

Chapter 11

The Legislative Scheme: Principles Governing the Type of Legislation Required and the Ordering of Its Provisions

11.1 Fundamental questions to be answered

These are not always adequately addressed by those giving instructions to legislative counsel, and it is the latter's responsibility to establish fundamental matters at the outset.

11.1.1 Matters relating to the type of legislation required

- Can the required policy be implemented by amending existing legislation?
- Is the new legislation to be self-contained or is more than one piece of legislation required?
- Is it going to need amplification by subsidiary legislation, and if so how far? (see further Chapter 15).

11.1.2 Matters relating to the legal mechanisms to be employed

A clear idea is also needed as to what the fundamental nature of the legislation is, so that a basic view can be taken with regard to its shape. Is it, for example, criminal in nature, revenue collecting or administrative? Typical further basic questions would be:

- Are rights and duties under the civil law to be extended or limited?
- Is licensing or registration the principal purpose?
- Is a new authority to be created and how central to the legislation will it be?
- Is the legislation of a 'portmanteau' type (i.e. dealing with a wide range of sometimes unrelated matters, such as miscellaneous minor amendments)?

11.2 A logical structure to legislation

A logical structure to legislation is needed so that its meaning can be communicated as quickly and easily as possible. The need exists both at the level of a whole Act and, as will be seen in section 11.3, within each single section.

Having decided on the type of legislation required, the next questions relate to how the items for inclusion are to be arranged so that the layout is logical and facilitates communication and use. The basic conventional Commonwealth structure of an Act can be seen in Figure 7.1, but attention now needs to be focussed on what are called the substantive and administrative provisions.

Except in the case of a short enactment of less than about 12–14 sections, there needs to be a selection of criteria for dividing groups of sections into Parts (in long enactments, the same applies to groupings larger than Parts, for example Chapters, Divisions). An intelligible pattern needs to be provided so that provisions are not scattered randomly through the enactment; themes therefore need to be identified that suggest combinations of sections with an obvious connection:

- in an Act setting up a new authority, these would be concerned with establishment and composition of the Authority; its functions and powers; procedures in its meetings; finance and audit requirements; appeals; and offences (see further Chapter 18)
- in an Act setting up a licensing regime, they would concern where the need for a licence arises, what qualifications are needed, how it is to be applied for, the duties of a licence holder, offences, etc. (see further Chapter 19).

All the relevant sections should then be gathered into the Parts decided on.

11.3 The logical sequence of sections within a Part

This must then be worked out, using the following rules:

- the general precedes the particular
- the important precedes the secondary
- the basic theme precedes the development of it
- the standard case precedes the exceptions
- the rules likely to be frequently applied precede those likely to be less frequently applied

- the permanent precedes the temporary
- where successive steps are to be taken, the earlier precedes the later.

Exactly the same principles apply to the grouping of subsections within a section.

A simple example of the misapplication of these rules can be seen in the following section:

Warrants in respect of undercover operations

- (1) A warrant under this section must be signed by the Minister.
- (2) Unless previously terminated, a warrant ceases to have effect:
 - (a) on completion of the undercover operation to which it relates; or
 - (b) at the end of six months from its date of issue,
 whichever is sooner.
- (3) The Minister may issue a warrant directed to the Commissioner of Police authorising the undertaking of a controlled undercover operation.

By application of the above rules, in particular the first three and the last, it can quickly be seen that the giving of the power must precede provisions on detail, and that there is a need to recognise the chronology, so that matters concerning the form of a warrant precede those relating to its termination. Thus the subsections would in practice need to be re-ordered:

- (1) The Minister may issue a warrant directed to the Commissioner of Police authorising the undertaking of a controlled undercover operation.
- (2) A warrant under this section must be signed by the Minister.
- (3) Unless previously terminated, a warrant ceases to have effect:
 - (a) on completion of the undercover operation to which it relates; or
 - (b) at the end of six months from its date of issue,
 whichever is sooner.

