CHANGES IN FORM OF NEW ZEALAND STATUTES

Here at last we have an account of changes to New Zealand statutes over the years and the times at which those changes occurred. As the author concludes, the changes are not substantial in themselves, but they are of real interest to those for whom the statute books are the tools of trade; and of particular interest to researchers and writers for whom accuracy in citation and reference is crucial.

I INTRODUCTION

In recent years there have been a number of calls for the simplification of statutes. Generally, it is complained, our statues are too difficult to both read and understand. Remedies suggested range from the use of more diagrams,[1] to better headings and sweeping reforms in the language of the law.[2] In 1968 the Statute Law Society was formed in England. Its purpose, to lobby for "technical improvements in the form and the manner in which statutes . . . are expressed . . . with the view to making the same more intelligible,"[3] and to disseminate information for the public to educate them about legislation and the legislative process. The society has produced pamphlets[4] and its activities probably prompted the establishment of the 1973 U.K. Committee on the Preparation of Legislation which recently published findings of its own.[5] Law Reform Commissions from Scotland and Canada (1972) have both reported that they are doing work in this area.

On the home front, recent letters to the editor[6] have expressed joy at one County Council's decision to publish a "translation" with all its public notices, while another has hopes that all legislation will be written for the reading level of a 12-year-old. The Minister of Justice however defended legal "gobbledygook" saying among other things that:[7]

> "Statutes are laws; they are intended to regulate human relationships. If those relationships are complicated the laws to regulate them must be too."

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1. E.g. flow diagrams.
2. (1974) XIII J. Soc. P.T.L. 96.
3. [1972] N.Z.L.J. 97.
4. *Statute Law: the Key to clarity. Statute Law Deficiencies. Statute Law: a radical simplification.*
5. The Renton Committee Report. *The Preparation of Legislation,* HMSO Cmnd. 6053 (1975).
6. *Evening Post,* April 3, April 10, 1975.
7. [1975] N.Z.L.J. 118. And see also *N.Z. Listener,* May 31, 1975, p. 6.

Whether statutes can or should ever be simplified to the point where the layman can read them easily is perhaps a moot point, but it is generally agreed that at least they should not be more complicated than is absolutely necessary. The changes in form of the New Zealand statute clearly demonstrate the extent to which appearance at least can improve, even if improvement in linguistic style proves too difficult. A quick glance at statutes of 1875 and 1974 will show that there have been a number of changes. But a closer look reveals a large number of things that have *not* changed. Undoubtedly, the present day statute is a more attractive document than the 19th century one, but the attitude toward it as reflected in the drafting has not changed a great deal.[8]

This paper examines in detail the changes as they occurred not only with a view to explaining them but principally to attempt to identify a trend or pattern in the changes.

II THE PARLIAMENTARY COUNSEL OFFICE

At present, almost all New Zealand statutes[9] are drafted by the Parliamentary Counsel Office. It is a separate office of Parliament under the control of the Attorney-General and headed by the Chief Parliamentary Counsel who has under him a Senior Parliamentary Counsel and Parliamentary Counsel. The office has not always had this form or name but its duties have, since its inception,, always been well defined. Under the influence of highly competent and skilled draftsmen who have headed the office, the statutes we have today compare favourably with the best in the world.[9a]

From 1841, when the first New Zealand enactment was passed, till 1907, there was no separate office for the drafting of statutes. At first, drafting was done by the Attorney-General and then, when New Zealand ceased to be a Crown Colony, by the Solicitor-General or the Assistant Law Officers. In 1877, there was created a position of Counsel to the Office of Law Drafting, but it was not until 1907 that it became separate from the Crown Law Office. This lasted for only three years, however, before it was absorbed back again by the Crown Law Office. In 1920, the Statutes Drafting and Compilation Act 1920 set up the office as it now is. The Law Drafting Office was to be in two departments: one for the drafting of Bills and the other for the compilation of statutes.

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8. This comment applies to all Acts as well as to Regulations and other statutory instruments.
9. The exceptions are local and private acts which are usually drafted by the proposers.
9a. Dean Griswold of Harvard University visiting New Zealand in 1951 concurred with this view. Harvard University then used New Zealand Acts as models for study.

Finally, in 1973, an amendment Act changed the name of Law Drafting Office to Parliamentary Counsel Office and the law draftsmen became Parliamentary Counsel. This was done for several reasons but probably the principal one being a desire to have a name which reflected the importance of the office.

III THE LAW DRAFTSMEN

The first New Zealand Ordinance, (No. 1, 1841), was drafted by William Swainson, the first Attorney-General,[10] in collaboration with the first Chief Justice, Sir William Martin. The statutes of those early years were naturally enough modelled on English enactments of the time but Swainson was no mere copier, and he set a high standard from the beginning. It has been said that he was a legislator-draftsman of exception skill for he combined:[11]

> "the kind of technical skill which we associate with such draftsmen of the Victorian Age in England as Sir Mackenzie Chalmers . . . with the creative resourcefulness called for in a pioneer statesman."

In 1877, John Curnin (the originator of the Curnin Index) appears as the first recorded holder of the office of Law Draftsman. He was succeeded in 1894 by Dr Frederick Fitchett who was appointed Solicitor-General in 1900.

From 1900-1916, William Jolliffe held the office. During this period, he prepared the five volumes of the 1908 Consolidated Statutes, as the Secretary to the Commission set up under the Statutes Reprints Act 1895. It will be seen later that it is in these 1908 statutes that the beginnings of the New Zealand 'look' in statutes can be found, it was also at this time that the opportunity was taken to improve previous faults.

No doubt it was to alleviate a heavy work load that in 1907 Professor John W. Salmond was appointed to the new position of Counsel to the Law Drafting Office. He was immediately involved in drafting major Acts and turned out to be an able innovator and trend setter. With his drafting (see e.g., the Native Land Act 1909) he laid the foundations for our modern methods and style of drafting, and his influence is apparent even today.[12] Following Salmond in 1918 was James Christie, once described by Lord Bledisloe as one of the finest draftsmen in the Commonwealth. He was Law Draftsman for 20 years, and spent a further seven years as Counsel to the Law Drafting Office. In 1945 he was appointed a temporary judge of the Supreme

10. On one view of MacLintock, A. H., *Crown Colony Government in New Zealand*, p. 130.
11. R. Cook, Q.C., ed., *Portrait of a Profession* (1969), p. 33.
12. One of Salmond's very interesting efforts was his attempt to abolish the *ejusdem generis* Rule, arguing that if the legislature uses a general term it should be held to mean exactly what it says.

Court. Christie visited England to study methods of drafting in 1925, and in 1930 went there for consultations over the drafting of the Statute of Westminster and the 1931 Reprints. Christies' principal quality was that of clarity. His attention to detail is revealed in the 1931 Reprints. They are comprehensive and contain meticulous editing.

H. D. C. Adams was appointed Law Draftsman in 1938. He was a brilliant, modest, but blunt and direct man. In 1956, he was appointed editor of the voluminous 1957 Reprints. He planned the whole work, and completed the final revision of volume 1 before he died in 1958. D. A. G. Ward was then appointed Law Draftsman. In 1967 be became Counsel to the Law Drafting Office, remaining so until 1974. J. G. Hamilton held the post of Law Draftsman from 1967 until 1971 when he was succeeded by J. P. McVeagh. On the latter's retirement in 1975 W. Iles, a member since 1959, was appointed to head the Office.

IV CHANGES IN FORM AND PRESENTATION

A. Mechanics

(1) Type Face

The type face used in present statutes is Baskerville. It has been the face used since 1954. Before that, there were at least three changes but, the differences have not been dramatic; our statute books are mainly consistent and tidy in this respect.

(2) Page Size

The present page size was introduced in 1931. It is an easier size to handle than the quarto pages of earlier statutes. At first the page was not really wide enough for the size of type and to allow space for marginal notes. With the relocation of those notes, however, the size is now ideal.

(3) Paper

The use of the bright white paper promotes eye strain, but the original hopes of having a dim-white paper has been thwarted by economic and availability[13] considerations.

(4) Size of the Volumes

Generally, the yearly Acts are put into two volumes, each of the standard width of about two inches and of about 900 pages. The size of the volumes at one time varied with the amount of legislation

13. See prior to 1963.

or the length of the Acts[14] but now, thanks to our many consolidations, there are two, or three, volumes of the same size produced each year.[15]

B. Punctuation

The early statutes were so fully punctuated that presentation was very badly affected.[16] But as time went by, it was realised that in some cases, strict grammar added nothing and no ambiguity would be caused by not adherring to it. And today punctuation is used as an aid to presentation. This is, with respect, very sensible. Changes in this regard took place as a matter of policy in the following years:

(1) The full-stop

Dropped

1927 — from after the subsection and paragraph numbering e.g., (1.) and (a.)
1932 — from the subject heading at the top of the page
1940 — after the word "ANALYSIS"
— after the number of the act at the top of the page
— after the regnal year at the top of the page
— after the date of assent following the Long Title
— after the "New Zealand" heading which remained until 1956.
1943 — after the cross-heads and part heads
1956 — after the contents of the analysis
— after the Title, at the same time as bold type was first used for it
— for 10 Reprinted Acts, after the 'marginal notes' when put into the sections

(2) The Comma

Dropped

1951 — from the date of assent, between the month and the year
— from the Short Title

(3) The Colon-Dash

1953 — The colon-dash after the enacting clause was changed to just the colon, e.g., " . . . by the authority of the same, as follows: "

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14. See, e.g. the 1955 volume which was swelled out by the Companies Act 1955.
15. The Reprint of the Land and Income Tax Act now accounts for an extra volume.
16. See e.g., statutes around 1900.

The combination, used frequently before 1953 is never used now. The colon is used where a list is to follow and the dash where a list of alternatives are to follow; although this appears to be a convention only, for no fixed rule can be found.

C. The Use of Arabic Numerals

Until relatively recently, Arabic numerals were not used in the text of statutes on the grounds that mistakes are easier to make when reading and writing them. This tended, however, to make simple sections excessively wordy. The usage is now freer, but it took a long time for this change to occur. Thus, in

1960 — References to other sections in any Act now used numerals; this meant that the previously long "subsection one of section sixty-six . . . . " became "section 66 (1)", although it is usually "subsection (1) of section 66."

1969 — The Commencement section previously reading, for example " . . . on the first day of April, nine hundred and seventy" now reads " . . . on the 1st day of April, 1970."

1969 — Generals use of the Arabic numerals, for example,
3 months
200
15 percent
3 members for 2 years, 1 of which . . .

Thornton[17] argues that the advantages of simplicity outweigh the slight risk of error involved and that the problem of error risk applies equally to the use of all numerals. The advantages of the short form are that:

(a) "S.19 (1) (b) "gives the correct order if the reader wants to look up the reference.

(b) The short form stands out more if the reader just wants to know whether in a section, a particular section or any other section is also mentioned — he can just run his eye over the words without having to read them.

D. The Tops of the Pages

Headings to pages up to 1932 looked like this:

5 Geo. V.]	Coal Mines.	[1932, No. 11.	5

17. Thornton, *Legislative Drafting*, p. 65.
See Appendix 1.

The full point after the subject title was, however, dropped after 1932, and in 1940, the points after the regnal year and after the number of the Act were also dropped.

In 1948, the regnal reference was dropped thus:

1953]	Town and Country Planning	[No. 16	5

And in 1954 both the line, and the brackets, were dropped:

1954	Municipal Corporations	No. 76	6

The page number was originally put in with the marginal notes, but in 1955 when the marginal notes were taken out and the text width extended, the number was fitted to the right and the number of the Act was reunited with the year:

1956, No.64	Counties	13

This occurs in our present Acts, excepting the very first page, which has the year and number of the Act split at the expense of the page number:

1974	New Zealand Superannuation	No.41

E. The Coat of Arms

The New Zealand Coat of Arms appears on the front page of all Acts but not on Reprints of Acts or on Amendment Acts. Until 1946, the British Coat of Arms was used, even though this country acquired its own in 1911. The words "New Zealand", underlined, appeared above the British Coat of Arms and this aided the identification of the country, which could otherwise only be found in the enacting clause.

In 1947 the New Zealand Coat of Arms was used but the name of the country was not incorporated in it. Consequently the heading, "New Zealand" was inserted underneath.

In 1956 the present Coat of Arms was used. It is a revised version of the 1911 one and has the word "New Zealand" incorporated in it .

F. The Numbering of the Acts

New Zealand has always numbered Acts as, for example, 1920, No. 46; but with the full-stop dropping out in 1940. Until 1947 the regnal year was stated at the top of the page: e.g., 11 Geo. V.

G. The Analysis

The change in punctuation, mainly the dropping of the full-stop, is the most noticeable change in the presentation of this section of the Act. The Analysis is in fact a recasting in the form of a contents list of the brief contents head of each section which appears in bold type at the beginning of each section. In earlier statutes the content heads were put in the margins where, with the extra room, they could be longer.[18] When the marginal notes went from the margin in 1955/1956, the analyses contained shorter heads. Marginal notes were often given to subsections as well and they were incorporated into the analysis. But since 1956, the practice has been to have only one note per section. Consequently, if what would otherwise be a subsection is important enough to warrant a note then the tendency is to put it in as a section; or simply omit the extra marginal note.

H. The Enacting Clause

This is one part of Acts which has not changed in form since 1852 when the General Assembly was established. It reads:

> "Be it enacted by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:"

For equal effect and greater simplicity this clause could, however, be simplified to read "Enacted by the General Assembly:" for by s. 2 of the Acts Interpretation Act 1924, "General Assembly" is defined to mean the General Assembly of New Zealand consisting of the Governor-General and the House of Representatives.[19]

I. The Title

1) Presentation

Before 1956 the Titles of Acts were not in bold type. This was introduced in that year and the full-stop was dropped with the introduction of bold type. The date of assent, in italics, (light type) follows, as it has always, set to the far right and prefixed by a left bracket. The formal archaic practice however of sprinkling capitals on selected nouns in the Title continued into 1950. For example:

> "An Act to fix the Basis on which the Court shall assess Compensation in relation to the Control of the Level of Lake Taupo"

Before 1949 certain words were invariably capped, these included "Law", "Enactment", "Legislative", "Provision", and "Amend' but

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18. E.g., the 'marginal note" to s. 28 Acts Interpretation Act 1924 in the 1927 Reprint leaves out "construction of" from the equivalent s. 25 of the 1924 Act: "Foregoing rules to apply to construction of this Act."
19. If the abbreviated form were adopted the *New Zealand* identification would need to be given more prominence than the Coat of Arms gives.

others were dealt with at the whim of the draftsman. In 1949 there must have been a suggestion to achieve some degree of standardisation, and, strangely, for two years, the words of the Title, with the exception of conjunctions were *all* capped. This retrograde step was remedied in 1951 when, as now, only proper nouns and Short Titles of Acts are given capitals.

In 1951 the contents section of the yearly volumes of Acts listing Acts under their Titles was left out. This was very likely an acknowledgment of the limited use given the section.

(2) Style

The Title is supposed to give a brief statement of the general purpose of the Act. Since Henry VII, it has been the custom to give each Act a distinct title but in construing the Act, the use of the Title has only recently been considered permissible. It can now be referred to only however, to resolve an ambiguity, and "may not be looked at to modify the interpretation of plain language."[20] In New Zealand, the Title is highly relevant for the construction of a statute because it could be used to determine the legislative 'intent' mentioned in s.5 (j) Acts Interpretation Act 1924. This accords the Title sufficient importance to require that it should do its job and do it well. New Zealand Titles, however, do not.

All Titles begin with — "An Act to . . . " though up till 1870 some began "An Act for . . . " In either case the first two words can safely be dispensed with especially if the Short Title is made prominent[21] as this will mention the "Act".

The details in the Titles vary greatly in the amount of information given or their usefulness. Broadly speaking, the Titles to Acts of 50 years ago were as good, if not better, than those of the present.[22] In general, they are kept to three or four lines. This is adequate for short Acts but there can be no justification for economy in a long and involved Act such as, for example, the New Zealand Superannuation Act 1974. It is:

> "An Act to establish a New Zealand earnings related fund and to provide a comprehensive coverage of superannuation benefits".

United Kingdom Acts have the lengthiest Titles, the quality of which New Zealand may well strive to equal. The Title for the United Kingdom 6-page Badgers Act 1973, for example is;

> "An Act to prohibit, save as permitted under this Act, the taking, injuring or killing of badgers".

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20. *Re Wykes* [1961] ch. 229, per Buckley J. at p. 242.
21. E.g., see United Kingdom Acts.
22. That is, the Acts of the last 5-10 years. But some of the Titles in 1974 are very full, e.g., Dangerous Goods Act 1974; Children and Young Persons Act 1974.

In New Zealand this Title would perhaps be reduced simply to "An Act to protect badgers."[23]

Many Acts in use in New Zealand are now consolidations. The Title to these Acts is written:

> "An Act to consolidate and amend the law relating to . . . . (short statement of the subject matter)"

The reader who looks back to the principal Act will invariably find a similar, if not the same limited Title. In tracing the original Title for the 1966 Consolidation of the Acts Interpretation Act 1924, for example one comes across substantially the same uninformative Title in reprints of 1957, 1931, 1924, 1908. But in the 1888 Act, we get the interesting:

> "An Act respecting the Form and Interpretation of Statutes, and *for the shortening of the language used therein*"[24]

In amendment Acts, the Title is invariably "An Act to amend the . . . . Act", giving no indication as to the nature of the amendment.

J. The Short Title

The first section New Zealand Acts has always been the section which sets out the Short Title of the Act, and which says that the Act may be cited by it. Before 1907, the section looked like this:

1. The Short Title of this Act is "The Acts Interpretation Act, 1888."

The 1908 Consolidated Acts kept this form because, it was said:[25]

(i) with regard to the inverted commas, that it caught the eye and made for ease of reference where the Title was long and involved.

(ii) with regard to the enacting clause, that it "appears to have been contemplated by the Acts Interpretation Acts which have always provided that an Act having a Short Title may be cited by it. Hence where an Act contains a Short Title, it is superfluous to say that it may be cited by it."[26]

Despite these remarks, made in the report to the House in 1908, the Acts in 1907 and after were in the form, for example:

"1. This Act may be cited as the Acts Interpretation Act, 1924." Note the dropping of the inverted commas and the capital T.

Finally in 1951 the comma was dropped from the Short Title and there has been no change to the present day. It is interesting to note, however, that in the 1957 Reprints the old formula was retained — but with new trimmings:

"1. The Short Title of this Act is the Partnership Act 1908."

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23. For a good Title see the Social Security Act 1973 (U.K.).
24. Emphasis added.
25. (1908) 1 Append. to JHR A—6, p. 2.
26. But of course a layman reading the Act would not be aware of this.

One can only presume that the compilers of the Reprints had the power to standardise them for in the introduction to those volumes it is said:[27]

> "The text of the Acts in the reprint has been modernised to accord with the existing style of the statute book, both as to spelling and generally . . . . "

K. Interpretation Section

The proviso to the definitions of words and phrases used in a special way in any Act is worded at present:

"In this Act, unless the context otherwise requires,—"

The use of these precise words can be found regularly in Acts dating back to 1931 and in one dated 1894. They have been invariably used during the last 20 years, but prior to 1957 these variations have occurred:

"If not inconsistent with the context"[28]
"Except where a different intention appears"[29]
"Unless a contrary intention appears."[30]

All this declares, of course, what is in fact the common law as found in *Meux* v. *Jacobs*.[31] Some jurisdictions do not even bother with them at all, and simply say, "In this Act, — . . . " Mauritius and Alberta are two who use this form. An improvement on the present formula, if it is to be continued to be used, however, could be achieved by dropping one (the second), or both, of the commas.[32]

L. The Marginal Notes

Most jurisdictions have marginal notes in smaller print indicating the nature of the sections they stand next to. Often, a reference in the Act to other legislation is identified by a marginal note giving the number of the Act referred to, so that the reader can find it more quickly.

New Zealand notes were placed in the margin until 1955 when they were taken from the margin and placed in the section in bold type after the section number. These are, however, still referred to as the "marginal" notes. (In fact before 1955 there were instances of the new form: firstly, in all the 1931 Reprints and then in the Social Security Act 1938).[32a] The reason the marginal notes were taken from the margin itself was to make Bills easier for the printer to set and

27. Vol. 1, p. vii [1957] Reprints.
28. E.g., Arbitration Act 1908.
29. E.g., New Zealand Society of Accountants Act 1908.
30. E.g., Air Navigation Act 1931.
31. (1875) L.R. 7 H.L. 481, 493.
32. See U.K. Acts which leave out the second comma.
32a. As reprinted in 1948.

correct. Because of the smaller type, the notes must be set separate from, but adjacent to, the main section. This meant that a change in the section would mean twice the work especially if the positioning of the section was changed. If bills in their corrected form were required in a hurry it was not unknown for a marginal note to end up next to a section it did not relate to. Although it was expediency and the time factor which prompted it, the change was one for the better. It is much neater and is just as effective while saving much space. Initially the note was given a full stop but it was realised after 10 Acts in 1955 that this was unnecessary and it was neater without it.

With their shift in positioning the notes have had to be more concise than they were before.[33] The helpful notes concerning referred legislation and related legislation of importance or interest has not been dispensed with; they follow the section but are not set in bold type. Under the present form, each section has a note before it whereas before, only some did. This means that a note is attached to even a very short section so that sometimes the note itself says just as much as what follows it.

V CHANGES IN STYLE

The layman knows when he is reading a statute (or any legal document). There is a distinctive legal ring about the language. This is a product of the combination in such documents of firstly, the use of archaic English and Latin words; and secondly giving common words an uncommon meaning: e.g., consideration, execution, etc.;
And while New Zealand statutes have improved noticeably over the years to the point where at least some of them are readable in a lay sense, progress has been extremely slow. The changes are often hard to detect and the development still far from adequate.

A. The Search for a Pattern

It may be thought that there would be a pattern to the changes in legal style which could be recorded with precision. Unfortunately this is not the case whatever view is taken of the matter. Whether such obvious groupings as:

1) decades since 1900
2) the periods of leadership of the respective Chief Law Draftsmen or Parliamentary Counsel

are used or other avenues such as

3) taking the developments of individual Acts and looking for a generalisation about all the Acts at the same time or period of the change

33. See The Analysis, supra.

4) groupings the statutes according to their subject matter
5) comparing the changes in specific sections (e.g. offences, repeal)

the result is equally unhelpful.

Of all, (5) is the most fruitful but the results are limited as they relate only to specific and fairly formal sections and not to the general drafting style. In (1) and (2) changes depended (it is inferred) on who the draftsman was, and not on any consistent or evident policy. Unlike the full stop and other presentation details there is not a single definable period in which style changed throughout. For example, the general decline of the archaic English "hereto", "hereafter" etc. is hard to pinpoint to any period but it is clear it occurred from a comparison of statutes of 1974 with those of 1900. It is perhaps to be expected that changes in style would take place over a longer period of time, but it is surprising to note occasional retrograde steps. In 1908 the Consolidated Acts provided an opportunity to improve old style and this was, in fact, done in many instances. But at least for s.2 of the Acts Interpretation Act 1888, no effort was made to improve the language. For example, the 1888 vintage " . . . now or hereafter passed", appeared in 1908 as " . . . heretofore or that may hereafter be passed". The latter phrase remains to this day in the 1966 Reprint.

Another example of this imperceptible change occurs in relation to the dropping of the use of the comma and semi-colon in sections. Examples can be found in the consolidations, but there is no consistent pattern.

Finally, by the 1920's sections did not, in general, contain the same number of subsections that appeared in earlier Acts. Section 40 of the Coal Mines Act 1908, for example, had 49 subsections, but in the 1925 Act, these were divided and new sections created so the number of subsections in any one section was much smaller. No generalisation can be made, however, as the incidence of sections with large numbers of subsections was never great.

Avenue (3) above has a number of drawbacks. A 'development' in the Act can only be seen to reflect truly the drafting style if there is a corresponding change in the substantive provisions requiring them to be redrafted. When they do not, they are left untouched and they are, therefore of no assistance. Further, if a change is spotted in the course of an Act's evolution, the change might not be one common to statutes of that period but be instead a practice established over the years since the section was last drafted. Again the change might be simply reflecting a particular practice recently applied to that type of section only.

Avenue (4) reveals so many variables that it is impossible to determine whether the differences are substantive or stylistic.

The question remains as to whether an inquiry such as this can

reveal anything worthwhile. D. A. S. Ward[34] confirmed that style was too "intangible" to categorise because

1. Acts are drafted by a number of draftsmen who are largely independent once they have shown competence.
2. Any particular draftsman's "style" was subject to change as he progressed.
3. An original draft might have been redrafted by another person.
4. Draftsmen have highly individual and personal styles.
5. It is not the practice of the Parliamentary Counsel Office to set down standard style policy in the same way as presentation style can be. This is because it is felt desirable to give the individual counsel as much freedom as possible to tackle any draft in the best way to obtain the object of the draft.

Avenue (5) involves basically a systematic search through statutes. The result simply confirmed the unpredictability of tendencies:

B. The Offence Section

New Zealand Acts use without apparent consistency, many different types of formulae for creating statutory offences. The most common is:

"Every person commits an offence against this Act who —

a) . . .
b) . . . "

followed by a section in which the penalty is specified. A variation on this formula is

"Every person who —

a) . . . .
b) . . . .

commits an offence against this Act and is liable to a fine of . . . "

The first of these is generally found in the more recent Acts and the second in older ones, but exceptions are not hard to find.[35] The first form is preferable as it can immediately be recognised as an offence creating section, whereas in the second, the reader must continue to the end of the (what could be a long) section. Marginal notes will often, but not invariably, give an indication. Sometimes an "offence" will be phrased as a prohibition: "No person shall . . . "[36] which is not only unnecessarily inconsistent but is also bad drafting because it does not specify that the act is in fact an offence. One can only presume that it is an offence by the general section which prescribes

34. Chief Parliamentary Counsel 1967-1972.
35. See s. 236 Post Office Act 1959, s. 3 Geneva Conventions Act 1958.
36. See Dangerous Goods Act 1974, s. 31, s. 32.

the penalty.[37] This comment is applicable to the also very common declaratory form of "It is an offence to . . . "

But whilst there do not appear to be any significant variations on the offence sections used in Acts some are evident. For example in the Destitute Persons Act 1910, s. 61 reads:

> "Every person who . . . shall be guilty of an offence, and shall on conviction thereof . . . be liable to a fine . . . "

while the Indecent Publications Act 1910, s.4 reads:

> "If any newspaper . . . shall . . . be conclusively deemed to have caused that . . . . and shall be severally guilty of an offence against this Act . . . . "

And in the Child Welfare Act 1925, s.30 (3) it is provided:

> "Every person who commits a breach of the . . . preceding subsection shall be guilty of contempt of court . . . . "

Again in the Patents Act 1953, s. 108 reads:

> "Where an offence . . . . is committed by a body corporate, every person who . . . . shall be deemed to be guilty of that offence unless he proves that . . . . "

And finally the draftsman of s. 53(3) of the Pharmacy Act 1970 faced with the task of drafting a section which had the gist of s. 108 of the Patents Act above used this formulation:

> "If any body corporate is *convicted* of an offence against this Act . . . . every person who . . . . himself *commits an offence*, and shall be *liable* . . . . to a fine . . . " (Underlining added)

Happily these examples are rare instances of departures from the common formulae and do not represent a pattern of any kind.

The changes in form of the offence-creating formulae have been slight despite inconsistent usage. The section associated with the offence section is the one which sets out the penalty where none is specified in the latter. Changes in this section have been much more noticeable. At present the most common wording is:

> "Every person who commits an offence under this Act for which no penalty is provided elsewhere than in this section is liable . . . "

The changes:

> "Every" — it is now invariably used whereas some old Acts used "any".
>
> "under this Act" — "thereunder" was used in 1926 and in one instance in 1974!
>
> "no penalty" — this is now finally settled as the accepted formulation although in the last 30 years, "no *specific* penalty" has kept cropping up. In 1920 "specially" was also used.

37. Discussed infra.

"provided elsewhere" — in many instances (1955, 1950) the order was reversed but now and in 1921, this formulation is used. Both in 1939 and 1974 "provided otherwise" was used, but there have been few repeats of the 1921 " . . . hereinbefore provided".

"than in this section" — variations include "Than *by* this section" (1939) while one section in 1955 left it out altogether.

C. The Section setting up the Corporation/Board

The most common form used today is:
"There is hereby established a Corporation to be called the . . . Corporation."

Whatever the merits of this form, the variations which have been (inconsistently) used are:

— "There shall be a Corporation to be called . . . . "[38]
— "There is hereby established for the purposes of this Act, a Council, to be known as . . . "[39]

D. The Section granting Powers to a Statutory Body

The sections are now framed in this way:

"(1) The Board shall have such powers, rights and authorities as may reasonably be necessary or expedient to enable it to carry out its functions.

(2) Without restricting the generality of subsection (1) of this section, it is hereby declared that the Board may from time to time . . . "

The pattern is for general, subjective and wide powers to be followed by particular powers. This has been the pattern at least since the 1920's. Then and before, the functions and powers of statutory bodies were often not as clearly set out as they are now, but the "subjective" nature of powers granted has always been enacted. Sometimes the distinction between a *power* and a *function* is not clear-cut and a general power may be granted in a section on functions while particular powers is mentioned in other sections.[40]

The present formula is the most popular among a number of variations.

The phrase "such powers, rights and authorities. .. " has variants which have, for example:

(a) used "all" instead of "such"[41]
(b) left out "rights"[42]

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38. S. 3 State Advances Corporation Act 1965.
39. S. 3 Nature Conservation Council Act 1962.
40. S. 11 (4) Dairy Products Marketing Commission Act 1947.
41. S. 20 Recreation and Sport Act 1973.
42. S. 9 Tourist Hotel Corporation Act 1955.

(c) left out "rights and authorities"[43]
(d) used "privileges" instead of "authority"[44]
(e) combinations of these.

Similarly the phrase "as may reasonably be necessary or expedient to enable it to carry out its functions." has the variants

(a) no "or expedient"[45]
(b) " . . . . for the effective performance of its functions"[46]
(c) " . . . for the attainment of the general exercise and object of its functions"[47]
(d) " . . . necessary, conducive or incidental to the performance of its functions"[48]

And the second part:

"without prejudicing the generality of the foregoing prov . . . "
"without restricting the generality of subsection (1)"
"without limiting the generality of the powers of sub. . . "

E. The Enabling Clause: The Section granting Regulation-Making powers

The form of this section has been directly affected by a Government direction given in 1961. It is the only example of a change in form and style which can be identified in the same way and with the same certainty as can the changes in presentation form.

Before 1961, the most common form of the enabling clause, expressed the power of the Governor-General in Council to make regulations in two parts thus:

(1) authorising such regulations as may in his opinion "be necessary or expedient for giving full effect to the provisions of this Act and for the due administration thereof"
(2) "Without limiting" that power, "for all or any of the following purposes. . . "

In 1961 a Government directive required that the enabling clauses be framed in this form:

"The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:

(a) . . .
(b) . . . (Specify as particularly and precisely as possible)
(f) "Providing for such matters as are contemplated by or neces-

43. See note 41 *supra.*
44. S. 27 Licensing Trust Act 1949.
45. S. 6, New Zealand Export-Import Corporation 1974.
46. See note 42.
47. Note 45.
48. See note 40.

sary for giving full effect to the provisions of this Act and for the due administration thereof".[49]

The reasons for this directive were both legal and political.[50] The effect has been of course, to make the section "objective" while the leaving the courts room to rule on questions of *vires*.

F. The Repeals Section[51]

The present form is:

> "The enactments specified in the First Schedule to this Act are hereby repealed"

The evolution of this form has been as follows:

> "Enactments" — this term has been preferred as it includes regulations as well, and is now used whether any instruments are mentioned or not. Where there are a small number of Acts to follow, "Acts" is used.
>
> "specified" — until 1950, "mentioned" was more popular but as early as 1939, "specified' was used.
>
> "to this Act" — until 1955, "hereto" was more used. One finds however that the newer form was used in 1931 and the older form in 1961.
>
> "hereby" has withstood over 100 years of use. New Zealand could probably follow the Mauritius use of "The enactments listed in the Schedule are repealed," which is more concise and is as precise:— something which was not on the mind of the draftsman of "The Anzac Day Act 1949 is *hereby consequentially* repealed."[51(a)]

G. The Use of the Proviso

Thornton[51b] makes a strong case for dropping of the use the proviso. Although his arguments are difficult to refute, the proviso is alive and well in New Zealand.[52] For example the N.Z. Superannuation Act 1974 in 75 pages had 97 sections and 37 provisoes. The first 75 pages of the Companies Act 1955 had 104 sections and 30 provisoes. The use of the proviso would seem to depend on the type of Act as one would have expected more than the 13 in the Coal Mines Act 1908 in its 128 sections and 47 (large) pages, but this is a speculative conclusion as there is no evidence to suggest that the number of provisoes do not depend on who is the draftsman.

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49. See for example, s. 95 New Zealand Superannuation Act 1974.
50. For a comprehensive discussion on the whole question, see G. Cain, *Regulation-Making powers of the Executive*, 1975.
51. For an interesting discussion of these types of repeals, see Murray, D. B., *When is a repeal not a repeal?* (1963) 16 MLR 50.
51a. S. 6, Anzac Day Act 1966. This is a common formula.
51b. Thornton, G. C., Legislative Drafting (1970).
52. H. Namasivayam in his *The Drafting of Legislation* (1967), Ghana Universities Press at p. 20 thinks that provisoes expressing exceptions are now justified by usage.

VI THE STATUTE TODAY — A COMPARISON WITH OVERSEAS

New Zealand is justifiably proud of its statutes. Of the Commonwealth jurisdictions the standard of presentation of New Zealand statutes is one of the highest while the style of drafting, from all accounts, is as good as any.[53] Constant reprinting has afforded the opportunity to maintain high standards. Changes occur however, for a number of reasons, as do the continuation of various practices, but where an overseas practice is clearly preferable to a New Zealand practice, a change should not be hindered merely on grounds of past practice. The following are in point.

A. The Head

The United Kingdom head provides a clear example of a deficiency in New Zealand Acts. The subject of our Acts (N.Z.) is printed at the top of the page, but this is not the official Short Title. Longer Acts also often have a page or two of Analysis first, which means that these Acts cannot readily be positively identified.
The United Kingdom practice of giving a big bold heading of the Act (the Short Title) is useful not only for reference purposes but also as an authoritative beginning to an important document.
In Acts of Mauritius, much prominence is given to the date of the assenting of the Governor-General to the Act. The clear display of the date of assent is a useful practice. New Zealand has the date of assent following the Title which may or may not be on the front page (because it follows the analysis) and is not labelled as such. As Acts often commence on assent, this date merits more prominence in our statutes.

B. The Analysis

While this section of the New Zealand Act may be taken for granted it is surprising how few other jurisdictions have one, especially in view of its obvious usefulness. This may perhaps be because it is felt unnecessary to repeat the marginal notes, (which is what the Analysis does) which are available by flicking through the pages. This argument is perhaps valid when the notes are in the margins which *is* the case in many other Acts, but even so, it is submitted that the New Zealand practice is the best. Other jurisdictions have a section in the Act which gives the contents of the Act in its *parts*. In the case of a long Act that can clearly be so divided, this can perhaps be more helpful than a detailed analysis of sections. The placing of the Analysis before all else has disadvantages which have been discussed. But it is probably the best place for it as it is not a (substantive) part of the Act. The Commonwealth of Australia Acts get over this problem, but not very effectively, by printing the analysis on separate pages and putting them in front of, and divorced from the Act itself.

53. Note 9a, *supra.*

C. The Title

Mention has already been made of the fullness of United Kingdom Titles. Practice varies in this matter but the tendency is to be on the lazy side. The worst offenders are the Canadian Acts. The Title to the Canadian Indian Act 1970 is, for example, "An Act respecting Indians". This is arguably as informative as anything in 10 lines can be if the Act is a wide-ranging one, but where the Act has a specific and limited objective, its mention in the Title can be very helpful. The majority of amendment Acts are also open to this comment but New Zealand's inadequate treatment in this regard is in line with most other jurisdictions.

D. The Short Title Section

Most Acts have this section at the beginning of the Act. This is in accordance with its importance. However, once an Act is identified and it gets to be known by the Short Title, its importance lapses. The United Kingdom Acts have the section at the end (having the necessary information at the head). This it is submitted, is the best practice.

E. Assent Commencement Dates

As previously indicated the date of assent is invariably put in the head. Mauritius gives it much prominence. Usually it follows the title. Practice varies for the placing of the commencement date. As is true for the Short Title, the importance of the section lapses once everyone knows the Act is operating either by implication or confirmation. What has to be balanced is the need to convey early a basic fact, and yet not let spent sections precede substantive ones.

F. Marginal Notes

Most other countries have marginal notes in the margin. Despite their smaller print they can be a useful reference aid to the reader. More space, however, is required than is the case with the New Zealand practice, which is also much neater and is only marginally less helpful to the reader.

G. The Amendment Act

A large proportion of legislation passed today is in the form of an amendment to existing law. In 1973 just under three-quarters of the Acts passed were amendment Acts.[54] In their present form these Acts in New Zealand do not give prominence to the following essential information:

1. The Act being amended.
2. The subject matter of the amendment.
3. The term by which the Act being amended will be referred to.

54. 93 out of 133.

The New Zealand Acts give this information in the Title and in the Short Title section. Unfortunately the Title gives no clue as to the subject matter as it is invariably "An Act to amend . . . Act" and is therefore superfluous in view of the Short Title which virtually repeats this. The United Kingdom amendment acts are generally specific as to what it is being amended. But if a number of sections are being amended, they could be listed, or, if the amending Act is to cover a variety of changes then this fact should be conveyed early and concisely in the enactment.

Overseas Short Titles to amendment Acts vary. Some have the word "amendment" in brackets (e.g., Gaming (Amendment) Act) while others do not bother to mention it at all.[55] The United Kingdom sometimes gives the amending Act a new Title altogether as they did with the Supply of Goods (Implied Terms) Act 1973, an Act which principally amended the Sale of Goods Act 1893. Admittedly that Act amended other Acts as well so that it could perhaps not accurately be called the Sale of Goods Amendment Act, but even so, this practice helpfully identifies the subject matter. The disadvantage of doing this is that one cannot then tell from the Short Title what Act is being amended, and nor can it be easily found.

To convey the subject matter, some Australian Acts[56] have a general subject heading at the beginning of the Act. Another way is the United Kingdom practice where, if possible, this information is inserted in the Short Title. For example, The Gaming (Raffles) Amendment Act 1973.

New Zealand amendment acts however, have this cumbersome section:

"1. Short Title — This Act may be cited as . . . [a]
and shall be read together with } [b]
shall be deemed part of . . . }
(hereinafter referred to as the principal Act)" [c]

Part [b] of this section is superfluous in view of s.18 of the Acts Interpretation Act[57] while [c] is inelegant.

The Australian Commonwealth[58] does it more neatly by breaking the section up:

"1. Citation — This act may be cited as the Wool Industry Act 1973
(2) The Wool Industry Act 1972 is referred to as the Principal Act
(3) The Principal Act as amended by this Act may be cited as the Wool Industry Act 1972-73."

The advantage of 1 (3) is that it eliminates the need for the word "amendment" and simplifies what under the New Zealand practice would appear as:

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55. Commonwealth of Australia.
56. Western Australia, Tasmania.
57. Which provides that a citation of an Act includes its amendments.
58. And also Queensland and Western Australia.

> "The Wool Industry Act 1972 as amended by the Wool Industry Amendment Act 1973 . . . "

Ontario[59] does not define "principal act" but repeats the Act at the beginning of every section. This may be repetitious but is at least very clear. Quebec uses the dubious method of stating the Act once and then subsequently referring to it as the "said Act". Alberta, on the other hand, has the interesting form of italicising the "instructions" in the amending act and leaving the substantive changes in normal type so that the reader can instantly sort out the actual amendments.

H. The Form of the New Zealand Amendment Act

New Zealand at present uses the "direct" form of amendment. Specific sections or words of the amended Act are referred to either for omission, addition or adjustment. This means that every section of the amending Act begins either

a) Section 2 of the principal Act is hereby amended by . . .
or
b) The principal Act is hereby amended by inserting after Section 2 . . .

This method is now used in preference to the "indirect method" which legislates *about* the Act being 'amended' rather than actually amending it. The United Kingdom uses this method which has the advantage that it is self-contained and therefore conveys the substance of the change very effectively, i.e. "all references to X will now be read subject to Y . . . ." The more serious disadvantage is that the reader of the amended Act can be left in doubt as to the extent of such general statements. In the direct method this doubt cannot arise.

The difference in (a) and (b) above used in New Zealand Acts is that (a) is the form used for any changes to existing words while (b) is used for additions to the Act itself, usually of more sections. If the *Act* is amended more than once, (b) then reads: " . . . is further amended . . ."

New Zealand did not adopt the direct method of amendment until the 1950's. Till then, amendment Acts were more in the nature of Acts which stated what was to be the new law, and with provisions which accommodated that new law with the existing (amended) law. For example:

> "In addition to the powers conferred on the Court by s.8 of the Principal Act the Court . . . may do all of the following . . ."[60]

I. Regulations

The essential information which ought to be given at the head of regulations is:

59. And also New South Wales and Alberta.
60. S. 7, Mortgage Relief Amendment Act 1931.

1. The subject matter,
2. The Enabling Act (and possibly the sections.)
3. When the regulations come into force.

Once again the United Kingdom instruments do this best. The first heading is usually brief but descriptive, and, is sometimes very helpfully the Short Title of the enabling Act (which Thornton suggests could be standard). This is then followed by a more particular sub-heading. What then follows is the Short Title of the regulations so the combined effect of the whole is a very informative title. The New Zealand head is, in contrast, uninformative. It gives prominent space to the Governor-General at the expense of any aid to the reader. The enabling clause is too verbose for the enabling Act to be seen at a glance. If it cannot be simplified, it could still be put at the end of the regulations, leaving of course, reference to the enabling Act at the front.

Mauritius has the simplest formulation, which is:

> "Made by the Governor-General under s. 3 of the Emergency Powers Ordinance 1968"

But there is also much merit in the simple: "Under the Gaming Act".[61]

The New Zealand Regulations Act 1936 requires the stating of the dates of making, and commencement,[61a] and also that the regulations be laid.[62] It is not, however, clear what happens if they are not laid.[63] If it is important the three dates appear then it is probably best that they appear in the one place, at the head. Mauritius has the date of making at the end. This would be a better place to put the New Zealand statement:

> "(Made by) His Excellency the Governor-General, acting by and with the consent of the Executive Council, at Government House at Wellington this 2nd day of September 1975"

J. Style

Only a cursory comparison between the United Kingdom and New Zealand styles of recent times can be made here. And, for the reasons outlined above, any conclusions as to style are limited in application. That *there is* a New Zealand style cannot be doubted. This is even evidenced by studying the several New Zealand Acts which have been part copied from United Kingdom Acts. Some noticeable features are:

1. New Zealand tends to use commas rather than brackets.

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61. Tanganyika does this.
61a. S. 4(2).
62. S. 4(2) Regulations Amendment Act 1962.
63. See G. Cain, *Regulation-Making Powers of the Executive.*
64. United Kingdom Acts were chosen because they lend themselves to such comparison since there are many examples of New Zealand Acts which are modelled on the United Kingdom Acts.

2. New Zealand prefers to put what amounts to a definition in its interpretation section in preference to a separate section.
3. New Zealand tends to avoid any elaboration on sections. The United Kingdom sections sometimes give what amounts to examples of legislative intent but New Zealand sections substitute for these the phrase . . . "in all the circumstances. . ." without more.[65]
4. New Zealand will take the opportunity to clear up bad drafting and will name the United Kingdom's "foregoing section".

VII CONCLUSION: TRENDS

In presentation and form the improvements made to New Zealand statutes have probably reached their ultimate. Following the introduction of the use of Arabic numerals in 1969 very little else needs to be done to the existing format, which with its economy of dots and dashes is both neat and effective. In this, it is as good as any in the world. It must be stressed however, that the present format has been used for over 120 years, and whilst it is the best present format it may need to be changed to suit the requirements of changing times. More and more people without legal training are now seeking to understand statutes for themselves. For this reason as well as for those already discussed there has perhaps, to be some change in emphasis.

In the matter of style, there has not been a consistent pattern of development. The very gradual changes in some areas only, has necessarily meant that in others there has been little or no change. Consequently old statutes remain as good or, in some cases, better than present efforts. The conservative nature of the law does not allow for wholesale changes but glaring inadequacies or archaic expression should not be perpetuated merely on the grounds of past practice:

It may well be that their cautiousness for change is to the credit of the draftsmen of New Zealand Acts as they have maintained a style that the profession knows and understands. But outside the field of law, and one need only take the up-dating of language used in the Bible as one most striking example, a changed emphasis in favour of attracting lay understanding is apparent. Perhaps the draftsman's work should reflect an appreciation of this.

Why cannot style be made uniform in the same way as presentation has been? This can surely be done without over inhibiting individual draftsmen. The opportunity for creative individual work is always available in the drafting of the large number of provisions which cannot be standardised. The examples given earlier have shown up some of the results of the present lack of order. The principal ones are: verbiage

65. Cf. s. 5 Occupiers Liability Act 1962 (N.Z.) with s. 2 Occupiers Liability Act 1957 (U.K.).

and uncertainty (that is have the changes been merely variations of the same theme or are they intentionally different?). The 1961 Enabling Clause is a good example of effective and beneficial uniformity. But the section granting powers is very akin to the pre-1961 enabling clause and could well benefit from similar direction. As for the offence section, a uniform approach has largely been achieved, but a directive as to exact form, if adhered to, could make these sections easier for the reader to firstly, identify the section as an offence section, secondly identify the offending act, and finally be informed of the remedy or sanction. Also a direction that draftsmen no longer use the proviso will hardly inhibit style. It may deprive them of a useful instrument for dealing with difficult drafts, but if it means that the law would become more accessible through clarity, then it is worth it.

Meanwhile, there is nothing in the statutes of today to suggest any radical movement for change in the future. And this, despite the message in the Title of the 1888 Acts Interpretation Act and in s.5 (c) of the Statutes Drafting & Compilation Act 1920, which requires the Officers of the Compilation "to consider the language and effect of the statutes" and to suggest changes to the Attorney-General.

T. Y. CHAN