

ACCESS TO LEGISLATION — DISCOVERY TO REFORM

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The purpose of this article is to, in a sense, provide a "do it yourself" guide to collecting legislation. The prime examples given are taken from the legislative patterns of Mauritius, Niue, Seychelles and Tokelau. This article focuses on the identification of the legislation of the country concerned, the collecting and consolidating of that legislation, its revision and reform, and the establishing of the status of the consolidation as the primary point of access to the legislation in force.

Prenant appui sur les systèmes juridiques de l'île Maurice, de Niue, des Seychelles et de Tokelau, l'auteur propose un petit guide sur la bonne méthode permettant de recenser les textes de lois dans les petits Etats. Pour chaque pays concerné sont successivement abordées les questions relatives à la collecte et à la consolidation des textes de lois applicables, au recensement des réformes et leurs modalités de regroupement au sein de corpus juris de référence qui le cas échéant, sont accompagnés de commentaires ou de décisions de jurisprudence.

I INTRODUCTION

The purpose of this article is to provide a "do it yourself" guide to collecting legislation in small jurisdictions. The prime examples given are taken from the legislative patterns of Mauritius, Niue, Seychelles and Tokelau. A significant part of this article relates to the identification of the legislation of the country concerned, the collecting and consolidating of that legislation, its revision and reform, and the establishing of the status of the consolidation as the primary point of access to the legislation in force. By way of extra assistance for access, commentaries, annotated legislation, and case digests can be provided for the legislation that is identified by the process.

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A primary goal of such an exercise is to provide an accessible and up to date statement of the legislation in force. Most countries aspire to have such a statement, a few do not, and there are others which may wish to have such a statement but, because of the small size of the jurisdiction or of the profession, such an exercise is commercially unviable for them. In some cases, resources such as international aid may be available for the task, but legislative tasks will often fail to get funding because they are not high among the country's political priorities for the limited aid available.

The key tools for the project are the constitution, the interpretation statute,¹ the standing orders of the legislature and the courts' legislation of the country concerned.

The flow of the work is – Discovery → Collection → Consolidation → Editing → Printing → Reform.

II IDENTIFICATION OF LEGISLATION

The identification of legislation in force is typically a significant exercise of legal historical research. To take the Tokelau legal system for instance, the inquiry would involve research going back at least to 1889 when Tokelau became a British Protectorate, but may even need to go back to 1877 when the Western Pacific Order in Council was promulgated in the United Kingdom.² From that date, legislation both of the United Kingdom and the High Commissioner for the Western Pacific would need to be tracked first for Acts and Orders in Council of the United Kingdom and any relevant King's or Queen's Regulation of the High Commissioner. Following that the enquiry would be of the various Orders in Council relating to the transfer of the administration of Tokelau from the United Kingdom government to the government of New Zealand and in turn, from the Governor-General of New Zealand (Governor of Tokelau) and the delegation of legislative powers to the Administrator of Western Samoa who promulgated Ordinances for Tokelau. Following that British colonial history, Tokelau as a territory was transferred to the government of New

1 The Interpretation Act 1999 (NZ) is the kind of document envisaged. The Legislation Act 2019 (NZ) would not be so handy for the specific task of consolidation. Mauritius and Niue both passed interpretation Acts with law collections in mind: The Interpretation and General Clauses Act 1974 (MRU); the Interpretation Act 2004 (Niue).

2 This enquiry would require access to the British Orders in Council in the Statutory Orders and Instruments of the British government, the *Gazette of the High Commission of the Western Pacific*, the *Fiji Royal Gazette*, the *Official Gazette of Western Samoa*, and the *New Zealand Gazette*. This enquiry is not always easy because, for instance, when the 1948 consolidation of the UK Statutory Orders and Instruments was published most New Zealand libraries disposed of the earlier volumes. This meant that many original Orders (ie those which had been repealed) for the early Pacific colonial period were no longer available.

Zealand. That transition was marked by the passage of the Tokelau Act 1948.³ The Governor-General of New Zealand could after that legislate for Tokelau by way of regulations. Since 1986 each village of Tokelau has been able to make rules for its village and, since 1996, Tokelau has had a national domestic legislative capacity which also empowered the amendment of regulations made by the Governor-General before 1996.⁴ Working through this history is time consuming and often presents uncertainties as to the governing legislation.⁵

III COLLECTING AND CONSOLIDATING

Having identified the legislation of the relevant period⁶ it is then necessary to prepare a record of the fate of that legislation – Has it been repealed? Has it been amended? Is it spent? It is useful to record this in the manner it was done for Mauritius and Seychelles by Sir Charlton Lane.⁷ That historical record obviates the need to redo the research.

3 In force from 1 January 1949.

4 Tokelau Act 1948, s 3A(2)(d).

5 This is without considering the Common Law of England which at several times in the colonial history of Tokelau has been the default system of law. The exercise is on a smaller scale but not unlike that painstakingly carried out by the New Zealand government in its preparation for the Imperial Laws Application Act 1988.

For the Pacific it is also useful here to refer to the CFTC report of 1979 by G P Barton: "Legal Resource Needs in Small States (Commonwealth Pacific Jurisdictions)" reprinted in (1999) 30 VUWLR 549.

6 The period may be that since the most recent authoritative collection or be that from the origins of the system.

7 *The Laws of Mauritius* (Government Printer, Mauritius, 1946). Figure 1 reproduces the first page of that chronology. The manner of operation is illustrated by Figure 2 which in respect of Ordinance 9 of 1832 is followed through to the data for 1837. The fate of that Ordinance in 1837 can be followed through time in a similar manner.

The Laws of Seychelles 2010 provides only the consolidated legislation; there is no chronological record – which makes it difficult to track the legislation historically.

Figure 1

REVISED EDITION OF LAWS, 1945.		
CHRONOLOGICAL TABLE.		
No.	Year and Titles of Ordinances.	How affected.
1832.		
1.	For putting into legal force and effect the new Penal Code for the Island of Mauritius and its Dependencies.	Disallowed: G. N. 10 Sept., 1833.
2.	For determining the formalities and conditions to be observed for the future in the publication of journals and periodical writings in the Island of Mauritius; and for providing for the repression of such offences as may be committed by means of the Press, or through any other medium of publication.	Lapsed: not confirmed.
3.	For making it obligatory on sugar planters to mark the bags or barrels of sugar with their names, or with that of their sugar manufactory, previously to the same being removed from the estate.	Lapsed: not confirmed.
4.	For investing the courts of law, in certain circumstances and on certain conditions, with the power to stay proceedings, in cases of compulsory sale of landed property.	Disallowed: Certificate 24 June, 1833.
5.	For extending the period fixed by the Proclamation of the 28th March last, for the completion of the biennial returns, in conformity to His Majesty's Order in Council of the 30th January, 1826.	Spent.
6.	For prolonging and determining the period granted by Proclamation of 28th March last, and by Order in Council of 30th May last, for completing the biennial census, conformably to the Order in Council of 30th January, 1826.	Spent.
7.	For the purpose of authorizing the importation into Mauritius, free of duty, of salt provisions from New South Wales, Van Diemen's Land and Swan River.	Lapsed: not confirmed.
8.	For maintaining and authorizing provisionally, with several modifications for the present year 1832, the levying of the direct annual and other taxes, on the same basis as in the preceding years.	Spent.
9.	For regulating the manufacture and sale of spirituous liquors.	Rep. Ord. 13 of 1837.

Figure 2

Chronological Table.			13
No.	Year and Titles of Ordinances.	How affected.	
1837—continued.			
13.	On the manufacture and sale of spirituous liquors.	Rep. Ord. 11 of 1846.	
14.	On licences.	Rep. Ord. 27 of 1845.	
15.	For the purpose of instituting "Juges de Paix" and establishing a general system of Police throughout the Island.	Lapsed: not confirmed.	
16.	For the revision of the rolls and lists upon which the tax for the benefit of the poor is levied.	Obsolete.	
17.	For the building of a new church at Mahebourg.	Spent.	
18.	For maintaining and authorizing provisionally for the ensuing year the collection of the annual direct and other taxes.	Spent.	
19.	For establishing for the year 1838, the expenditure not already fixed by Her Majesty's Government.	Spent.	
20.	For the better regulation of the relations between masters and servants, or other persons working for wages, by manual labour, as also between masters and apprentices.	Lapsed: not confirmed.	

In the presence of the list of legislation in force with its amendments, the next step is to consolidate that legislation. That exercise is sometimes done to produce a non-authoritative statement of the law, but it is also often done on the basis of a statutory authority which both authorises the consolidation and on completion gives the consolidation binding effect as the source of the law or at the very least as a *prima facie* source.⁸

Legislation which provides for the making of consolidations takes many forms. The Statute Law Revision Act 1990 of Seychelles is relatively long at 13 sections. It has detailed provisions for the appointment of a Commissioner⁹ to prepare a revised edition of the legislation, a very detailed list of the powers of the Commissioner (three and a half pages), instructions as to the physical form of the edition and for the digitising of the legislation. The Act also declares that on completion the consolidation will be "the sole and authentic version of the laws in force". "Statute law" is not defined but it is clear from s 4 that the reference includes the Constitution, Acts and statutory instruments. In common with similar statutes, the Commissioner has no power to make substantive changes to legislation. A simpler version of such a statute is the Reprint of Statutes Act 1991 of Niue. Like the Seychelles Act, the Niue Act refers to "statutes" but, unlike Seychelles, the word is defined to include

⁸ The 1908 *Consolidated Statutes of the Dominion of New Zealand* was enacted. The *Reprint of the Statutes of New Zealand 1908-1957* had the value of "*prima facie* evidence".

⁹ For the *Laws of Seychelles 2010*, the Law Revision Commissioner was A R Perera (former Chief Justice of Seychelles).

all legislation. The Niue statute is one page long and has a short and general statement of the range of the consolidation. Section 6 declares that "judicial notice of any statute reprinted pursuant to this Act shall be taken by all courts and persons acting judicially".

In the case of Mauritius there were, in the post-independence period, several enactments that dealt with aspects of consolidating the law. One was the Reprint of Laws Act 1982 which gave authority to the Prime Minister for the "correction of clerical, printing and stylistic errors in the text of an enactment". A reprint promulgated in accordance with that Act became "the official text of the enactment". This Act clearly addressed what would be commonly identified as proofing errors.¹⁰

The Revision of Laws Act 1982 of Mauritius is thoroughgoing and similar to the Statute Law Revision Act of Seychelles. It established a Law Revision Unit within the Attorney-General's Office with the precise object of revising legislation. The intention was that the updating and consolidating of legislation would be an ongoing task. The preparation of revised editions of the law was conducted under the Attorney-General and, in accordance with s 4, any revised edition would from the day immediately following the date to which the revision was accurate "be the sole official text of the enactments included in it". The powers of revision set out in s 5 are extensive and include, but go beyond, those indicated in the Reprint of Laws Act 1982 (MRU). There is no power to change the substance of the legislation but errors may be corrected and names, localities, offices and procedures, which have changed as a result of changing circumstances since the legislation was passed, can be made.¹¹ In the case of Mauritius this was significant because in 1982 the legislation still reflected several colonial eras and the structure of the various colonial administrations.¹²

It is useful to have government support for the prompt passage of legislation which tidies the law book without substantial reform. In the case of Mauritius in 1972, during the process of consolidation, a 124-page statute was passed dealing with minor amendments, corrections, and the like.¹³ None of those provisions

10 One or two such reprints per year were common. See also the Standing Orders of the House of Representatives of New Zealand, SO 102 which addresses the issue in a slightly different manner; and the Legislation Act 2019 ss 84-87. That Act is compendious and deals also with matters of interpretation and in ss 92-100 deals with revisions.

11 For an example of such changes by legislation see the New Zealand Laws Act 1979 (Niue), s 3 and First Schedule.

12 In a few cases the legislation in force dated back to the revolutionary years of the French colonial period.

13 The Laws of Mauritius (Correction of Errors and Minor Amendments) Act 1972. It was a somewhat grander version of the regular Statutes Amendment Act of New Zealand (SO 262 Standing Orders

involved any substantive or politically interesting or controversial matters.¹⁴ The consolidation process has the value of confronting the law maker with contradictory, otiose or absurd provisions in the existing law. An Act along the way to deal with that is useful so that the eventual consolidation is a relatively clear and coherent body of legislation.

The process of identification, collection and consolidation should be systematically recorded so that authority for all steps taken can be readily accessed. In earlier times this was done by a card filing system: A card for each piece of legislation. On that card was recorded the amendments, any repeal and replacement, obsolescence etc. A chronological table with a record of all pieces of legislation provides the basis for a cross-checking of the data on the cards. The cards in turn are the basis for the consolidation exercise. The cards record a chronological development of the legislation from enactment to date. The consolidation process (which provides another cross-check) should work from the current date backwards. That process avoids duplication of effort because if a particular provision has been repealed there is no need to track previous amendments. In 2022 all these processes are likely to be recorded electronically. This is efficient and quick but presents a greater risk of error. Measures need to be put in place to guarantee retention of the records and that there is no alteration that goes unchecked.

The consolidation frequently discloses duplication of principles in diverse pieces of legislation which need to be rationalised, omissions, and in the case of countries with a supreme law in the form of a written constitution, pre-Constitution provisions which have been rendered invalid by the supreme law.¹⁵ Attending to these matters is a revision task and best done on a statute by statute basis. Such matters are usually not of political consequence; if there is strong political support for the access to law

of the House of Representatives of New Zealand). The 1972 Act was followed in the Revision of Laws Act 1974 by the repeal of approximately 250 (mostly spent) pieces of legislation. See also Norfolk Island.

- 14 For instance the repeal of legislation relating to a specific outbreak of smallpox or the maintenance of a 19th century leper hospital that had been closed.

In preparation for the 2004 Niue consolidation, the Legislation (Correction of Errors and Minor Amendments) Act 2004 was promulgated. It had 38 pages (64 sections). It was complemented by the patriation of the interpretation laws; the Interpretation Act 2004 (Niue) repealed the Acts Interpretation Act 1924 (NZ) which was then in force.

- 15 Eg a law which is inconsistent with the Constitution or duplicative of an entrenched provision. In the Revision of Laws Act 1974 (MRU) the human rights and citizenship rules of the Code Napoleon (then in force in Mauritius) were repealed on the grounds that those matters were covered by the supreme law.

project, passage of the necessary legislation will not be difficult nor a cause for embarrassment for the government.

The discovery and consolidation task will also identify those pieces of legislation which have not been brought into force. Where the legislation is not recent it usually can be repealed. There are however instances where the role of the legislation was precautionary or in terrorem rather than ever being intended to be made operative.¹⁶ Alternatively the discovery may be a spur to the government to proclaim the legislation.¹⁷

Consolidations should have a specified cut-off date appointed well in advance of that date. The choice of the date should take into account the election cycle and the parliamentary cycle. The cut-off date that is set should coincide with the end of a legislative session and not be coincident with an election period. A date so chosen results in the publication of a consolidation which at the moment of publication is a correct statement of the law on that date. This has not always happened. In the case of Seychelles for example, the cut-off date for the *Revised Edition of the Laws of Seychelles 2010* was 31 December 2010; finally the consolidation was proclaimed under the Reprint of Statutes Act in 2016.¹⁸ This meant that the official collection of the laws when declared was nearly six years out of date. Many of the consolidated laws had by then been amended with the result that when the revised laws came into force they required substantial annotation. Another such example was the Lane edition of the *Laws of Mauritius*. Its cut-off date was 31 July 1945. It was not declared till many years later by which time amendments to the law since 1945 had to be integrated into the new official text which in several cases was impossible because the amendments referred to provisions and circumstances which were not reflected in the consolidated 1945 laws.¹⁹

16 Eg the Distribution of Fodder (Control) Ordinance 1961 (MRU) was still not in force in 1977.

17 Especially is this the case where the government is implementing/enforcing the legislation on the false assumption that the law has commenced.

18 The Laws of Seychelles (Commencement) Order 2016 (SI 2016/33) of 11 May 2016. A major reason for the delay was the unstable text, which repeated proofing and correcting could not resolve. The message from that experience was "don't mix texts from different formats". In order to save typing costs, much extant legislation was scanned. Also, some was typed, and the most recent enactments were in PDF or Word form. The way forward when confronted by a large unstable text (16 large volumes in the Seychelles case) will be to do individual consolidations on a rolling basis as has been done in New Zealand.

19 Eg the Prisons Regulations 1891 were consolidated in the Lane edition as at 31 July 1945. When the consolidated version finally took effect, the Prisons Regulations had been amended many times.

IV REVISION AND REFORM

The consolidation is the ideal basis for reform endeavours. The consolidated version of the legislation inevitably reflects the past. This is very clear where the consolidation follows decolonisation, the enactment of a new constitution or a lengthy period without legislative review.²⁰ Governments are likely to change also so the reform and revision of existing legislation enables a government to integrate its policies into the legislation. Former British colonies, now independent states, typically have much to do and many will have much to do for some time because the early years of independence require significant government energy for the managing of the state. Reform of legislation may not be the highest priority. Legislation with economic implications will either have been done immediately at independence or, because of the uncertainties of the outcomes of desired reforms, the alteration of existing fiscal legislation may be delayed many years till there is a degree of confidence in the economy. For instance in the case of Mauritius reform of the income tax law, the companies legislation and the equivalent of registration and other duties though admittedly in need of reform were not reformed for decades.²¹

British colonial legislation and in some cases current legislation is organised in terms of caputs (CAP) reflecting the English parliamentary system of roll numbers. Acts/Ordinances were organised numerically by this system. In consolidations frequently the legislation has been grouped by broad subject area and the CAP numbers altered accordingly. From one consolidation to another the CAP numbers often vary to reflect the place of the Act within the order of the new collection.

Accessibility is significantly improved when the collection orders the material by short title of the Act. The consolidation provides the opportunity for obscurely titled legislation to be given a title which guides the reader to its subject matter.²² Whether the subsidiary legislation under that Act appears along with the Act²³ or whether there is a separate volume of consolidated subsidiary legislation which presents the

20 A common aspiration for legislative reviews is every five years.

21 The Income Tax Ordinance 1950 was repealed by the Income Tax Act 1974; the Companies Ordinance 1913 was repealed by the Companies Act 1984; the Arrêté du 16 Frimaire An XII was repealed by the Registration Duty Act 1982.

22 Similarly, a change of title for Acts from eg Penal Code, Judiciary Act, Procedure for Criminal Matters Act, Civil Procedure Act to eg Criminal Code, Courts Act, Criminal Procedure Act and Civil Procedure Act would enable their production in the same 'C' Volume.

23 As in the case of the Seychelles consolidation.

regulations in alphabetical order under the empowering statute²⁴ will be decided by practitioner or judicial preferences.

In the past access was facilitated by key words or key phrases presented as marginal notes which in the days of hot lead type-setting meant two separate printer's blocks which were eventually aligned. This was a demanding task even if the result might have been seen to be elegant given the indenting etc involved. A more recent, more efficient and less costly approach has been to have those side notes/marginal notes inserted as part of the running text in bold.²⁵ The marginal note should run less than a full line.

The role of marginal notes will be determined by the legislation which provides the basic rules of interpretation.²⁶

Figure 3

	CHAPTER 52	
	COURTS ACT	
	[30 th November, 1964]	
	ARRANGEMENT OF SECTIONS	
SECTION	PART 1	Act 21 of 1964 Act 13 of 1967 S.I. 123 of 1970 S.I. 98 of 1973 Act 6 of 1974 S.I. 95 of 1975 Act 13 of 1976 S.I. 72 of 1976 Act 23 of 1976 Dec. 18 of 1978 Act 6 of 1983 S.I. 60 of 1985 Act 4 of 1986 S.I. 15 of 1990 Act 28 of 2010 S.I. 69 of 2010
	General	
1.	Short title.	

24 In Niue the *Niue Laws 2019* presents all the subsidiary legislation in its Vol 4.

25 Eg as in contemporary New Zealand legislation.

26 Eg Legislation Act 2019 (NZ) s 10; Acts Interpretation Act 1924 (NZ) s 5.

Figure 4

Version as at 28 October 2021	Legislation Act 2019	Part 2 s 28
<p>(3) However, an Act's Title and commencement sections, and any principal legislation provision, come into force on Royal assent (and no reference in the commencement section includes them).</p> <p>(4) In subsection (3), principal legislation provision means a section or part of a section that identifies legislation being amended.</p> <p>Compare: 1999 No 85 s 8</p> <p>Section 25(3): amended, on 25 March 2021, by section 4(2) of the Secondary Legislation Act 2021 (2021 No 7).</p> <p>Section 25(4): inserted, on 25 March 2021, by section 4(2) of the Secondary Legislation Act 2021 (2021 No 7).</p>		

Printed legislation should be hardbound²⁷ and have sufficient margin for annotations.²⁸

Reform substantially involves legislative drafting. The almost standard pattern now is to use "the plain English" method in the interests of accessibility to the widest possible audience. Some drafting offices have an established style guide.²⁹ In smaller jurisdictions standardisation of legislative formulae can be achieved by taking a drafting text such as Thornton *Legislative Drafting*³⁰ and annotating a master copy with, where there is a range of alternative formulae,³¹ the formula which is to be used in that jurisdiction. This avoids formulae changing with a change of drafter and the consequent possibility of an argument in court which is based on the principle that a change of formula results in a change of meaning. An established drafting guide also assists the drafter who is then free to focus creatively on the substance of the legislation.

27 Experience of looseleaf systems has often not been good. Looseleaf collections need a regular and reliable updating and a professional filing system. In many countries looseleaf systems when consulted are found not to be up to date, have no indication as the date to which the new leaves have been inserted, or have leaves missing.

28 A finding list records the amendments to legislation in force. This may be recorded on the consolidated text at the beginning of the piece of legislation (as in the example in Figure 3), or with the affected provision noted where it appears (Figure 4, the New Zealand practice), or both. An annotation with the affected provision saves users having to repeat the research which has already been done by the consolidator.

29 Eg Parliamentary Counsel Office Canberra, *Drafting Practice Guide* (2022); <<https://www.pco.act.gov.au/library/Drafting%20Practice%20Guide.pdf>>. Parliamentary Counsel Office NZ – in-house *Drafting Manual*.

30 G C Thornton *Thornton's Legislative Drafting* (5th ed, Bloomsbury, 2013).

31 Eg penalty clauses.

V COMPLEMENTARY DOCUMENTS

Access to legislation is important and the first step is to make the legislation in force available for the public. It is, however, not in itself sufficient. There is also a need to have clear methods for people to find the legislation they require – in other words, lists and directories are important. The primary tool for this purpose is usually a finding list.³² Ideally this provides alphabetical indexes of statutes and subsidiary legislation by short title. Subsidiary legislation should be listed alphabetically by empowering statute. Additionally, chronological lists of enactment should be made available to aid access. If these lists are maintained annually, as was the case in New Zealand and Mauritius for instance, they provide very rapid access to the legislation in force as well as a historical record of enactments, their amendments and repeals.³³

Commentaries on legislation provide context and examples of the use of the legislative provisions in practice.³⁴ References to court decisions which have considered the legislation in question are invaluable. Law reports are a necessary tool for the preparation of digests.

*The Laws of New Zealand*³⁵ may be seen as an advanced version of such digests. The Mauritius Digest of 1999³⁶ is a more traditional form as is the *Seychelles Digest of 2014*. A basic digest can be compiled quickly and easily by a collecting of the headnotes of reported cases and arranging them alphabetically by subject matter with, as may be appropriate, indexes to the precedents used by jurisdiction.

The starting point for access to legislation is in the identifying of the legislation in force and the maintaining of it in an accessible and up to date form. Once that is secured, guides, handbooks and commentaries can be readily prepared.

32 Eg the NZ Legislation *Tables of New Zealand Acts and Ordinances* [etc]. For this purpose, it is best to have short titles that reflect the substance of the piece of legislation in question.

33 Eg *Cook Islands Legislation: A Finding List as at 30 April 2019* (Cook Islands Government, Wellington, 2019) or that in *Niue Legislation Supplement 2020-2021* (Government of Niue, Alofi, 2021) 1-51.

34 New Zealand has such commentaries in respect of the main areas of legal dispute, eg *McGechan on Procedure* (Thomson Reuters, 1985-); *Adams on Criminal Law* (Thomson Reuters, 2005-).

35 *The Laws of New Zealand* (LexisNexis).

36 Venchard, Angelo, Glover *New Mauritius Digest* (Best Graphics, Mauritius, 1999) 5 volumes.