondary legislation made by the Executive is subject to annulment by the Legislature, or to its formal approval, where it is considered politically or legally important.
3. Interpretive Law 9 of 1945.
4. Law No.(4) of 1995, on the processes for preparing legislation.
5. *Quere* the legal effect of provisions of such secondary legislation which is in conflict with other primary legislation.
6. It is assumed if the Executive were to fail to make and issue secondary legislation where there was a mandatory requirement to do so, or failed to do so adequately, there would potentially be grounds for legal action by those adversely affected by the failure of the Executive to fulfil its legislative obligation.
7. Para. 5.
8. Para. 6.
9. "Punishment shall only be imposed upon individuals. Collective punishment is prohibited. Crime and punishment shall only be determined by law. Punishment shall be imposed only by judicial judgement, and shall apply only to actions committed after the promulgation of law."
10. *Quere* the capacity of one category of secondary legislation to repeal or amend secondary legislation of another category.
11. Para. 8.

Conclusions and Recommendations

Principal objective of a drafting manual

27.1 The manuals reflect the careful co-operative work undertaken by the Government of the Palestinian Authority, the Palestinian Legislative Council and the Palestinian academic community.

However, a drafting manual is a practical working tool designed to give direct guidance to drafters; it is not primarily a vehicle for abstract jurisprudential analysis, or for a critique of existing constitutional and legislative provisions, or for setting out the procedures for developing legislative policy or preparing drafting instructions for the drafter.

It is, therefore *recommended* that in revising the content of the two manuals, this principal objective of a drafting manual is maintained and that material that does not directly further that objective be omitted.

However, it is recognised that some of the peripheral material would rightly find a place elsewhere. For example, material on the preparation of policy leading to legislation and material on the preparation of drafting instructions could form the core of instruction manuals for public servants directly involved in those tasks.

Structure of the drafting manuals

27.2 The development of advice on drafting led to the publication in 2000 of a manual mainly, though not entirely, directed to drafting primary legislation; four years later, a second publication dealing with the drafting of secondary legislation followed.

Obviously much of the advice on analysing and clarifying drafting instructions, on legislative structure and presentation, and on drafting style is common to primary and secondary legislation. This is reflected in the second drafting manual, which refers the reader to advice in the first manual in places, and elsewhere essentially replicates material contained in the earlier manual.

Unless the likely users of the two manuals are significantly different in qualifications and experience, a natural conclusion would be to amalgamate the material into a single revised manual. However, it would appear that the constitutional and legislative provisions related to making and issuing secondary legislation should be reviewed and may well require amendment following that review. It would therefore be wise to postpone preparing definitive advice relating specifically to drafting secondary legislation until that process has been completed.

It is, therefore, **recommended** that a single drafting manual be prepared. It should be structured to allow specific advice on the effect of provisions of the Amended Basic Law on the capacity to make secondary legislation and regulate its content, on the legal relationship between the Amended Basic Law and primary legislation regulating the making and issuing of legislation, on the legal relationship between the Amended Basic Law and enabling provisions in primary legislation, and on the nomenclature of secondary legislation, to be conveniently included once the law on these matters has been sufficiently clarified.

27.3 A drafting manual, being a working document reflecting best drafting practice, is likely to require regular periodic revision.

For this reason, it is **recommended** that the manual or manuals be divided into functional divisions, with the paragraphs and sub-paragraphs within each division numbered serially to foster both ready reference and revision.

Content of the drafting manuals

27.4 One limitation in the focus of the manuals is insufficient focus on the principles of legislative interpretation and construction as applied by the judiciary. It is important for the drafter to be acutely conscious of how the draft may be interpreted by the courts.

It is **recommended** that when revising the drafting manuals, greater emphasis should be placed on principles of legislative interpretation and construction and how they may influence drafting style.

27.5 Much of the advice in the manuals is general drafting advice. The principal exception is the extended treatment in the first drafting manual of drafting penal provisions. However, other categories of provisions have their own particular complexities and equally demand similar extended treatment. These might include: evidential provisions; appeal provisions; taxing provisions; licensing and registration provisions; provisions creating public bodies; and provisions on their borrowing and lending. It is perhaps

unrealistic to expect that advice will be prepared on the drafting of all categories of provisions that would benefit from extended treatment in a first revision of the drafting manuals, but such categories could be identified and advice on drafting could be launched.

It is therefore **recommended** that categories of legislative provision which merit specific drafting advice due to their particular complexities should be identified; the process of incorporating that advice in successive revisions of the drafting manuals should be started.

27.6 In the analyses of the two manuals, some general and numerous specific proposals for revising their content have been made. For convenience, these have been gathered together and summarised in a schedule, in the order in which they appear in the report and with the appropriate paragraph references.

It is **recommended** that the proposals in the analyses of the drafting manuals contained in the report, and summarised in the schedule, be considered in any revision of the manuals.

Status of a revised drafting manual

27.7 Some jurisdictions, particularly emerging democracies in Europe, have incorporated rules on the structure of legislation and detailed principles of drafting style in primary legislation. This formality reflects the importance the jurisdictions attach to these matters. Nevertheless, it is widely recognised that enacting such laws has the serious disadvantage of inflexibility. Drafting style evolves in all jurisdictions, and drafting advice should be able to be revised readily to accommodate this.

On the other hand, if a drafting manual is going to enhance consistency and maintain high standards, it must be given a degree of authority. One way of achieving this is for the government and the legislature to make an appropriate authoritative declaration that legislation should be drafted in accordance with the drafting manual.

It is therefore **recommended** that, once a revised drafting manual has been published, the Government of the PA and the Palestinian Legislative Council consider making an appropriate authoritative declaration that legislation be drafted in accordance with the manual.

27.8 It is a mistake to believe that the publication of an authoritative drafting manual is in itself sufficient to achieve an ongoing high standard of legislative drafting.

27.9 First, it is important to ensure that those undertaking drafting are thoroughly familiar with its contents and their practical application. This can be best achieved through a training programme for existing drafters, and for new recruits, based on the drafting manual. A series of graduated drafting exercises which require the drafter to draft applying the principles within the manual would be effective.

It is therefore **recommended** that, once a revised drafting manual is published, the PA Government and the Palestinian Legislative Council jointly inaugurate a training programme for all drafters based on the manual, and ensure that newly employed drafters also participate in such an exercise.

27.10 As already indicated, drafting style is not static, and drafters regularly face new issues which they must resolve. All this should eventually be reflected in a drafting manual. One useful way to achieve this is to establish a committee (with representatives from the government, parliament, other agencies with drafting responsibilities, and experts in legislative drafting from outside the public service) to review on a systematic periodic basis the content of the manual, including its examples of appropriate and inappropriate drafting, and to oversee the publication of revised editions of the manual. Such a committee's task will be greatly facilitated if procedures are established by which drafters may submit material from their current drafting experiences. This material might include examples of what they consider successful and unsuccessful drafting, examples of addressing particular drafting problems, and drafting issues which they believe need oa standardised response.

It is therefore **recommended** that, upon publication of a revised draft manual, the Government of the PA establish a representative committee to review the manual on a systematic periodic basis and publish revised editions of the manual when appropriate; and that the committee be assisted in its work by facilitating contributions from drafters active in the field.

An interpretation act for the PA?

27.11 At various points in the report, general reference has been made to the enactment of an Interpretation Act in many common law jurisdictions, and the value of the various elements of such legislation in drafting. This is explored further, with footnoted illustrative examples.

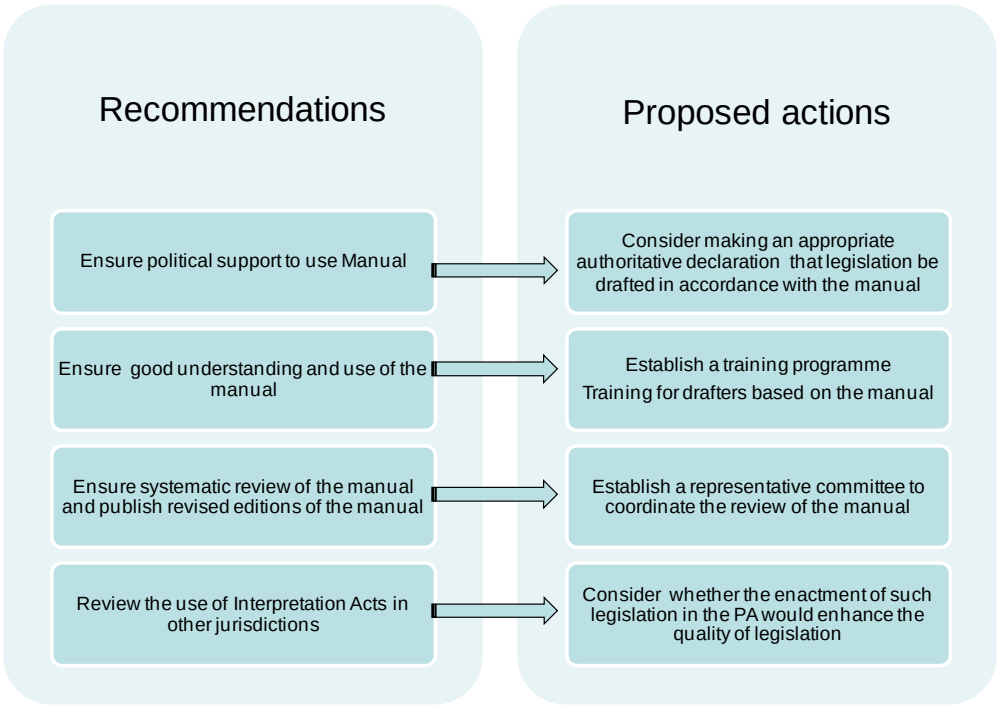
27.12 The categories of provisions commonly found in Interpretation Acts are: (i) principles and rules of interpretation and construction, which may be expressed generally (with greater or less elaboration), or functionally, or both;[1] (ii) generally applicable definitions, which are usually stated to apply only where legislation does not appear to have a contrary

intention, and thus allows the drafter the discretion to provide an alternative definition more suited to the draft legislation; (iii) general operative provisions, relating to, for example, commencement, publication, judicial notice, application to the government, repeal,[2] gender,[3] use of the singular and plural, time and computing time periods,[4] measuring distance,[5] service by post, citation of other legislation and the duplication of offences; (iv) "framework" provisions, relating to, for example, the power to make subsidiary legislation in anticipation of the enabling legislation coming into force,[6] the exercise of powers and duties,[7] and imposing penalties.

27.13 As the examples show, some of these provisions establish general rules which relieve the drafter from addressing them in individual pieces of legislation. Other provisions create a default position from which the drafter may expressly deviate, or courts on the basis of interpretative principles may decide not to apply. The provisions of an Interpretation Act can therefore contribute towards consistency in legislation, but with a degree of flexibility, and also substantially ease the burden on the drafter.

It is therefore *recommended* that the Palestinian authorities review the use of Interpretation Acts in other jurisdictions and consider whether the enactment of such legislation in the Palestinian Authority would enhance the quality of legislation.

Figure 1. Recommendations and proposed actions



Notes

1. *E.g.* Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

   [(Canada Federal) Interpretation Act 1985, s. 12];

   "(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

   (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment."

[(New Zealand) Interpretation Act 1999, s. 5]

"Where an Act refers to an enactment, the reference, unless the contrary intention appears, is a reference to that enactment as amended, and includes a reference thereto as extended or applied, by or under any other enactment, including any other provision of that Act."

[(UK) Interpretation Act 1978, s. 20(2)]

"Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act."

[(UK) Interpretation Act 1978, s. 11]

2. *E.g.* "Where an Act repeals a repealing enactment, the repeal does not revive any enactment previously repealed unless words are added reviving it."

[(UK) Interpretation Act 1978, s. 15]

"(1) ..... where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,—

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against that enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

(2) This section applies to the expiry of a temporary enactment as if it were repealed by an Act."

[(UK) Interpretation Act 1978, s. 16]

"(1) Where an Act repeals a previous enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.

(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears,—

(a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;

(b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

[(UK) Interpretation Act 1978, s. 17].

3. *E.g.* "In any Act, unless the contrary intention appears,—

(a) words importing the masculine gender include the feminine;

(b) words importing the feminine gender include the masculine;

(c) words in the singular include the plural and words in the plural include the singular."

[(UK) Interpretation Act 1978, s. 6]

"Words and expressions importing the masculine gender include females and bodies corporate."

[(Nauru) Interpretation Act 1971, s. 2(4)]

4. *E.g.* "Subject to section 3 of the Summer Time Act 1972 (construction of references to points of time during the period of summer time), whenever an expression of time occurs in an Act, the time referred to shall, unless it is otherwise specifically stated, be held to be Greenwich mean time."

[(UK) Interpretation Act 1978, s. 9]

"(1)A period of time described as beginning at, on, or with a specified day, act, or event includes that day or the day of the act or event.

(2) A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.

(3) A period of time described as ending by, on, at, or with, or as continuing to or until, a specified day, act, or event includes that day or the day of the act or event.

(4) A period of time described as ending before a specified day, act, or event does not include that day or the day of the act or event.

(5) A reference to a number of days between 2 events does not include the days on which the events happened.

(6) A thing that, under an enactment, must or may be done on a particular day or within a limited period of time may, if that day or the last day of that period is not a working day, be done on the next working day."

[(New Zealand) Interpretation Act 1999, s. 35]

5. *E.g.* "In the measurement of any distance for the purposes of any Act that distance shall, unless a different intention appears, be measured in a straight line on a horizontal plane."

[(Samoa) Acts Interpretation Act 1974, s. 23(c)]

6. *E.g.* "Where an Act which (or any provision of which) does not come into force immediately on its passing confers power to make subordinate legislation, or to make appointments, give notices, prescribe forms or do any other thing for the purposes of the Act, then, unless the contrary intention appears, the power may be exercised and any instrument made thereunder may be made so as to come into force, at any time after the passing of the Act so far as may be necessary or expedient for the purpose—

(a) of bringing the Act or any provision of the Act into force; or

(b) of giving full effect to the Act or any such provision at or after the time when it comes into force."

[(UK) Interpretation Act 1978, s. 13]

7. *E.g.* "(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.

(2) Where an Act confers a power or imposes a duty on the holder of an office as such, it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, by the holder for the time being of the office."

[(UK) Interpretation Act 1978, s. 12]

Schedule of Proposals in the Analyses

Legislative drafting manual (2000)

Introductory chapter

1. The description of the hierarchy of legislation in the introductory chapter could be omitted, or alternatively rewritten with a more practical focus. [4.1-4.2]

2. The "Legislative Policy" [Intro.III.(7)-(9)] section would be better included in the section advising the drafter how to consider the drafting instructions which they receive, and might be rewritten as indicated. [4.3]

3. Detailed advice on the preparation of drafting instructions [Intro.IV.(10)-(13)] is not required in a manual for drafters, who are not involved in that function; although it would be useful guidance for those who are. In preparing the advice for that audience, officials may note the comments in the report on the advice as it presently appears in the manual. [4.4-4.5]

Chapter 1. Work plan

4. The manual assumes that drafting instructions will be received by drafters complete and in writing. This is not always so, and the manual should offer fuller advice, as indicated, on responding to drafting instructions. [5.3]

5. The different advice in the manual on how drafters should address drafting instructions [I.I.(3)-(18)] would be better presented if they were more clearly differentiated. [5.3]

6. The manual suggests that the drafter must research the technicalities of the matter which is the subject of the drafting instructions, including if necessary "resort to specialised technical consultancy" [I.I.(2)]. This is considered an errooneous approach and it is suggested that the advice, together with the example included with it, should be reconsidered. [5.4]

7. The manual rightly advises the drafter to establish the legal context of the drafting instructions [I.I.(6)-(13). However, the terms of the advice might be reconsidered to the extent that in well-resourced jurisdictions much of the legal context would be included in the drafting instructions and the drafter would not be left to undertake the initial research. This might also be reflected in advice on the preparation of drafting instructions, were this to form a separate advisory document as suggested. [5.5]

8. The manual firmly recommends against drafting being shared among the drafting team [I.I.(18).1] However, the factors cited in the report suggest that this recommendation could be presented in less absolute terms [5.6]

9. The manual suggests that if the drafting instructions create a need to consult further with experts, the drafter should not hesitate to consult them directly [I.I.(14)]. For the reasons presented, this advice would be better omitted or at least qualified. [5.6]

10. In the advice on preparing a drafting plan, there would be merit in adding to the matters to be included in the plan: any consequential amendments, repeals or savings in existing primary or secondary legislation. [6.1]

Chapter 2. The general structure of units of legislation

11. In revisiting the advice on the drafting of the title, the Palestinian authorities may wish to consider the use of a "long" title, or similar device. [7.3]

12. In revisiting the advice on the drafting of preambles, consideration might be given to simplifying their content. [7.4]

13. The advice on drafting definitions would benefit from some restructuring and the inclusion of some general introductory advice, as indicated. [8.1]

14. The advice on the various uses of, and the various limitations on, definitions [II.II(5).4-5], might be amended in a revision of the text as proposed. [8.2]

15. Consideration should be given to adding further advice on drafting definitions, as indicated. [8.3]

16. It is suggested, for the reasons indicated, that the general principles on the organisation of legislative provisions [II.III.(9)-(10)] be presented in more qualified terms. [9.2]

17. Drafters are advised to place the number of each Article in brackets [II.III.(12).1]. It is suggested, on the grounds indicated, that this advice might be revised. [9.3]

18. The advice on explicit repeals [II.IV.(14).3] adopts a style of the repeal of legislation "and its amendments". It is suggested, for the reasons indicated, that drafters should no longer be advised to refer in this general manner to the amendments of repealed legislation. It is also suggested that regular republication of legislation with amendments it is the most practical approach to allow the user to keep track of amendments. [10.2]

19. The manual observes [II.IV.(18).2.B]: "it is permissible to state the enforcement of the legislation articles on different dates, but this method must be avoided and not used unless in absolute necessity, because it will lead to facing difficulties in using the legislation". It is suggested, for the reasons stated, that this advice might be further qualified. [10.3]

20. The advice on the use of appendices [II.V.(23)-(27)] might be amended as indicated. [11.1-11.3]

Chapter 3. Legal expression

21. On drafting style, it is suggested that it would be helpful to introduce the advice with comments on striking a balance between accurate and clear drafting [12.2]; to give more prominence to the importance of word order, and in particular the placing of modifying words and phrases [12.3]; to make some comment on "narrative" drafting [12.4]; and to offer systematic analysis and advice on linking legislative provisions. [12.5] [21.1-12.5]

22. As a general observation, examples used in the manual should be reviewed to determine whether they fully illustrate the principle they are intended to illustrate, and could often be made more dynamic by indicating how they might be more satisfactorily drafted. [13.1-13.2]

23. III.I(1).4 of the manual advises the drafter to draft in the present tense to ensure the greatest clarity. This advice might be expanded, as indicated, to offer advice on provisions which contain time relationships. [13.3]

24. III.I.(1).5 of the manual advises on drafting using a conditional form. It is suggested that the advice might be expanded to note that, while the conditional form may in some circumstances foster understanding, it can also often be avoided to ensure even greater clarity. [13.4]

25. III.I.(1).6 of the manual advises on referencing other legislative provisions. It is advised that vague references to the position of provisions should be avoided. It is suggested to add that references to an article being above or below the article are usually also unnecessary. [13.5]

26. III.I.(2).3 advises against using synonyms for the same legislative concept. It is suggested that this advice be expanded to note that not only will this create ambiguity, but courts commonly assume in legislative interpretation that if a different word or phrase is used it is intended to mean something different. [13.6]

27. III.I.(2).6 of the manual advises the drafter to use neutral and not emotive descriptive terms, as the legislation should not engage the emotions of the user. It is suggested that this advice could be developed by the use of the arguments indicated. [13.7]

28. III.II.(3).4.A of the manual advises on the use of "every" and "any" in legislative drafting. This advice could usefully be revisited. These words do not necessarily indicate what is intended, and their use is best avoided to ensure that there is no ambiguity. [14.1]

29. III.II.(3).4.B of the manual advises on the use of the conjunctions "and" and "or". This advice could be further developed, as indicated. [14.2]

30. The advice on the use of brackets [III.II.(3).5.E] should be reviewed, on the grounds indicated. [14,3]

31. The manual also recommends that the semi-colon should be avoided in legislative drafting [III.II.(3).5.F]; this advice might be qualified, for the reasons stated. [14,4]

Chapter 4. Certain legislation and special provisions

32. IV.I.(1)-(7) of the manual addresses the repeal, substitution and addition to existing provisions. The recommended styles for achieving the amendments are somewhat over-elaborate and cumbersome by contemporary international drafting standards. This could be usefully considered, as indicated. [15.2-15.5]

33. It is suggested that a less elaborate style might also be used in drafting the titles of amending legislation. [15.6]

34. It is suggested that officials reconsider advice that a provision should be included in amending legislation to the effect that the amendments and the original legislation should be read as one [IV.1.(5)], for the reasons indicated. [15.7]

35. It is suggested that the implied recommendation [IV.I.(6).2, second example], that amendments should not be drafted by reference to existing words in the provision to be amended, should be elaborated as indicated. [15.8]

36. It is suggested that the following additional matters be included in the advice on drafting penal provisions [IV.III.(11)-(29)]: specific defences [16.2]; onus of proof [16.3]; further advice on procedural issues [16.4]; and appeals [16.5]. [16.1-16,5]

37. To strengthen the advice to the drafter to ensure that sanctions for offences are proportionate and consistent, it is suggested that consideration be given to the technique of legislating to create general categories of sanctions. [16.6]

38. The manual advises on the elements to be included in drafting an offence [[IV.III.(15)-(20),(27)]. The text here is somewhat repetitive and could be revised in that respect; and also by further elaboration of the advice, as indicated, and in particular in identifying who may commit an offence. [16.7]

39. In IV.III.(27) the manual draws attention to the importance of the drafter providing for the mental element (*mens rea*) in drafting an offence. This advice could benefit from further elaboration, as indicated. [16.8]

Appendices

40. Consideration might be given, as indicated, to drafting concise descriptions as titles of the structural elements and individual provisions within the legislative text. [17.1]

41. App2.(1) suggests that the illustrative note, but perhaps not the interpretative note, is made available to members of the Legislative Council. It is desirable that both documents be made available to those who formally enact the legislation, as they should be as well-informed as possible of the provisions which they are enacting into law. [17.2]

Secondary legislation drafting manual (2004)

42. Although it is an area of some legal uncertainty, explored in the preliminary chapter, there is a need for the manual to contain a rather more systematic exposition of the legal relationships between the Amended Basic Law and primary legislation, and between primary legislation and secondary legislation made under its authority, in respect of the three categories of secondary legislation (executive regulations, ministerial decisions and instructions). Such an exposition, in the manner indicated, would enhance the utility of the advice in the manual for the drafter. [18.2-18.4]

Preliminary chapter

43. A drafting manual should as far as possible offer well-founded guidance, and not raise issues to which no sound solutions are offered. To that extent, the initial extended critique of the constitutional and legislative bases for enacting secondary legislation in this chapter should be presented in a more practical, rather than purely analytical, manner to be of immediate utility to the drafter consulting it. [19.1-19.4]

44. The manual considers general limitations on the content of secondary legislation [*Assignment controls*, paras. 5 – 9]. On the grounds stated, it is suggested that this analysis should be revisited. [19.6-19.9]

Chapter 1. The essence of secondary legislation

45. A review of the manual might well consider that, for the reasons indicated, the material in this chapter could be distributed elsewhere in the manual, or in some cases dispensed with. [20.1-20.4]

Chapter 2. General structure of secondary legislation

46. The manual advises that secondary legislation should be numbered serially, but that there should be a separate series for each authority issuing it. This advice should be reconsidered, on the grounds stated. [22.1]

47. The advice on drafting a preamble for delegated legislation perhaps results in a preamble that is somewhat over-elaborate in style, and might be reconsidered. [22.2]

48. The advice that definitions provided in the enabling legislation should not be replicated in the secondary legislation made under it could be elaborated, for the reasons given. [23.1]

49. In the paragraph *Jurisdiction article*, which contains advice on drafting an article stipulating the application and extent of secondary legislation, the first example of enabling legislation is exceptionally vague in content; perhaps it should be replaced, or at least reference made to its shortcomings. [23.2]

50. The manual observes that the provisions of secondary legislation "are mostly procedural orientated rather than subject orientated". While this may well be an accurate reflection of the current use of secondary legislation in the PA, international experience suggests that the use of secondary legislation develops over time and is used increasingly as a vehicle for substantive law as well as procedure. This might usefully be reflected in the advice. [24.1]

51. It might be helpful to add to the advice: if repeal and savings provisions in secondary legislation are likely to be extensive, it might be more efficient and advantageous for the user if the secondary legislation were entirely repealed and enacted with the new provisions. [25.1]

52. It is suggested in the manual that, on the basic of existing practice, secondary legislation should include a provision in the following terms: "All competent parties, each party in their own field of specialisation, shall execute the provisions of this legislation". This advice could usefully be reconsidered, for the reasons indicated. [25.2]

53. The first five pages of chapter 3 are devoted to the creation and contents of a "secondary legislation document", referred to in this report as drafting instructions, for secondary legislation. There is, of course, value in providing standardised advice on this, but it is not necessary to place it in a manual to advise the drafters of secondary legislation. It is sufficient, as the manual does, to advise the drafter on how to analyse such instructions and, if necessary, how to clarify them with those who prepared them. [26.1]

Annex: Website references

General Guide on Legislative Drafting (translated into Arabic):

Legislative Drafting for Democratic Social Change: A Manual for Drafters

(Arabic version)

www.arabparliaments.org/whatwedo/publications.aspx

(EU) Joint Practical Guide (to drafting within EU institutions):

http://eur-lex.europa.eu/en/techleg/index.htm

Scotland:

Plain Language and Legislation

www.scotland.gov.uk/Publications/2006/02/17093804/0

Australia:

Drafting Manual

Plain English Manual

www.opc.gov.au/about/draft_manuals.htm

Canada (Ministry of Justice):

Legistics

http://canada.justice.gc.ca/eng/dept-min/pub/legis/index.html

New Zealand:

Principles of Clear Drafting

LAC (Legislative Advisory Committee) Guidelines

www.pco.parliament.govt.nz

Albania:

Law Drafting Manual in Albania *(5 May 2006)*

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Modernising the Public Administration

The Legislative Drafting Manuals of the Palestinian Authority

ASSESSMENT REPORT

Law drafting techniques and procedures play an important role in ensuring legal certainty and security, which are essential preconditions for advancing economic reform and improving the living conditions of the Palestinian people. Inefficient rules may not achieve their objectives and textual ambiguities may lead to unsuccessful implementation of legislation thus undermining the rule of law. The Palestinian Authority is in the process of revising its legislative drafting manual and secondary legislative drafting manual.

Based on international good practice examples, this assessment report identifies options to improve the existing two manuals and recommendations to support coherent and consistent legislative drafting techniques across legal departments in the public administration of the Palestinian Authority.

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