

Preface

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

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

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

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

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

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

Some general conventions are followed in the Manual:

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

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

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

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

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

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