LL.B. IV Term

LB-4034-Legislative Drafting

Cases Selected and Edited by

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Course Objective

This course aims at providing a practical guidance of the principles and techniques of legislative drafting. It also aims to provide a thorough analysis of the nuances involved in drafting of a legislation. The course lays down a methodical study of the manner in which the drafter should proceed with the drafting. It further explores the pre-requisites which a draftsman needs to equip himself with. It highlights the problems and challenges faced by a draftsman in carrying out the task of drafting a legislation.

It is expected that the students will acquire analytical skills and knowledge to analyse the tools and techniques employed by the draftsman.

Topic 2: How do we put together the components of legislative sentences?

a. Principal subject
b. Principal predicate
c. Predicate modifiers

Topic 3: Main parts of legislation

Topic 4: Common phrases and their significance

Topic 5: How should we structure a legislative text?

a. General considerations
b. Drafting sections
c. Drafting sentences in sections
d. Paragraphing
e. Numbering
f. Ordering and linking sentences in a section
g. Linking sections
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i. Grouping Section

Topic 6: How should we organise a legislative text?

a. General considerations
b. Preparing an outline
c. Factors influencing an outline for a Bill

Topic 7: How can we develop good legislative style?

a. General considerations
b. Developing good legislative style
c. Gender-neutral drafting
d. Some additional matters of style

UNIT 3: WORKING WITHIN LIMITS

Topic 1: How do we work with interpretive approaches and rules?

a. General considerations
b. Judicial approaches to interpretation
c. Interpretive assumptions and presumptions
d. Aids to interpretation

Topic 2: How do we work with Interpretation Acts?

a. Importance of Interpretation Acts
b. Application of Interpretation Acts
c. Using Interpretation Acts to facilitate drafting

UNIT 4: DRAFTING CONSTITUTIONS

Topic 1: How do we work with the Constitution?

a. The Constitution and the legislative counsel
b. Particular constitutional constraints

Topic 2: How do we work with fundamental rights and freedoms?

a. Drafting under a bill of rights
b. International standards

Prescribed Legislation:

General Clauses Act, 1897

Prescribed Books:

1. B.R. Atre, Legislative Drafting (Principles and Techniques), Universal Law Publishing- An Imprint of LexisNexis, 5th edn. (2017).
2. Arthur J. Rynearson, Legislative Drafting Step-by-Step, Carolina Academic Press (2013).
3. Nirmal Kanti, R. Cambray's Principles of Legislation and Legislative Drafting, (2017).
4. T. K. Viswanathan, Legislative Drafting: Shaping the Law for the New Millennium, Indian Law Institute, 2nd edn., (2007).
5. V.P. Sarathi, Interpretation of Statutes, Eastern Book Company, 4th edn., (2003).
6. Lectures on Constitutional Law and Legislative Drafting, Vol. I, Institute of Judicial Training and Research, Uttar Pradesh, (1989*).*

Suggested Readings:

1. P.M. Bakshi, "The Discipline of Legislative Drafting", Vol. 34, No.1, *JILI*, p. 1 (1992).
2. O.P. Motiwal, "The Principles of Legislative Drafting", Vol.16, No.1, *JILI*, p. 11 (1974).
3. P.M. Bakshi, "Proviso in Legislative Drafting", Vol. 34, No. 2, *JILI*, p. 179 (1992).
4. S. K. Hiranandani, "Legislative Drafting: An Indian View", Vol. 27, No.1, *The Modern Law Review*, p. 1 (1964).
5. Namrata Mukherjee, Shankar Narayanan, *et al*., "Manual on Plain Language Drafting", Vidhi Centre for Legal Policy, (2017).
6. Law Commission of India, 60th Report (1974) and 183rd Report (2002) on General Clauses Act, 1897.

Rubric for Theory Exam Papers:

'All the theory papers, except for CLE subjects*, for LL.B. semester exams carry 100 marks each, for which the University of Delhi conducts an end semester descriptive exam of 3 hours duration. A typical theory question paper contains 8 questions printed both in English and Hindi languages. The student is required to answer 5 out of 8 questions. Each question carries equal marks, that is 20 marks each. Hence the maximum marks for each paper are 100. A student has to secure a minimum of 45 marks out of 100 to pass a paper. Answers may be written either in English or in Hindi but the same medium should be used throughout the paper.'

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India

- Ministry of Law and Justice - links to Constitution, Indian Code and Central legislation: http://lawmin.nic.in/welcome.html#
- INCODIS, the India Code Information Service - links to: Indian Code and Acts of the Parliament of India: http://indiacode.nic.in

Australia

- LawSearch Online - access to Commonwealth (of Australia) legislation: http://www.comlaw.gov.au/
- Australasian Legal Information Institute - links to legislation data bases in Australasia and other countries, including Canada, India, Malaysia, New Zealand, Singapore and the United Kingdom: www.austlii.edu.au
- Commonwealth (of Australia) legislation: www.austlii.edu.au/au/legis/cth/consol_act
- Office of (Commonwealth) Parliamentary Counsel - links to: Commonwealth, State and Territory legislation, drafting offices in Australia and elsewhere and plain language sites: www.opc.gov.au

Canada

- CanLII - a non-profit organization managed by the Federation of Law Societies of Canada. This website provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions: http://www.canlii.org/en/index.html
- David Elliott's site provides a collection of articles on legislative drafting and plain language: http://www.davidelliott.ca/
- Federal Department of Justice - Justice Laws Site - Federal Acts and Regulations: http://laws-lois.justice.gc.ca/eng/index.html
- Uniform Law Conference: http://www.ulcc.ca/

New Zealand

- Office of Parliamentary Counsel - links to: New Zealand legislation, other drafting offices: www.pco.parliament.govt.nz
- New Zealand legislation: http://www.legislation.govt.nz/default.aspx
- New Zealand Legal Information Institute: legal research web-site with links to legislation, other legal databases: http://www.nzlii.org/

Nigeria

- International Centre for Nigerian Law, Law Library: http://www.nigeria-law.org/LawLibrary.htm

United Kingdom

- Parliamentary Counsel - links to: UK primary legislation, UK web-sites related to legislative issues, model codes of practice, conduct, and procedure: http://www.cabinetoffice.gov.uk/content/office-parliamentary-counsel
- United Kingdom legislation: www.legislation.hmso.gov.uk
- United Kingdom primary legislation: www.hmso.gov.uk/acts.htm
- United Kingdom Statutory Instruments (including Scottish and Welsh): www.hmso.gov.uk/stat.htm
- United Kingdom Good Law Initiative: https://www.gov.uk/good-law
- Bills currently before Parliament: www.publications.parliament.uk/pa/pabills.htm
- British and Irish Legal Information Institute - databases for legislation for the United Kingdom (from 1988) and Ireland: www.bailii.org/databases.html
- Hansard Society: http://www.hansardsociety.org.uk/
- Scottish Government, Plain Language and Legislation: http://www.scotland.gov.uk/Publications/2006/02/17093804/5

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WHAT IS LEGISLATIVE DRAFTING ALL ABOUT?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

This Section aims to give you a general background to legislative drafting. It introduces some general themes, notably in relation to the responsibilities of legislative counsel.

In addition, this Section includes suggestions on how to approach the task of drafting legislation. You should try to follow them when you are doing the drafting exercises. If you develop good working practices during your study of legislative drafting, they will stand you in good stead in your professional practice.

Section Objectives

By the end of this Section, you should be able to do the following:

- explain what legislative drafting entails and how it is typically provided in parliamentary-based jurisdictions;
- describe the basic responsibilities of legislative counsel and how they can be fulfilled;
- determine to whom particular types of legislation should be addressed;
- list the factors that influence the way legislation is expressed, especially in contrast with everyday communication;
- decide what practical steps you can take to facilitate the task of legislative drafting.

(1) DRAFTING AND LEGISLATIVE COUNSEL.

a. What is legislative drafting?

Legislation deals with legal rights, liabilities, duties and powers—that is, with legal relationships between various classes of persons in the community and between the State and the members of the community. Drafting is about expressing these relationships in a text that is suitable to be made into a form of written law or "legislation" through a formal procedure. This text must also communicate its substance so that those affected can conduct their activities with legal certainty.

This view puts the emphasis on the form and style of legislation; it implies that *drafting skills are concerned with using language effectively, choosing the most appropriate expressions and presenting them in a clear and unambiguous way. An important function of the legislative counsel is to help communicate the content of legislation to those who will use it. Without question this is a central feature of legislative drafting.* But it is by no means the complete picture.

What the legal relationships are to be is a matter of policy. The choice of policy is made by the person or organization that provides *drafting instructions* and has to be "validated" or "enacted", sometimes with modifications, by the body authorised to give a text the force of law. Viewed from this standpoint, *drafting is the act of transforming or "translating" policy into formal written rules or "provisions"*. As with other forms of translation, it may be achieved in a variety of different ways and making choices of approach in the light of legislative experience to obtain the most effective and acceptable way by which the policy can be given legal effect. It calls for an understanding of what has to be provided for by law to implement the policy with certainty in a way that can successfully withstand legal challenge.

As legal requirements become clearer in the course of drafting, the policy itself is often refined or even rethought. Drafting also involves testing the policy against the manner of its implementation. Will it work? How best can it be made to work? What are the likely legal consequences? Are these desired or should the policy be modified?

New legislation is not prepared in isolation. It has to fit with the existing body of law (both written and unwritten), without causing conflict between the new and the old and with proper regard for the interests of those who have regulated their affairs on the basis of the existing law. Drafting is also about producing a smooth fit and transition between the old law and the new. The policy-maker may have given little attention to what may be needed for these purposes and how best to bring it about. It is often left to legislative counsel to attend to these matters and forms an integral part of the drafting process.

A draft legislative text has no legal force until it is validated by the appropriate law-making authority through the recognised law-making process. Drafting is about producing texts that satisfy the requirements of that process and facilitates their enactment into legally-enforceable texts. Typically, this requires legislative counsel to monitor the text (for example, a bill or a draft regulation) as it passes through the process to prevent legal or formal errors creeping in.

Legislative drafting takes place at the stage when policy is converted into legislative provisions. Legislative drafting involves the preparation of a legislative text in the appropriate form so that it will give effect to the policy as a coherent part of the written law in a legal system. The way in which it is written determines how effectively it communicates its requirements to those affected. It usually has to be drafted to comply with the local drafting standards, which in some jurisdictions are formally set out in written conventions or practice directions. But drafting is concerned with what is to be communicated, as well as with the way in which it expressed. Dick (*Legal Drafting in Plain Language*, 3rd ed., p. 5) suggests that "legal drafting is legal thinking made visible". We can suggest that legislative drafting is legislative policy made visible.

b. Why is legislative drafting important?

In the modern state, much social and institutional change has to be made through written law. This is both a democratic expectation, confirmed by state Constitutions, particularly provisions guaranteeing fundamental rights and freedoms, and a practical necessity. We can no longer look to courts or to custom alone to adjust the legal system to the fast changing demands made upon it.

Legislation is central to the process of change, for example in a move from one form of economic system to another or from one form of government to another. It is the vehicle by which countries respond to the increasing demands that arise from membership in the international order, as for example the changes introduced through the World Trade Organisation (WTO) and international agreements on environmental protection.

Legislation and the institutions created under it are the principal instruments through which planned development is undertaken. Development calls for new legal institutions that must be appropriate to the needs and circumstances of the particular society. This process is undoubtedly affected by the quality of the instruments and by the speed with which they are drawn up and put into effect. Success may depend on:

- the quality of input from persons with specialist legal skills and knowledge;
- the excellence of the prior research into the legal and practical implications of the policy options;
- the satisfactory integration of the new legislative scheme with the overall legal system.

The goal of legislation in a constantly changing environment is to provide a framework for settled legal relationships, to reduce the potential for conflict and to establish effective machinery for resolving the disputes that inevitably arise. Success rests in large part upon the quality of the legislation, which in turn depends upon the competence, skills and expertise of those responsible for its preparation.

Yet many States are handicapped in making the legal changes they require by their lack of the personnel and procedures needed to produce innovative legislation. Many countries repeatedly report the scarcity of persons with skills in legislative drafting.

c. Who should draft legislation?

Jurisdictions based on the parliamentary model have generally inherited the practice of separating legislative drafting from policy-making. Policy is for the Ministry responsible for the subject area. Drafting is treated as a distinct legal activity to be carried out by a cadre of specialist legal officers—*legislative counsel*—assigned primarily or exclusively to this work.

This model has been implemented in varying degrees throughout the world, particularly in the British Commonwealth. Although the sharp distinction between policy and drafting functions is maintained in many places, notably Australia and Canada, it is less pronounced in many others where legislative counsel have significant responsibilities for policy-making as well as drafting.

This distinction is also not common in states that are not based on the parliamentary model. There the Ministry team charged with formulating the policy for new legislation typically undertakes the drafting too. The team includes lawyers from the Ministry who are expected to take on this work as part of their duties. In many systems the process is eased by the fact that many public administrators have legal qualifications. In such a system, legislative drafting is a form of legal writing in which some of the Ministry lawyers may develop special competence; it is not a separate function performed by a specialist cadre from outside the sponsoring Ministry.

A centralised drafting office serving the needs of the Government is now a settled feature of parliamentary drafting. It has become a necessity in many countries where there are few lawyers in public administration, especially in the individual Ministries. The system of preparing legislation is geared to a centralised drafting office (in particular the practice of legislative counsel working from instructions prepared by the policy-makers) rather than as a member of a particular Ministry.

d. What are the advantages of a centralised drafting office?

The advantages are those that flow from any expert service:

- all drafting is undertaken by a cadre of specialist government lawyers—legislative counsel—who can be expected to bring knowledge of the existing statute law and extensive expertise and experience in solving legislative problems in the ways with which legislative assemblies and the courts are familiar;
- the service is operationally independent of other Ministries; legislative counsel can offer opinions on effectiveness or practicality of legislative proposals that are not coloured by the commitment to particular solutions that tends to develop in sponsoring Ministries;
- high standards of drafting are set, leading to greater consistency and better quality in the legislation and to the adoption of legislative approaches that are grounded in well-tried precedents;
- since drafting is seen as a specialist skill requiring legislative counsel of high quality, centralising the activity makes the best use of limited resources and ensures that the task is in the most competent hands.

e. What are the drawbacks of a centralised drafting office?

The following drawbacks may arise:

- Ministries complain that legislative counsel lack specialist knowledge of particular fields of law, resulting in legislative solutions that do not satisfy specialist requirements as well as they might;
- as there are few legislative counsel, it is rarely practicable for them to be brought in whilst the policy is being worked out, although their input at that stage could be invaluable and time-saving;
- a distinct cadre of specialists may begin to see themselves in elitist or superior terms. Legislative counsel may maintain what has been called an "arcane and somewhat inflexible craft tradition" (Twining and Miers 1981, p. 203), which may lead to a reluctance to innovate or to deviate from established precedents.
- the concentration of demands made on a single drafting office can impose serious time pressures on legislative counsel who then have too little time to deploy their specialist skills to full effect; they may have to accept unsatisfactory compromises and expedient solutions in order to complete the task according to the timetable.

More than one commentator has remarked on the tension between holding out a specialist drafting service as a model to be emulated and the constant and serious criticism to which its work is subject. However, the complexities of preparing much modern legislation are so demanding that specialist legislative counsel are probably inevitable. Arguably, the widespread acceptance that the preparation of legislation, and especially its drafting, are expert functions may have distracted attention from the need to reform the procedures for preparation and enactment. It may also have contributed to a reluctance to consider changes to existing drafting practices.

f. What are the responsibilities of legislative counsel?

Legislative counsel are pivotal players in the legislative process. If legislative drafting is important, those who practise it must play a central role. If legislation of high quality is essential, those who have the capacity to produce it must be crucial figures.

In one sense, drafting is a technician's job, because it involves practical writing skills. But it is far more than that. It is creative work of the kind that makes demands on the intellect and analytical skills rather than functional talents or artistic flair. It depends upon a foundation of legal knowledge and ability and a capacity to use and develop legal concepts and to foresee and counter legal problems.

The functions which legislative counsel'sperform and the range of tasks associated with those functions are set out in the following chart:

Function	**Associated tasks**
Analyse	understand the policy and proposals by examining the instructions in detail
	carry out any required background research
	clarify the instructions
	initiate consultations to refine the policy and proposals
Design	advise on the practicability of achieving the policy objectives
	decide on the legislative approach
	work out the legislative scheme and requirements
	prepare an outline for the overall structure of the legislation
Compose	draft the legislative text

	revise and redraft following consultations
Scrutinise	check each draft for accuracy, certainty and consistency
	remove errors of substance and ambiguities of syntax and expression
Manage	meet deadlines in the legislative timetable
	monitor progress of the legislative text through the enactment process
	draft amendments required as the text proceeds
	check all versions of the printed text
	prepare the text for final approval and publication

(2) LEGISLATIVE EXPRESSION.

a. To whom should legislation be addressed?

We often hear complaints that legislation is drafted in a complicated and unnecessarily detailed way, that it is difficult to read quickly and is not easy to understand, especially for people without legal training. These criticisms are sometimes valid. Some legislation is drafted with too little thought for those who have to use it. But this fact should not lead us to conclude that legislation can always be expressed so that it can be understood at a glance by everyone.

Complex concepts are an inevitable part of any developed legal system. It is often difficult to simplify complicated concepts, or their application or extension to new circumstances, without losing essential characteristics of the policy they embody. It is also often difficult to avoid using standard legal language in a legislative text that is intended to operate with existing legislation that also uses that language.

That said, we have to keep in mind that legislation is the way in which authoritative rules of law are communicated. In order to communicate clearly, we should keep in mind the interests of those with whom we are communicating (the "audience"). When writing a letter or a memorandum, we usually have its recipient in mind. We try to express ourselves in ways that are familiar to the recipient; we use a style and vocabulary with which they are likely to be comfortable; we take account, often subconsciously, of their experience and general knowledge of what we are writing about. Factors such as these influence our mode of writing.

In principle, legislative drafting should be no different in this respect. We should consider our audience. The following classes of persons come to mind as those who are addressed by legislation:

1. the Government, and in particular the client Ministry, that is putting forward the policy to be expressed in the legislation;
2. legislators who enact the legislation;
3. those who are to administer the legislation (for example, public authorities) or enforce it (for example, the police);
4. the sector of the community that constitute the principal users of the legislation, including:
    - those who are to comply with the legislation (for example, the general public or particular classes of the public or commercial enterprises);
    - those who will be protected by the legislation or will benefit from it, and so have an interest in its enforcement;

5. those who must advise as to its requirements (for example, legal practitioners or other professionals);
6. judges, who must decide disputes as to its meaning or application.

If the purpose of drafting is to communicate legislative requirements, logically the legislation should be addressed to its principal users. The principal users are not those who make the legislation; they are the persons who will have the most frequent recourse to it. It should set out the legal requirements in the way they as users are likely to find most helpful.

Different legislation may address different audiences. For example, legislation on the sale of goods should be directed towards the commercial community; but legislation creating an Institute of Legislative Drafting will probably mainly concern those running it.

Different parts of a complex statute may have to be addressed at the same time to different audiences. For example, one part of the legislation on environmental protection may be directed to those who have to alter their activities to comply with its new requirements; another part may be concerned with the way that an official inspectorate is to carry out its functions. Though both groups may read both parts in order to understand the legislative scheme, the individual parts should be written with the interests of the primary group of users in mind.

The style of drafting may be significantly affected by the decision as to who the principal audience is. The more legislation impinges on the affairs of members of the public, the greater the case for stating the legal requirements in more detail, so that it affords more guidance to those affected. But legislation on the internal administration of a government institution that does not directly affect members of the public may be drafted in broader terms, leaving considerable latitude of action to those responsible for carrying it out. As the Hansard Society Commission suggested (para.218):

To achieve the best drafting style it is almost as important to be clear for whom you are drafting as it is to decide what should be in the bill or instrument.

b. What should be our aims as legislative counsel?

Legislative counsel who are preparing new legislation to implement policies decided upon by a government usually try to draft it in terms that are as direct, logical and clear as their skill and expertise can ensure. But the primary aims of legislative counsel are to be certain and unambiguous. They must do their best to ensure that

- the intentions of the policy-makers are exactly met; and
- as far as possible, both those general policy aims and the particular applications of the new policy are realised.

In principle, legislative counsel should choose language that admits of no doubt as to what is intended. That is far from easy. Indeed, it is impossible to eliminate all doubt and attempts to do so may lead to excessive detail and only complicate the legislation. In some instances, it is sensible to use expressions that deliberately leave issues of exact meaning to the courts or other official interpreters who apply the legislation to a wide range of fact situations.

c. Are there any constraints on the legislative counsel?

It is a principle of the common law system that judges may not vary, qualify, add to or diminish requirements laid down by an Act of a sovereign Parliament. In consequence, if legislative provisions are to be subject to exceptions or limitations, these must be set out in the legislation. The result is that even quite straightforward legislative texts may have to contain detailed qualifications or other terms that put beyond question the exact scope of their application. Policy-makers or legislators may insist on the inclusion of such provisions.

Legislation is often prepared under a most demanding timetable, during which the requirements of Government Ministries and other interested bodies must be established and fully provided for. Complicated situations have to be covered comprehensively in the draft legislation with an exactness of expression that aims to prevent doubts about foreseeable contingencies to which the legislation may be applied. Yet time constraints may mean that legislative counsel have to draft broadly expressed provisions because there is insufficient time to explore the details. However, when the legislation is examined by those who must administer it, the intentions of the law-makers as to its application in given circumstances should be ascertainable without recourse to the courts, even though close study may be necessary.

d. How does legislative expression compare with other forms of communication?

To avoid ambiguity in legislation, legislative counsel typically use more elaborate forms of expression than are found in ordinary speech or writing. In commonplace communications, a person states in quite simple terms what he or she requires another to do or not to do. These statements are readily understood because they are uttered against a background of shared experience upon which both parties draw in expressing or discovering what is meant. Short-cuts can often be taken since uncertainty can be clarified by requests for further information.

For example, an instruction from a father to his daughter, “Fetch the car”, will be completely understood by both. Both know which car is being referred to, where it is, that the daughter is expected and has authority to drive it and so on, without those matters being expressly mentioned by either.

Legislation, however, must be expressed in generalised language of a more abstract nature. The context in which its requirements are to apply must be apparent from its terms and the scope of its application must be ascertainable from an examination of the words actually used.

The point can be illustrated by another simple example. The biblical commandment—“Thou shall not kill”—prohibits the termination of human life but is not intended to refer to the slaughter of animals or the destruction of insects or flowers. We know this because of the context in which the commandment was originally made and continues to be used.

We also know that it is not concerned with deaths caused by someone in circumstances over which he or she had no control. We also feel instinctively that it does not fully apply to killing that is the only way to preserve one's own life or to prevent another from being killed. Whatever our beliefs, we are also likely to conclude that the commandment provides incomplete guidance on such questions as killing during war or public disorder, or under extreme provocation or mental illness, or in cases of abortion, capital punishment or euthanasia or of deaths following medical negligence or in traffic “accidents”.

But the legal system must provide guidance for all these cases. The law must attempt to differentiate between the many varied circumstances in which the death of one person is caused by another (whether in breach of the biblical precept or not or whether murder or not) and to deal with the attendant consequences in ways that the community finds acceptable. The result inevitably is an elaborate series of prescriptions, exceptions and extenuations. Many may find this body of rules to be complicated or not easy to assimilate because of its detailed nature. This may be so even though the individual rules are stated as directly and in as straightforward language as is possible.

e. What are the differences between legislative and non-legislative commands?

The difference between a legislative command and others uttered in commonplace communications can be further illustrated by the following example.

Imagine you board a public bus and see the following notice facing you:

NO STANDING ON THE BUS PENALTY $25

Very probably you would understand at once what is required. Yet a prohibition in this form is not suitable for legal purposes. In fact, it is a simplified summary of the statutory provisions. It is those provisions that would be relied upon if any legal proceedings were brought for non-compliance.

On reading the prohibition, you are very likely to conclude that it is directed to you as you board that particular bus as a passenger. You may also conclude that you cannot be carried by that bus if there are no empty seats and that, if there is an empty seat, you must take it and remain there while the bus is in motion. These conclusions result from:

- a common sense reading of the notice;
- the setting in which the notice is posted and is intended to be read;
- your knowledge and experience of riding on buses.

The law cannot take so much as understood. In the criminal law, in particular, there is a strong presumption that individuals should be given the benefit of any ambiguous legal provision. As Lord Esher stated in *Tuck & Sons v Priester* (1887) 19 QBD 629, at 638:

If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions, we must give the most lenient one.

f. What more is needed to create legislative prohibitions?

Legislative provisions that create prohibitions must:

- state the precise terms and limits of the prohibition in general language; and
- prescribe the exact classes of persons who are subject to the prohibition and the legal context in which, and the circumstances when, the prohibition applies.

  By inference we can then deduce when the prohibition does not apply. The bus notice does not deal with these matters.

We need to know why the prohibition is imposed. We have already seen that the intention of the notice may be to require passengers to remain seated while the bus is in motion. If so, the prohibition is principally to protect the passengers against injury (and the company against civil liability). But it may also be there to reinforce the authority of the person in charge of the bus (for example, the driver if there is no conductor) or to direct persons not to enter the bus if there are no seats available. By asking why the prohibition is imposed we may conclude that more than one type of behaviour is to be regulated. Each type may require separate legislative treatment.

The reader of the notice connects it to the particular bus on which it appears by seeing it there. A legislative provision applies to buses in general and must itself indicate the types of public transport it applies to and, by implication, the ones that are to carry the notice. For similar reasons, the provision must prescribe, in general terms, the occasions when it applies (or does not apply). For example, it is unlikely to be needed when a bus is out of service or perhaps when chartered for a private function (when the use can be regulated by the terms of the hiring). In consequence:

- the provision must be integrated with the general body of legislation governing public transport undertakings;

- the prohibition must be drafted to be part of the criminal law and enforceable through the conventional criminal processes if the penalty is to be enforced by criminal prosecution; and
- the language used to express the prohibition must follow that used to describe public service passenger vehicles in that legislation.

g. How should we choose the right expression?

In the actual drafting of legislative provisions, great care is taken to avoid language forms and grammatical structures that are ambiguous or are capable of more meanings than are intended. As we have seen "No standing on the bus" is capable of many meanings.

In drafting a legislative provision, we must decide what approach is most effective. For example,

- should it be stated as a legal prohibition? (informing the public what they must not do)
- should it make standing on a bus a criminal offence? (informing the public what will happen if they do what they must not do)
- should it command passengers (informing the public what they must do)?

We might have to add so many qualifications or exceptions to any prohibition that would be easier to draft a positive command as what must be done, rather than what must not done, in the particular circumstances. The offence is then committed by those who do not do what the provision requires.

In composing legislative provisions, legislative counsel must fit them to the existing body of law, by using terms and a legislative form that are consistent with it. In Example 1 it must be assumed that the terms "passenger", "public transport vehicle" and "scheduled service" have the meaning given to them in other parts of the legislation containing the provisions. Other terms such as "summary offence" and "penalty" link them with the general criminal law, which gives substance to those concepts. This version gives effect to the policy that we concluded underlies the notice in the bus. It bears little resemblance to the original notice, but it provides the essential legal basis for using a notice in those terms.

Example 1

1. A passenger being carried in a public transport vehicle on a scheduled service must remain seated while the vehicle is in motion, unless he or she is in the course of embarking or disembarking.

2. If all the seats provided for the use of passengers on a public transport vehicle on a scheduled service are occupied:

(a) a person must not enter the vehicle; and

(b) a person without a seat must disembark with all reasonable speed, if the driver of the vehicle directs them to.

3. A person who contravenes section 1 or 2 commits a summary offence and is liable to a penalty of $25.

Legislative counsel prepare legislative texts to provide direction as to the conduct expected or permitted of prescribed classes of people in particular circumstances. The texts must contain precise provisions as to who is affected, when and under what circumstances the texts apply and how they direct behaviour. Although legislative counsel generally try to express these provisions as simply as they can, inevitably the provisions are more detailed and may appear more complicated than ordinary expression, principally because they must be complete and exact.

h. What work practices will facilitate drafting?

Drafting Work Practice Tips

Here are some suggestions as to practices to follow and things that can be helpful to facilitate legislative drafting. In some countries they may not all be attainable, but you should do your best to implement them.

1. Make sure you are well-equipped for drafting:
    - Provide yourself with plenty of space, a large flat desk with a lot of room for your papers, good light and ventilation and, if possible, protection from interruptions.
    - Have a computer with Internet access and word-processing capability (for example, MSWord or WordPerfect) that can generate a publishable text.
    - Have your reference material close to hand, in particular:
        - the Constitution of your jurisdiction and related documents;
        - the Interpretation (or General Clauses) Act of your jurisdiction;
        - an up-to-date set of the legislation in force in your jurisdiction (this may be publicly available on-line from a government or publicly-funded website);
        - a good dictionary and thesaurus;
2. Allow yourself plenty of time
    - do not leave preparation to the last moment;
    - start writing early and produce as many drafts as are needed and time allows;
    - take time to consider your drafts and have second thoughts.
3. Analyse your instructions and prepare an outline of the legislative text before writing it and keep your notes and outline handy for reference.
4. Proof-read your drafts rigorously at every stage, checking repeatedly for:
    - typographical and substantive errors,
    - ambiguities in syntax, grammar or use of words,
    - inconsistency with other provisions.
5. Invite colleagues to comment on your draft.
6. Follow these word-processing practices:
    - ensure that each page of text carries a distinctive directory/file reference (for example in a footer), so that you or others can readily retrieve it from the computer;
    - be sure to back up your work to a secondary source (for example a USB key or external hard-drive) at the end of each working session, make sure that it carries an appropriate label, and keep the source safely in another place;
    - do not confine your scrutiny to the text on screen. Print your drafts and check the text from the printed copy. It is easier to overlook flaws on screen.
    - do not rely exclusively on an electronic spell- or grammar-check. Always carry out a personal scrutiny too.
    - make use of any templates that have been developed in your jurisdiction for formatting draft legislation;

- if the draft will go directly to a printing shop or bureau after it leaves your computer, ensure that it complies with their requirements.

7. Be systematic in your approach and your procedures:
    - make sure each page of your draft, and each separate provision, is appropriately numbered so that the text can be kept in an order;
    - as points strike you that will require to be attended to at a later stage, make a written note in a notebook or comments embedded in the text so that the point is not forgotten;
    - keep your notes, drafts and other working documents systematically filed; number each draft and date all the documents that you produce. (this enables you to recover any of the material promptly, particularly material that you may have discarded and later think may be useful).

WHAT IS LEGISLATION?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

This Section looks at

- the basic types and characteristics of legislation,
- the terms that are used to describe different kinds of legislative texts and their typical components, and
- the structure of primary legislation (usually known as Acts or statutes) and the texts used to enact them (Bills).

By the end of this Section, you should be able to describe the following in relation to your jurisdiction:

- the various types of legislative texts and the terms used to describe them;
- the conventional features and components of primary legislation (Bills and Acts);
- the conventions relating to the structure of Bills and Acts.

In particular, you should be able to use the appropriate technical terms to describe the characteristic features of primary legislation and Bills.

(1) TYPES OF LEGISLATION

a. What is legislation?

We use the term "legislation" generally to refer to written rules or other provisions of law made by a body that:

- has the legislative power to make the rules or provisions conferred on it by or under a Constitution; and
- has followed a legally prescribed or recognised process of law-making.

The factor that distinguishes legislation from other kinds of rules or provisions is the source of the authority to make them. Only those bodies that have the legislative power conferred upon them can make legislation.

There are two basic forms of legislation:

- *primary* legislation; and
- *subsidiary* legislation.

Constitutions invariably state which body or bodies have the power to make primary legislation.

- in a **unitary state**, this power is typically vested in the national legislature (for example Parliament or a National Assembly);
- in a **federal system**, the power is shared between the national (federal) and the state (provincial) legislatures according to a division of authority set out in the Constitution;

- in a **dependent territory**, power to make primary legislation on local matters rests with the local legislature (for example a Legislative Council), but it may also be exercised or overridden by the legislative authorities in the metropolitan country;
- in a **military regime**, the legislative power as provided for in the Constitution has usually been assumed by a Military Council and is exercised by the authority of its own decree.

There are other cases, such as the United Kingdom, where the legislative power of Parliament rests upon an unwritten constitution incorporating a basic principle of parliamentary sovereignty.

Activity 1

Note for your jurisdiction:

1. the body (or bodies) that have power to make primary legislation;
2. the provisions of your Constitution (or other basic law) that confer that power and govern its exercise.

b. What forms does primary legislation take?

The power to make primary legislation is exercised in accordance with required procedures: a process referred to as "enactment". That term may also be used to refer to the legislative text itself, or even to a legal proposition contained in a single sentence in the text. Those texts are usually referred to as "Acts" or "statutes".

The Constitution typically prescribes the basic features of the enactment process for primary legislation, referring to an individual text before enactment as a "Bill", and after enactment as an "Act". However, other terminology may be used:

1. in **federal systems** a different term may be used to refer to State texts after enactment, to distinguish them from federal enactments (for example "Law").
2. in **dependent territories** a different term may be used to refer to local instruments after enactment, to distinguish them from metropolitan enactments (for example "Ordinance").
3. in **military regimes**, a different term may be used to refer to instruments made by the Military Council after enactment (for example "Decree" or "Edict").

Activity 2

Note for your jurisdiction, with the reference to the relevant provision of your Constitution or other basic law, the term or terms used to describe individual texts made by the body (or bodies) in which the power to make primary legislation is vested:

1. before the text is enacted;
2. after its enactment.

These Materials use "Bill" and "Act", as well as "primary legislation" to cover all these forms of legislation.

c. Which bodies have power to make subsidiary legislation?

Primary legislative bodies typically have power to make laws on all matters, subject to the limitations stated in the Constitution (for example in federal jurisdictions certain exclusive powers may be reserved to the federal or state legislatures). This is generally expressed as:

the power to make laws for the peace, order and good government of [the particular jurisdiction].

This power permits the enactment of legislation ("enabling legislation") delegating a limited legislative power to other bodies, even when, as is usually the case, the Constitution is silent on the matter. Those bodies may exercise that power by issuing their own legislation, commonly referred to as subsidiary legislation. Other terms describing this form of legislation include:

- delegated legislation;
- subordinate legislation;
- secondary legislation.

These Materials use the phrase "subsidiary legislation" throughout to describe this form of legislation.

Legislative power is typically delegated to a wide range of bodies, for example the Head of State, Ministers of the Government, statutory authorities, local government councils. In the usual case, the delegation is to authorise subsidiary legislation to supplement provisions on a specific matter that are already set out in primary legislation. But more general powers may be granted to bodies performing a governmental role over a limited area or activity (for example local government councils). In both instances, the delegation and the limits on it are generally found in primary legislation, which takes precedence over subsidiary legislation.

Activity 3

Note references to any provisions of the Constitution of your jurisdiction that authorise or regulate the delegation of the legislative power to other bodies.

d. What forms does subsidiary legislation take?

The following terms generally describe instruments used to make subsidiary legislation for the following purposes, although practice is not consistent either between or within different jurisdictions.

- **proclamation**: the formal public announcement of legislation that is likely to be important or have significant consequences.
- **regulations**: subsidiary legislation of general application, especially that containing provisions of substantive law.
- **rules**: an instrument that prescribes procedural requirements rather than provisions of substantive law.
- **rules of court**: an instrument that prescribes procedural requirements relating to court proceedings.
- **bye-law or bylaw**: subsidiary legislation made by statutory bodies to have local or specific application.
- **notice**: a formal announcement of subsidiary legislation unlikely to have major significance for the general public.

- **order**: an instrument that applies provisions contained in the enabling Act to specific persons, or classes of persons, or to specific cases or places.

We consider which is the most appropriate term for particular cases in LGST 557, Module 1, Section 3 (*How do we draft subsidiary legislation?*).

Example 1

The following is an example taken from subsection 25(1) of the model Interpretation Act in the Resource Materials):

"subsidiary legislation" means proclamation, regulations, rules, rules of court, bye-laws, order, notice or other instrument made under a written law and having legislative effect.

The term "written law" is defined in the same section:

"written law" means the provisions of the Constitution, an Act or subsidiary legislation for the time being in force.

Individual instruments of subsidiary legislation are typically said to be "made" rather than "enacted". There is no special term in common use for the instrument before it is made. It is generally referred to as a "draft" instrument.

The formal terms that you should use to describe instruments, either collectively or individually, are generally indicated by the terminology adopted in your local Interpretation (or General Clauses) Act.

Activity 4

Note (with reference to your Interpretation Act) the terminology used in legislation in your jurisdiction for the following:

- subsidiary legislation collectively,
- individual pieces of subsidiary legislation generally (for example, "instruments")
- different types of subsidiary legislation (for example, "regulations" or "rules").

(2) CLASSIFICATION OF PRIMARY LEGISLATION (BILL AND ACTS).

The range of matters that primary legislation may deal with is limitless. However, there are certain kinds of Bills and Acts that are enacted in most jurisdictions for similar purposes and are referred to by similar terms. We use these terms in these Materials.

The following kinds of Bills are frequently prepared for the following purposes:

- **amending Bill**: a Bill with the principal purpose of making alterations to existing primary legislation.
- **appropriation / supply Bill**: a Bill to authorize public expenditure for the following financial year, as determined by the heads of expenditure in the estimates approved by the legislature. A *supplementary* appropriation Bill may be called for if additional expenditure must be authorised in a given year.

- **codifying Bill**: a Bill to provide a comprehensive and coherent set of written rules for a major area of law.
- **consolidation Bill**: a Bill to gather together into one Act existing written rules on a given matter, especially those rules that are scattered across different Acts.
- **declaratory Bill**: a Bill with the principal purpose of stating what the law is, and has been, on a particular topic in order to remove doubt or uncertainty.
- **enabling Bill**: a Bill with the principal purpose of conferring powers to do something that is otherwise unauthorised or unlawful.
- **finance Bill**: a Bill, usually annual, with the principal purpose of providing for the raising of revenue to meet public expenditure and to change existing taxation laws.
- **money Bill**: a Bill containing provisions dealing with financial matters that under the Constitution may not be initiated in or amended by an upper chamber of the Parliament.
- **Government Bill**: a Bill introduced into Parliament by or on behalf of Government to give effect to Government policy.
- **private member's Bill**: a Bill introduced into Parliament by a member who is not a minister of the Government on a matter of general importance though often of special interest to the member or to some group with which the member is concerned.
- **public Bill**: a Bill that is of importance to the community generally, though not necessarily applying to the entire jurisdiction; it may be introduced as a Government Bill or as a Private Member's Bill.
- **private Bill**: a Bill (sometimes required to be enacted by a special Parliamentary procedures) to make special rules for a particular locality or particular persons, or group of persons, at their request.
- **indemnity Bill**: a Bill to remove legal liability, usually from some specified person or persons for a breach of a law.
- **validation Bill**: a Bill to declare valid some action, omission or procedure that, as the law stood at the time, was invalid or legally defective and, therefore, to rectify the legal consequences.

Activity 5

Find out whether any of the Bills just described are common in your jurisdiction by looking in your statute book or asking an experienced colleague. Note any different terms that are used.

(3) STRUCTURE AND FORMAT OF BILLS AND ACTS.

Legislation is distinguished from other written texts by a highly regularized structure and format that is intended to make it easier to use. This subsection describes the characteristic features of primary legislation (Bills and Acts), and the functions they generally perform. A specimen Act is provided to enable you to compare its features with those in recent Acts in your jurisdiction.

Subsidiary legislation shares many features of primary legislation, notably in the substantive parts. However, since the makers and the making process are different, the technical apparatus for subsidiary legislation is different. For example, there may be no long title, explanatory memoranda or section notes. Instead, it typically contains a heading, authorising words indicating the maker and the authority for making, provision for the maker's signature and its date and an explanatory note.

Activity 6

Glance through different Acts. Make yourself familiar with its overall structure and the gist of their contents.

Most features are common to both Bills and Acts, but some appear only in one of the other.

a. What features appear in acts?

1. **Citation** (year and number)

   Typically, the *year* is the year in which the enacting process is completed; the *number* represents the order in which the Bill is given Assent. The number is entered when the Act is published after enactment.

2. **Table of Contents or Provisions**

   A table of contents or provisions may be provided, particularly for longer Acts. It is generally made up from the section numbers and section notes. It is sometimes referred to by a different name (for example "Analysis").

3. **Coat of Arms**

   The national insignia, commonly printed to signify the formal authority of the Act. But it has no legal significance and is automatically added by the Government Printer.

4. **Long title**

   A formal statement of the scope of the Act. It generally begins with the words "An Act to …"

5. **Preamble**

   A recital of the circumstances and reasons leading up to the enactment.

6. **Enacting words**

   A standard formula that indicates that the Act has completed the formal process of enactment. The styles of these formulae vary widely.

7. **Short title**

   The label or name that may be used to refer to the Act. It facilitates its citation.

8. **Commencement provision**

   There are various ways to provide for the commencement of an Act including specifying a particular date to delegating, usually to the Government, the power to set a commencement date or dates. If no commencement provision is included, the Act generally comes into force on a day it receives assent by the sovereign. In some jurisdictions the date or dates of commencement are included with the official published version of Acts.

9. **Application provisions**

   An extension or restriction of the standard rules governing the application of the Act (for example to apply to part of the jurisdiction only or to have extra-territorial effect).

10. **Duration provisions**

    Imposing some limitation on how long the Act remains in force.

11. **Road map clause**

    Directions to users on how to find their way around the Act.

12. **Section note**

    An editorial aid to the contents of the section to which it is attached. It is also known as a "shoulder note". If printed in the margin, it is known as a "marginal note" or "side note".

13. **Section**

    The principal component of an Act. It comprises a numbered sentence, or sequence of sentences (each constituting a subsection), dealing with a distinct legal proposition in the legislative scheme of the Bill. Related sections may be grouped into distinct Parts or, within Parts, into Divisions, each with a descriptive heading.

14. **Subsection**

    A division of a section (numbered by a number in brackets) that deals with an element of the legal proposition dealt with by the section.

15. **Paragraph**

    One of a series of parallel components of a legislative sentence (in a section, subsection or Schedule). Each is given a bracketed letter in sequence and indented from the margin. A similar feature *within* a paragraph is termed a sub-paragraph, but is typically numbered with bracketed roman numerals and is further indented. In some jurisdictions, the terms "clause" and "subclause" are used instead.

16. **Interpretation provisions**

    Provisions that give meaning to terms used in the Act or explain how expressions in it are to be interpreted. These provisions typically contain defined terms or expressions used in the Act to which a particular meaning (definition) is attached.

17. **Schedule or Annex**

    Legislative content relating to particular sections of an Act and linked to them by the terms of those provisions (inducing words). If there are several schedules or annexes, they are set out, in a numbered sequence, in the order of their inducing sections.

Activity 7

For this Activity, have available:

Two or three recent Acts from your jurisdiction, each of no more than a few pages.

In the following table, tick column 1 if the feature is in regular use in your jurisdiction. In column 2, note down any differences in terminology or use of the feature.

Feature	Yes	Differences
1. Citation		
2. Table of Contents or Provisions		
3. Coat of Arms		
4. Long title		
5. Enacting words		
6. Short title		
7. Commencement provisions		
8. Section note		
9. Section		
10. Subsection		
11. Paragraph		
12. Interpretation provision		
13. Schedule		

b. What features appear only in bills?

Most of the preceding features appear in Bills (the citation is an exception in so far as it relates only to Acts). In many jurisdictions, additional features may be found only in Bills.

1. **Bill Number**

   This number is assigned when a Bill is introduced. It reflects the order in which the Bill is introduced in a particular legislative session. In bicameral legislatures, the numbering of Bills in each house is usually distinguished by the addition of a letter before the number, for example “S-1” for Senate Bills and “C-1” for Commons Bills.

2. **Modified long title**

   Typically, the long title is preceded by the words—“A Bill for”.

3. **Line numbering**

   Each page of the Bill has line numbering in the margin, usually at intervals of 5 lines. These are inserted by the Government Printer and facilitate debate.

4. **Explanatory memorandum**

   This is a statement attached to the front of a Bill explaining the general purpose of the Bill and the legal effects of the individual Parts and sections. In some jurisdictions, it finishes with a note on the financial implications of the legislation. This is also known as a statement of Objects and Reasons.

Activity 8

For this Activity, have available a copy of a recent Bill from your jurisdiction of no more than a few pages. In the following table, tick column 1 if the feature is in regular use in your jurisdiction. Note any differences in terminology or use of the feature.

Feature	**Yes**	**Differences**
(a) Bill Number		
(b) Modified long title		
(c) Line numbering		
(d) Explanatory Memorandum		

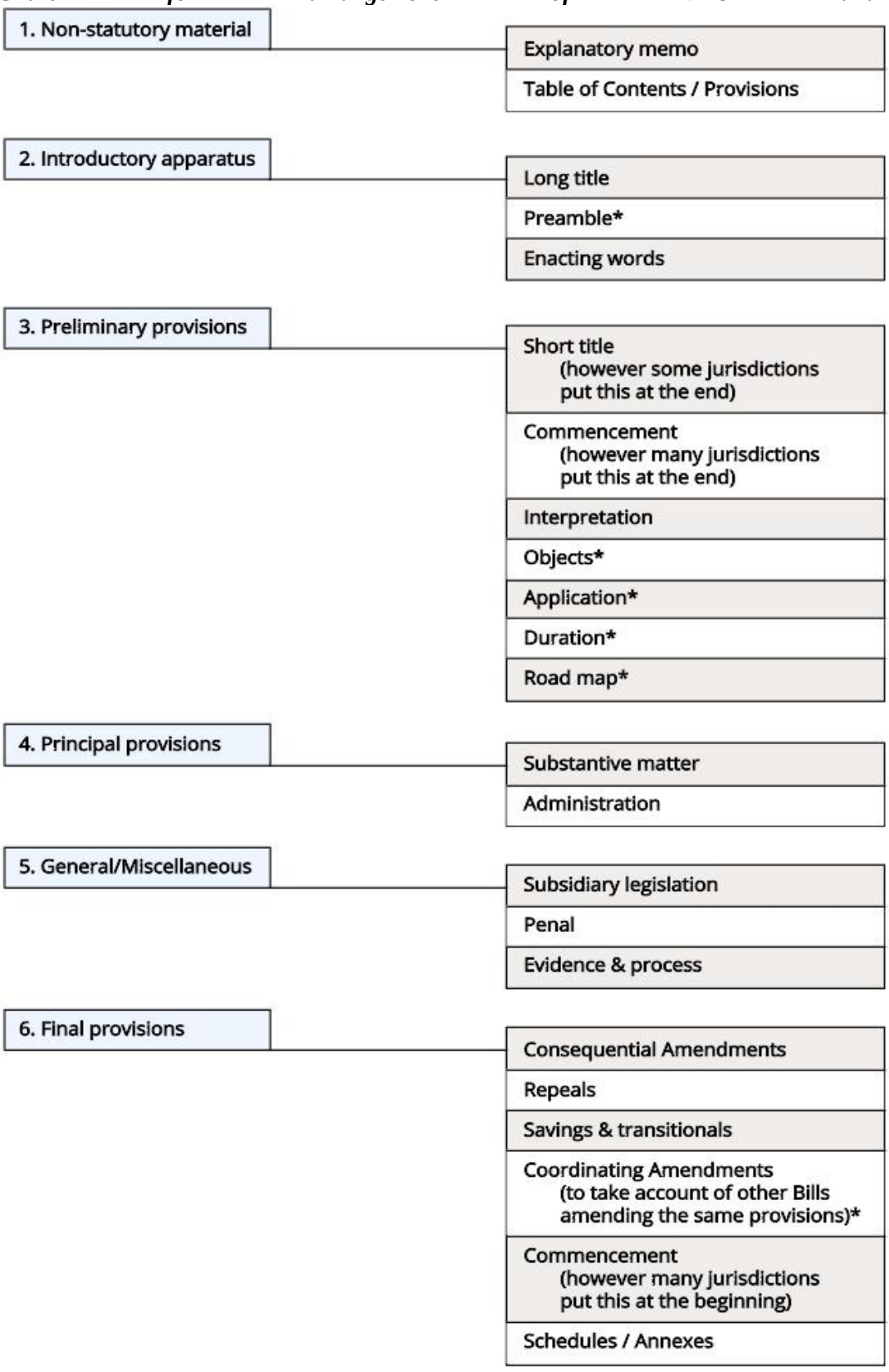
(4) CONVENTIONAL ARRANGEMENT OF BILLS AND ACTS.

From your reading of the Act and your local legislation, you are aware that legislative counsel tend to follow a conventional order when arranging the sections in Bills. Of course, the actual sequence in a particular Bill is dictated by the treatment of its subject matter.

Most jurisdictions have their own conventions for the arrangement of Bills. But these conventions have much in common from one jurisdiction to another.

The following chart outlines a model widely used. It indicates the order in which the various types of legislative matter are typically set out when they occur in a Bill and the main functions they perform in the resulting Act. (These matters are given headings in the chart for purposes of explanation. They would not necessarily be contained in formal Parts with those headings). This order reflects the relative importance of the matter in particular sections. The Chart also indicates with an asterisk (*) certain features that may be found infrequently, although some of them are valuable when the proper circumstances for their use arise.

Chart for arrangement of Bills and Acts



1. Non-statutory Materials

This material is not strictly necessary for the operation of an Act, but it is often added to facilitate using the Act.

2. Introductory Apparatus

These features provide important details about the enactment of the Act.

3. Preliminary Provisions

These provisions circumscribe the operation of the Act.

4. Principal Provisions

Substantive provisions

The main body of rules relating to the subject matter of the Bill.

Administrative provisions

Operational rules in support of the substantive provisions.

5. General/Miscellaneous

Delegation of legislative powers

Powers to make subsidiary legislation to supplement the principal provisions

Penal provisions

Offences and penalties in support of the principal provisions.

Evidence & process

Rules relating to proceedings arising out of the principal provisions.

6. Final Provisions

Amendments and repeals

Alterations to existing law resulting from the principal provisions.

Savings & transitional provisions

Temporary provisions made necessary by the alterations to existing law made by the Act.

Coordinating Provisions

When a Bill amends a provision that is also being amended by another Bill, a coordinating provision may be required to ensure that the two amendments operate harmoniously and that the later one does not undo what the earlier one has accomplished.

This model is not universally followed. In some jurisdictions, the first three preliminary provisions (short title, commencement and interpretation) are contained in the final provisions. They are then typically placed at the end of the final provisions, with interpretation before the other two.

Activity 9

Note whether the listed items are generally included in the preliminary or in the final provisions in Bills in your jurisdiction. By giving appropriate numbers, show the order in which they usually appear.

Item	**Preliminary or Final**	**Order**
1. Short title		
2. Commencement		
3. Interpretation		
4. Amendments & repeals		
5. Savings and transitional provisions		
6. Schedules		

WHY DO WE DRAFT AS WE DO IN PARLIAMENTARY SYSTEMS?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

Drafting styles in jurisdictions based on the parliamentary system, like the common law itself, have their roots in the English legal system. Again like the common law, legislative drafting has evolved over a long period of time and through the experience brought by legislative counsel working in many jurisdictions. Practices that are now taken for granted are often best explained by their historical origins. In learning how to go about the task today, it helps to have an understanding of the factors which have led to present practices.

We need to think critically about the way legislation is drafted in order to see where sensible improvements can be made to inherited drafting practices. If we are to do that, we must have a clear idea as to the objectives we should be seeking to achieve whenever we are drafting a piece of legislation.

Section Objectives

By the end of this Section, you should be able to do the following:

- describe the way legislative drafting developed and how that development has influenced the way that we draft today;
- provide an overview of the principal characteristics of legislative drafting in parliamentary jurisdictions;
- establish the principal objectives for which legislative counsel should work and the fundamental practices that are most likely to contribute to achieving them.

Studying this Section

This Section describes the systematic approach developed in England in the 19th century to composing legislative sentences and structuring legislation. This still underlies much of what we do today. We will work with these matters again in TOPIC 2 (*Writing Legislative Sentences*), when we look at them in more depth. At this stage, it is sufficient to understand the essential approaches described here, rather than to put them into practice. You will have plenty of opportunity for that later. For now, you need to see how these approaches have influenced current practices and given rise to the distinctive characteristics of drafting in the jurisdictions based on the parliamentary model.

This Section also looks at the qualities we should be trying to incorporate into our drafts. These considerations, and the ways in which they can be best addressed, recur throughout the Materials. You will have many opportunities in the Modules that follow to develop techniques for these purposes. Studying this Section is designed to provide you with an initial frame of reference for your subsequent work and with a clear perception of what standards you should be trying to achieve.

1. HISTORICAL DEVELOPMENT OF LEGISLATIVE DRAFTING

Drafting in jurisdictions based on the parliamentary model has its origins in English practice, which was exported through the colonial legal system. It remains strongly influenced by that practice, no doubt because of the extensive range of experience and tradition.

a) Where did drafting begin?

Early legislative drafting in England (from the 15th century) was largely undertaken by Judges and conveyancers. They brought to it the wordy and legalistic style they used in the deeds and court instruments of the time—a practice encouraged by payment by the length of the document. These features were accentuated from the 17th century when, in the struggles between the King and the Parliament, the judges cut down the generality of statutory language (which tended to favour the Crown) by strict construction. In response, Parliament sought the same objectives by specifying in detail and repeating at length the particular matters that would have been covered by rules drafted in broad terms.

By the 19th century, lay readers especially found the contents of most statutes unintelligible. Legislation generally suffered from poor arrangement and structure, an inconsistent and elaborate mode of expression, a dense and unhelpful format and obscure language. Blocks of unbroken text contained lengthy sentences in which many matters were compressed (for a process of separate enactment was needed for each sentence). They were also written in artificial and legalistic language.

b) How did drafting develop in the 19th Century?

Early stages

The 19th century was one of great legal change; drafting was caught up in that process. A better style was deliberately developed to counter the shortcomings in legislation, which Jeremy Bentham trenchantly criticised in the early years of that century. It was facilitated by the gradual professionalisation of the work, which began with the creation of the Office of Parliamentary Counsel, in the United Kingdom, in 1869.
In this period, we may mention four influential figures:

- **George Coode**, a barrister in private practice, who undertook a major revision of the poor laws, which led to *On Legislative Expression* (1845 & 1852) (This is reprinted in E A Driedger, *The Composition of Legislation*, 1976).
- **Sir Henry Thring** (later Lord Thring), a barrister who drafted for the Home Office from 1861 and by whom the Office of Parliamentary Counsel was founded. He wrote *Practical Legislation*, 1877, 1902.
- **Sir Mackenzie Chalmers**, who drafted major commercial statutes in the later part of the century, such as the *Sale of Goods Act 1893*, which were adopted widely outside the United Kingdom.
- **Sir Courtenay Ilbert**, also of Parliamentary Counsel, who wrote *Legislative Methods and Forms*, 1901.

All made significant contributions to a much improved approach to common law drafting in the later 19th and the early 20th centuries. Their writings and legislative drafts had considerable influence throughout the then British Empire.

Colonial developments

Drafting was often undertaken by law officers who had gained their training in English law, and who looked to English drafting practices. Some improvements in drafting occurred independently in colonial jurisdictions, although they were not usually followed in England. For example, the *Indian Penal Code 1860*, *Indian Evidence Act 1872*, *Indian Contract Act 1872* and the *Code of Civil Procedure*, *Code of Criminal Procedure 1898* demonstrated that a complete body of common law could be reduced to lucidly

written rules that were accessible to those without a legal training. The legislative counsel of that time also devised ways to enable legal principles to be enunciated and their application to be understood, notably by the addition of explanatory material and examples. Neither trend carried over into the first half of the 20th century.

19th century improvements

Sound groundwork was provided by Coode. As a result of his efforts, theoretical underpinnings to drafting practice were provided for the first time. In particular, he formulated a framework for composing legislative sentences, asserting that each should contain standard components and showing how they should be consistently deployed. We take account of those ideas in these Materials. Coode made many suggestions designed to produce more reliable drafting practices. They included:

- the prime virtues in drafting are simplicity and directness of expression. Common patterns of English should always be used;
- sentences should follow each other in a logical sequence, for example, in accordance with the chronological order of the events to which they relate;
- separate legal sentences should be used to provide for different rules relating to different persons or different events and there should be one sentence for each class of case, in which a distinct person is subjected to a distinct legal provision;
- if a legal person is engaged in several actions in the same set of circumstances, the series of actions should be gathered in a single sentence, in the order in which they will occur;
- artificial or arbitrary definitions of terms should be avoided. Instead of providing certainty of meaning they can conceal important effects;
- definitions should challenge attention by being placed before, not after, the matter to which they relate; defined terms should be identified by some distinguishing mark;
- provisos should be avoided; their only legitimate use is to create an immediate exception to a general proposition.

Subsequent developments

Later legislative counsel, Lord Thring in particular, pioneered a number of practices that complement Coode's proposals. These included:

- legislative sentences should be short, with only one sentence to a section (or, if the section is divided into subsections, to each subsection); this was facilitated by the statutory permission in 1850 to use sections and subsections.;
- there should be a unity of purpose between the subsections of the same section; the main proposition in a section should be contained in the first subsection; qualifications and exceptions should be contained in subsequent subsections.
- lengthy Acts should be divided into Parts and headings ascribed;
- distinct matters, which have no connection with each other, should not be dealt with in the same Act;
- the simplest expressions found in ordinary composition will generally be adequate.
- Latin terms and unnecessary technical expressions should be avoided;
- the same term should be used to describe the same thing; a different term should be used to describe a different thing.

c) How did drafting develop in the 20th Century?

The major common law jurisdictions seemed to lose touch with many of these basic precepts of sound drafting, at least in the second half of the 20th century. A number of the features earlier criticised re-appeared, such as long-winded and complex statutes using compressed sentences, elaborate detail, poor structure, and obscure language and terms. This was undoubtedly brought about by the increasing demand for wide-ranging legislation to regulate new activities or to introduce fundamental social change. These shortcomings may have been a little less apparent in some jurisdictions where sound practices developed by Attorneys-General during the colonial era often continued to be influential (Alison Russell, *Legislative Drafting and Forms* (4th ed. 1938)).

Principled drafting

To counter these trends, it has been proposed that legislation should move away from the traditional styles. It has been urged that greater prominence should be given to statements of principle, rather than a detailed elaboration of rules to regulate the legal relationships of those concerned with or affected by the legislative scheme (for example, Sir William Dale, *Legislative Drafting: A new approach* (1984)). There is little evidence that such a radical shift has been adopted. The principal reason commonly given is that this approach may produce less detail in the legislation as to responsibilities of those affected, but in consequence:

- that detail might have to be settled by the courts or by Executive direction or decision;
- this could lead to a reduction in the authority of the Legislature, which constitutionally and traditionally is the body expected to settle such matters.

Plain Language

Plain Language has developed in the latter part of the 20th Century in a host of areas of writing, including in legislative drafting. In this context, it entails a return to the principles put forward by Coode and Thring and was pioneered by E. A. Driedger, *Composition of Legislation*, (2nd ed, 1976)). In particular, there have been serious efforts in some countries:

- to work out how those principles can once more be applied to the legislative circumstances and drafting requirements of today; and
- to eliminate those recent practices that have tended to defeat the aims behind those principles.

This is particularly evident in Australia, where the impact of the "plain language" movement on drafting has been considerable (see for example the website of the Office of Parliamentary Counsel: http://www.opc.gov.au/plain/index.htm). This followed from a wider concern about the clarity of legal documents, especially those intended for direct use by members of the public. The Law Reform Commission of Victoria conducted a thorough examination of this matter (Report on Plain English and the Law (1987)). As part of this exercise, the Commission prepared a *Manual for Legislative Drafters* which aims “to help people involved in legislative drafting to prepare Acts which communicate their message efficiently and effectively.”

Proposals on this matter have not been limited to the composition of legislation. Others have been made with respect to the organisation and formatting of legislation to enable the contents to be more readily understood (Law Reform Commission of Victoria, Report on Access to the Law: the structure and format of legislation (1990)). Other sources are mentioned in the Bibliography in the Resource Materials.

These initiatives have been accompanied in Australia by general directions on drafting from Attorneys-General to legislative drafting offices, which have themselves begun to develop contemporary drafting techniques to improve the legislative expression and the structure and presentation of legislation (See, for example, the Drafting Directions Series of the Australian Commonwealth Office of Parliamentary Counsel: http://www.opc.gov.au/about/draft_directions.htm). These Materials take account of these developments.

2. THEORETICAL FOUNDATIONS OF THIS FORM OF DRAFTING

The early developments established theoretical underpinnings for the common law approach. They also provided a coherent body of principles with respect to legislative syntax (the way that legislative sentences should be structured) and generally relating to legislative expression. The later developments built upon these foundations.

Since the groundwork for our current approach was done by Coode, it is valuable to look at his analysis. Coode believed that a more acceptable style would be practised if certain principles were followed in writing all legislative sentences. The following summarises, first, the theoretical premises upon which he built and then the principles themselves.

a) What were the premises of Coode's approach?

Coode's approach contained these premises:

1. **Aim of legislation**: the overall aim of legislation is to regulate relationships between legal persons (those recognised by law as capable of having legal rights and obligations) and, in doing so, "to secure some benefit to some person or class of persons".
2. **Methods of securing benefits**: there are two alternative ways of securing benefits:
    - confer an appropriate right, privilege or power directly upon the person or class of persons that is to benefit; or
    - impose an obligation or liability upon a different person or class, so that a corresponding benefit results, indirectly, in favour of the person or class that is to benefit.
3. **Basic structure of a legislative sentence**: typically, a legislative sentence should provide specifically for one or other of these alternatives, but not both, since express provision of one normally gives rise to the other by implication. But "no single sentence in a law can do anything else than one or both of these".
4. **Functions of the legislative sentence**: typically, a legislative sentence should (in addition to defining one of the necessary elements of the relationship between persons or classes by these means):
    - prescribe the limits to the stated right, privilege, power, or duty and liability; and
    - designate the circumstances in which it arises and the conditions under which it operates.

Example 1

> **12.** If a court awards the custody of a child over the age of 14 years to any grandparent of the child, that grandparent is liable to maintain the child until the child reaches the age of 18 years or obtains full-time employment.

The rule in this example confers a benefit upon certain children by imposing a liability on their grandparents. The sentence also determines when the liability arises and when it ceases, by stating the circumstances and conditions in which the rule operates.

b) What were Coode's components of a legislative sentence?

To fulfil these general objectives, Coode made proposals concerning the components of legislative sentences and offered a number of other guidelines about the way sentences should be structured.

Coode asserted that legislative sentences ought to have two core components, and may have two optional components:

Core components

Legal subject

A rule in a sentence must be directed to a subject who can respond to it. So, the subject must be one recognised by the law as a person upon whom a right, privilege or power can be conferred or an obligation or liability imposed. The person to whom the rule is directed is its legal subject. Grammatically, the legal subject takes the form of a noun, modified as required to add greater precision; it is often also made the grammatical subject of the sentence.

Legal action

The legal action states what the legal subject *may* or *may not*, or *must* or *must not*, do, in order to confer the intended benefit. Grammatically, this takes the form of a verb, with an auxiliary verb that directs how the subject is to be affected: "must" (or "must not") or "may" (or "may not"). The verb too may be modified (for example, by the addition of an adverb) to give greater precision. This constitutes the *principal predicate* in the sentence.

Example 2

The subject and the action (predicate) are highlighted in the following:

> **10.** A police officer **[= subject]** may arrest a person who is committing an indictable offence **[=action/predicate]**.

Optional components

If a legislative sentence contains only a subject and an action, it constitutes a universal rule. Legal rules, however, are usually intended to have effect in particular circumstances or when particular conditions arise. So, if the rule is not to have universal effect, one or both of the following must be added:

Case

The case prescribes the circumstances to which the rule is confined or in which the rule has its effect. Grammatically, this may take the form of a subordinate clause, beginning with "where" or "when" and having its own subject and predicate.

Condition

The condition prescribes actions which, when performed, cause the legal rule to take effect or not take effect. Grammatically, this may take the form of a conditional subordinate clause, beginning with "if" or "unless" and having its own subject and predicate.

There is considerable similarity between cases and conditions, particularly in terms of their functions. The essential difference is that the latter focuses on some action that triggers or limits the application of the rule as opposed to some more general set of circumstances.

Example 3

> **12.** When a motor vehicle is illegally parked in a public park **[=case]**, an enforcement officer may request the operator of the vehicle to remove it from the park, unless the operator provides the officer with a reasonable explanation for its presence in the park **[=negative condition]**.

c) What were Coode's guidelines for forming sentences?

It is scarcely surprising with this general approach that common law legislation is made up of a series of detailed and specific provisions directed towards required or permitted behaviour of persons or classes of persons identified in the legislation. The absence of expressed general principles in the legislation is understandable. Readers of statutes drafted in parliamentary jurisdictions will find these features familiar.

Coode's guidelines on how to select the components of legislative sentences should also be familiar to users of Commonwealth legislation, although a number of them have been modified by later practice.

Selecting the legal subject

- The subject should be a legal person

  The legal subject must be a legal person (individual or body) that the law recognises as capable of bearing rights, privileges, powers, liabilities or obligations. It can, therefore, never be, for example, an animal or an inanimate thing (other than a ship). Rules are intended to affect the behaviour of persons; they cannot be directed to dogs or disorders.

- The legal person should be the grammatical subject of the sentence

  Typically, the legal subject should be the grammatical subject of the sentence. But an inanimate thing can be made the grammatical subject, if the legal person affected is obvious from the sentence.

- There should be only one legal subject in any sentence
- The subject should be placed in a prominent position in the sentence

  The subject should occupy a distinctive position in the sentence, preferably at or near the beginning of the sentence and before the verb (predicate).

Example 4

A person must not use a guard dog at any premises unless the dog is under the contrul of that person at all times while it is being so used.

The grammatical subject of the sentence is a legal person (applying to everybody with legal personality); it is in the most distinctive possible position in the sentence—at the beginning.

- The subject should not be obscured

  The legal effects of the rule will be less clear if the legal subject is obscured, for example because an inanimate thing, rather than the legal person, is the grammatical subject.

Example 5

It is unlawful to use a guard dog on any premises unless the dog is under the control of a person at all times while it is being so used.

A guard dog must not be used on any premises unless the dog is under the control of a person at all times while it is being so used.

These two versions of the same rule obscure the precise persons to whom the prohibition applies. (Is it the owner of the premises, the handler, the user or the owner of the dog?). No legal person is identified. The grammatical subjects are the inanimate "it" (sometimes termed a "false subject") and a non-person "guard dog". A sounder approach is the one in Example 4.

Selecting the legal action

- The action should contain a specific auxiliary verb

  The legal action should contain a verb that is qualified by one or other of the following auxiliary verbs:

  - "must" or "must not" for: commands to act or not to act (duties);
  - "may" or "may not" for: rights, privileges, and powers (or absence of them)
  - "is" or "may be" for: liabilities.

- The verb should be in the active voice

  The verb should, wherever possible, be used in the active voice; this facilitates making the legal subject into the grammatical subject and expresses the effect on the legal subject more positively. However, if the rule is to require the legal subject to submit to, or to be subjected to, some action or liability, the passive voice may be used, so long as it is clear, or if it is irrelevant or unnecessary to state, by whom that action is to be taken.

Example 6

A person trespassing on land occupied by a railway company *may be prosecuted*.
A person arrested under this Act must *be brought* before a magistrate as soon as practicable.

- The action can contain several verbs

  More than one verb (with the appropriate auxiliary) may be used in a legislative sentence to provide for the performing of a series of related legal actions.

Example 7

The police officer *may* arrest a person whom the officer suspects to have committed an offence, but must bring that person before a magistrate as soon as possible.

Selecting the case

- The case should take the initial position in the sentence

  Where the rule is to operate in specific circumstances only, those circumstances should be described *before anything else* in the sentence, as they provide the context for everything that follows in the sentence.

- The case should always be speaking

  The verb in a case clause should be expressed as always speaking (describing a current, rather than a future, state of affairs). It should *not* use the auxiliary verbs "must" or "may", which must be reserved for the legal action.

- The case should be in the present tense, or when required, a past tense

  The present tense should be used, if the circumstances described are concurrent with the legal action. The perfect tense should be used if the circumstances described are to have occurred before the legal action.

- The case should begin with an appropriate introductory term

  A case clause should usually be introduced by the conjunction “where” (where it describes circumstances) or “when” (when it describes a time at which or by which circumstances occur).

Example 8

When a police officer *sees* a person committing an indictable offence or *where* a reputable person *has reported* to the officer that a person has committed an indictable offence, the officer may arrest that person.

The sentence in this example contains two cases and illustrates both the recommended uses of verbs and introductory terms.

Selecting the condition

- The condition should usually be a condition precedent

  If the rule will only take effect if some person has performed some action that triggers it, the subordinate clause that describes it is a condition precedent.

- It should be placed towards the beginning of the sentence

It should precede the legal subject/legal action, since the rest of the sentence has effect only if the condition is met.

- It should always be speaking and, typically, in the present tense

  The auxiliaries "must" and "may" should not be used. If the condition occurs at the same time as the rule is triggered off, the present tense should be used. Only if the action has already happened, is a past tense needed.

- Conditions (if more than one) should be set out in a logical order

  If there are several conditions, they should be set out in a logical sequence (for example, in the chronological order of their occurrence or of their performance).

- The condition should begin with an appropriate introductory term

  A condition clause should be introduced by the conjunction "if", unless the clause takes the form of an exception or states a condition under which the rule does not take effect; then "unless" is needed.

Example 9

If a court, after dismissing a case, *considers* that the charge was frivolous, it may order the complainant to pay to the accused person a reasonable sum as compensation for the expense to which the accused may have been put as a result of the charge, *unless* the accused *has incurred* no expenses.

The sentence in this example contains a condition precedent and an exception (negative condition). This too illustrates both the recommended use of verbs and introductory terms.

d) How have later legislative counsel built on Coode's approach?

Later legislative counsel have built upon Coode's approach, and they have also modified it. Two factors helped in this respect.

1. Coode's approach assumed that subject, action, case and condition would be contained in the same sentence, almost certainly influenced by the requirement that each section of an Act could contain only one sentence. After sub-sectioning was authorised, legislative counsel found less need to compress both the main proposition and its exceptions and qualifications into the same sentence. They also gained more flexibility by being able to compose related sentences in the subsections of a section. These trends were strengthened by the use of paragraphs to divide the contents of individual sentences.
2. Coode used his own terms to describe components of legislative sentences. Later legislative counsel have rightly relied upon standard grammatical terms. This emphasises, as Driedger insists, that "there is no special language for statutes". As a result, legislative counsel now tend to use the following terms:
   - a sentence, in grammatical terms, includes a principal subject and a principal predicate (conforming to Coode's "legal subject" and "legal action");

- modifying clauses can be used in sentences (as "sentence modifiers") to describe the context or fact situation, or both, in which the rule operates. (There is no *grammatical* difference between the "case" or "condition" as Coode's distinction might suggest).

The following are some of the principal ways in which later legislative counsel modified the Coode approach.

- The principal subject can be a non-personal subject

  It is too restrictive to require the grammatical subject of every sentence to be a legal person (as Coode himself recognised). In many cases an inanimate or impersonal grammatical subject may be used with the principal predicate:

  - declaratory statements,
  - definitions, interpretation or explanatory provisions,
  - application or referential provisions,
  - general prohibitions applicable to anyone doing the prohibited action,
  - when it is obvious which legal persons are affected,
  - to provide continuity with a matter dealt with in an earlier sentence.

  Subjects of these kinds should be used only so long as they give rise to no uncertainty as to the legal persons who are to comply with the provisions in the sentence.

Example 10

The following sentences illustrate the cases listed above:

declaratory:

The *Guard Dogs Act 1985* is repealed.

definition:

In this Act, the expression "complaint" means an allegation that some person known or unknown has committed an offence".

application:

Section 25 of the Penal Code applies to persons convicted of an offence under this Act.

It is prohibited to park a motor vehicle in a public park.

obvious subject:

Applications for a dealer's licence are to be made to a local government council.

continuity:

A warrant for arrest under this section may be issued by any Judge or magistrate.

- The principal predicate can be used more flexibly to state conclusions of law, as well as to provide for actions

  Principal predicates are no longer concerned solely with actions. They are used to declare legal status or consequences.

- Making fuller use of passive verbs

  Principal predicates are now more frequently in a passive tense than Coode suggested. The decision should be dictated by ease of use, but, as Coode insisted, only if there is no ambiguity about the legal persons who are to comply with the rule.

- Employ a wider range of auxiliary verbs

  The verb in the principal predicate is not limited to verbs using the auxiliaries "may" or "must". This can be too restrictive. Although "shall" has traditionally been used, it is now widely accepted that it should not be used because of its ambiguity and because it is not used in common speech to impose obligations, and is unnecessarily legalistic.

  Alternatives to "may" are also more frequently used, for example to express a right, "is entitled" can be used; this avoids ambiguity about whether the provision confers a right or a power.

  Finally, the present tense is now used to make a statement of legal consequence or legal status.

Example 11

The following sentences illustrate the use of other verb forms:

On receiving a complaint alleging a corrupt practice by a public officer, the Commissioner *must investigate* the conduct of that officer and of any other person who appears to the Commissioner to be concerned in the alleged corrupt practice.

A person *commits* an offence who knowingly obstructs a police officer when performing any function under this Act .

There *is established* by this Act an Institute by the name of the Legislative Drafting Institute of Utopia.

The tort of detinue *is abolished*.

- Context clauses can be used more flexibly than the case and condition

Different kinds of context clause

Though both are sentence modifiers, analytically, we may still distinguish:

- a clause that states the fact situation in which the rule operates (case); and
- a clause that states an action that triggers the rule (a condition).

Different uses of introductory words

Legislative counsel tend now not to use "where" to introduce a context clause as this connotes locality rather than conditionality or circumstance in general usage. Instead they increasingly prefer:

- "if" to introduce a context clause that describes the factual setting or general circumstances in which the rule operates or one describing an action or event that causes the rule to operate;
- "when" to introduce a context clause that describes an action or the event on the happening of which the rule takes effect.
- "unless" to introduce a clause describing an action, event or state of affairs that precludes the operation of the rule.

Flexible positioning in the sentence

Context clauses are not now routinely placed *before* the principal subject and verb in the sentence. That was necessary when sentences tended to be complex and detailed in order to allow readers to see whether the provision applied to their circumstances before going further into the sentence. Sentences today are typically shorter.

The order of the sentence components is dictated by sense and ease of understanding. It is more difficult to understand a subordinate clause without having read the principal clause. Sentences are easier to understand if the principal clause precedes the subordinate clauses, particularly with lengthy subordinate clauses. So, it is often clearer to put the subordinate clause *after* the main proposition. If the rule can operate in several alternative fact situations, it may be more convenient to set these out *after* the principal subject and predicate.

Example 12

A police officer may arrest a person if a reputable person reports to the officer that the person has committed an indictable offence.

An elected member of the council must vacate his or her seat -

(a) *when* the notice for the election for the council is issued;

(b) *if* the member fails to attend 3 consecutive meetings of the council, without obtaining the prior permission of the council;

(c) *if* the member is appointed to a public office;

(d) *if*, in the case of an appointed member, the appointment is revoked by the Minister.

3. PRINCIPAL CHARACTERISTICS OF THIS FORM OF DRAFTING

a) What are the principal characteristics of this form of drafting?

The account you have just studied suggests some of the principal characteristics of drafting approaches in parliamentary jurisdictions. The following features have traditionally distinguished these drafting approaches from those in other jurisdictions, particularly those having civil law systems, which tend to be cast in broader and more generalised language that puts considerable emphasis on statements of principle.

- Policy objectives are implicit

  Legislation does not have to articulate its policy objectives. Typically, these are left to be deduced from the terms of the legislation, Legislative counsel having drafted its provisions appropriately so as to convert the policy into legislative provisions.

- Fewer statements of general principles

  Legislation rarely contains general principles governing legal relationships, from which particular requirements or applications have to be deduced. Since the function of the courts is to apply and interpret legislation, and not make it, Parliament must provide, and be seen to provide, a body of particularised rules covering all foreseeable cases or at least to authorise the making of subsidiary legislation for that purpose.

- Specific and detailed rules

  Legislation provides specific rules to govern or regulate the actions of persons whose behaviour is to be subject to the legislative scheme. In consequence, it contains a good deal of detail, designed to provide precise and certain guidance about its application.

- Compression of matter

  To minimise the number of legislative sentences, the same sentence may contain the complete rule and its context, and sometimes an exception to it. In addition to making the sentence long and detailed, such compression can lead sometimes to a complex structure.

- Drafting devices

  In order to minimise the adverse effects of this particularisation in legislation, legislative counsel make frequent use of such devices as:

  - definitions and interpretation provisions;
  - concepts created uniquely for the statute.

- Technical legislative rules

  Special rules governing the structure, operation and construction of written law are typically stated in an Interpretation Act and, to a much lesser extent, by the common law. Where these are silent or unsuitable, each legislative instrument has to provide its own technical rules on those matters.

- Relationship between provisions

  Each proposition in a statute is treated as a separate enactment. Therefore, the exact relationship between different propositions on related matters must be made very clear. If that is not obvious

from the context, linking words and cross-references must be provided (for example, “subject to section 5” or “without prejudice to section 6”).

- Legalistic language

  Since they provide legal rules, legislative sentences follow the language used in legal practice, as well as the terms used to describe established legal concepts. In addition, sentences tend to have a more formal style and vocabulary than is found in ordinary usage; they can become tortuous and convoluted and reliant on unnecessary legal jargon.

Although these features continue to be prominent in many jurisdictions based on parliamentary models, they are diminishing in others, for example in Australia and Canada. These changes are in large part motivated by concern about the usability problems that these features often entail. These Materials discuss these concerns and what can be done to address them.

4. DRAFTING OBJECTIVES

a) How should drafting be oriented in the 21st Century?

Many of the principal characteristic of legislative drafting outlined above make legislative texts harder to use and understand. Although they can be explained in terms of the historical and theoretical underpinnings of this form of drafting, these characteristics have been more recently called into question. Legislative counsel increasingly consider the expectations of those who read and apply legislation and they have begun developing techniques to facilitate this task. These techniques, which have often been pioneered in the name of plain language, benefit all users of legislation, including judges and legal practitioners, government administrators and, of course, members of the public who are affected by legislation. In this respect, legislation has much in common with other types of legal documents.

Activity 1

Before we look at some ideas on this, give thought to what qualities a typical user might be looking for from any legal document to which they are referred. Suggest five expectations to which users are likely to give priority.

b) What do users expect from legal documents?

When users of legal documents are asked this question, most say that they favour those documents that:

- tell them what they want to know,
- are easy to read and understand,
- are not obscure,
- use the shortest space,
- deal with all the necessary points,
- contain no contradictions,
- leave no doubts.

Legislative counsel should accordingly strive to produce texts that satisfy these expectations.

c) How can we meet these expectations? (*Seven Cs of Legislative Drafting*)

Seven Cs of Legislative Drafting

By those standards a good legislative draft is one that communicates to users, in terms that are:

1. Capable of being complied with;
2. Clear;
3. Comprehensible;
4. Concise;
5. Complete;
6. Consistent
7. Certain.

You should think of these objectives as the *Seven C's of Legislative Drafting*.

d) Are the *Seven Cs* equally important?

Most lawyers put the last of these objectives, *certainty*, as their first priority as they are looking for answers from legislation to their particular legal problems. They become concerned if they find ambiguity or a possibility of conflicting interpretations, or no answer at all. However, failure to give effect to the other objectives often contributes to uncertainty. For example:

- if the policy of the legislation is not communicated clearly, it may be construed in unintended ways, leaving those affected uncertain as to how they may act;
- if legislation does not cover the complete ground, it will be uncertain as to how matters not dealt with should be approached;
- legislation that is not concise, for example because it is wordy, long-winded and repetitious, may increase the likelihood of uncertainty about its meaning and application.

Tensions sometimes occur between these objectives. For example:

- in order to be certain, we may not be able to be very concise;
- the more detail we provide in the interests of completeness or certainty, the more there will be to understand;
- the more we must cover in dealing with a complex legislative scheme, to be certain and complete, the greater the problem of communicating clearly the essential nature of the scheme and ensuring that it can be fully complied with.

Despite these tensions, your principal aim should remain constant: do all you can to give effect to each of these objectives.

e) How can we achieve the *Seven Cs?* (*Seven Basic Drafting Practices*)

Seven Basic Drafting Practices

These Materials encourage you to adopt drafting practices that contribute to these objectives. There are 7 basic practices that constitute their foundations.

1. **Analyse and plan**

   When you start composing legislative sentences, make sure you already have a sound idea of what you are setting out to communicate. This calls for:

   - a clear grasp of the *factual* background and the existing *law*;
   - a good understanding of the *policy* behind the legal change to be made;
   - a decision on the *options* available to give effect to that policy;
   - a preliminary view of what *matters* need to be covered by new legislation;
   - an outline of how the legislation should be *structured* to present its provisions most effectively.

2. **Provide a rational structure**

   Organise the contents of your draft text to reveal the basic structure and logical development of the legislative scheme and to make it as easy as possible for users to find what they may be looking for. This will be made more likely if:

   - the *key features* of the legislation are prominent;
   - there is a *logical relationship* between the parts and the whole;
   - related matters are in a *rational sequence* that emphasises the nature of their interconnection.

3. **Follow drafting standards**

   Follow the standard drafting practices in your jurisdiction and, in your treatment of the subject-matter, draft consistently with related legislation. User expectations are formed by past use of legislation. You should be cautious about experimenting or innovating. An opportunity for that may arise when you are in a position to influence the direction of your drafting service!

4. **Use an effective writing style**

   You should aim to make your text as easy to read as possible. This means:

   - write in standard and grammatical English;
   - communicate your ideas clearly, directly and concisely;
   - use language that is not pretentious or archaic;
   - use sentence structures that are not overloaded or complicated.

5. **Choose good presentation**

   Set out your drafts so that the text is easy to work with by ensuring that:

- plenty of "*white space*" appears on each page of the legislative text (the text is not densely packed);
- sentences are *short*, or use *paragraphing* to display component parts;
- longer texts are *divided* into Parts or Divisions;
- instructive *visual aids* are used, such as formulae, maps and diagrams.

6. **Provide aids to finding and using**

You can help users by providing devices that make it easier for them to find their way around the legislative text. These can include:

- intelligent *section notes* (or side-notes/shoulder notes);
- *helpful headings* for Parts, divisions and Schedules;
- *road-maps* (provisions indicating where matters are dealt with in the Bill)
- a *table of contents*/arrangement of sections;
- *footnotes* and marginal cross-references.

7. **Check and scrutinise**

As you complete each version of your draft text, look back at it through the eyes of someone coming to it for the first time. Once it is in an advanced stage of drafting it is unlikely that you will have time to make radical alterations to its form and organisation, but there are always opportunities to make useful improvements.

This task is easier if you put your draft to one side overnight and come back to it the next day for a fresh look. These are some changes you should consider:

- *break long sentences* into two or even more sentences, with the main topic in the first subsection, and the supporting elements in those that follow;
- *format sentences* to make them easier to read quickly, for example by using paragraphing;
- *reduce unnecessary detail*, by substituting broad terms or transferring the detail to definitions and interpretation provisions;
- *remove superfluous words*;
- *substitute shorter expressions* for those that are unnecessarily long;
- *substitute modern forms of expression* for archaic and obscure terms.

PREPARATION OF LEGISLATIVE SCHEME

The preparation of a legislative scheme is the prime task of the legislative drafter. Before proceeding to draft any legislation the drafter has to face innumerable difficulties before he takes a final decision on the scheme of the legislation. Before attempting to draft any legislation it is very important for a drafter to analysethe subject-matter of the legislation. Only after proper analysis he will be able to formulate an action plan or a theme of the legislation. To prepare even a rough outline of the Bill the drafter has to take into consideration number of things. Preparation of legislative scheme is difficult task and the drafter has to face many agonising movements while preparing one. The drafter must remember that the legislation prepared by him is always subjected to legal scrutiny by the Judiciary. The courts while subjecting the Legislation to legal scrutiny always take five factors into consideration,

1. What is the object of the enactment;
2. What was the existing law before the legislation was passed;
3. What was the mis chief or defect for which the existing law had not provided?
4. What remedy the legislation has provided for; and
5. The reasons for such remedy.

It is, therefore, necessary for the drafter to take into consideration these factors before preparing any legislative scheme.

As soon as the legislative proposal or instructions are from the administrative ministry or department, the drafter should satisfy himself that the proposals or instructions contain,

(i) sufficient background information to enable him to see in perspective and in context the facts and problems which. the legislative proposals intend to meet;
(ii) the principal or main object of the legislation is stated clearly, and concisely;
(iii) methods of means by which the objects of the legislation are proposed to be achieved;
(iv) all known legal implications and difficulties are stated;
(v) present law or legal status is clearly indicated in respect of the subject-matter of the legislation.

THREE STAGES OF PREPARING LEGISLATION

The drafter on getting instruction from the concerned administrative ministry must proceed to prepare a scheme of the legislation in three stages:

Stage I : Get a clear concept of the legislative proposals received from the proponent of the legislation

Stage II : Prepare a conceptual outline including all major ideas and objects and outline the remedies that the proposed legislation to provide.

Stage III : Check the current existing statues and provisions of the constitution and other general laws such as the Code of Criminal Procedure, the Code of Civil Procedure, the Evidence Act, etc.

Let us consider two examples for explaining these three stages.

Example 1 : Protection of biodiversity and sustenance of ecological process or systems
Example 2 : Special form of Marriage, its solemnisation, registration and divorce

STAGE I : CLEAR CONCEPTS OF THE LEGISLATIVE PROPOSALS

It is essential to understand the concept or object of the legislative proposals clearly. Clarity of object for which the legislation is to be prepared is the first priority of the drafter. In the given examples the concepts would be,—

Example 1: Bio-diversity legislation

The main object or concept of this legislation would be to protect biological diversity for the benefit of humanity and to meet peoples needs from biological resources while ensuring long term ecological sustainability of earth's biotic wealth.

Example 2 : Legislation on special marriage

Here the concept is to provide for a special form of marriage between two persons, its solemnisation, registration and also to provide for divorce, alimony and maintenance.

STAGE II : PREPARATION OF CONCEPTUAL OUTLINE AND OUTLINING THE REMEDIES PROPOSED BY THE INTENDED LEGISLATION

After the drafter consolidates concept or object of the legislation the next stage is to prepare the detail conceptual outline of the legislative proposals received by him. At the same time he must enumerate and understand the remedies that the proposed legislation intends to provide. This enables the drafter to arrange the subject matter of the legislation in an orderly manner. The clear and concise conceptual outline of the purpose and remediesto be provided by the legislation is always helpful in dealing with the subject-matter in all its perspectives.

Example 1: Bio-diversity: the conceptual outline

1. Biological diversity or bio-diversity refers to the variety of life forms, plants, animals and micro-organisms.

2. Three levels of bio-diversity:

   (a) Genetic diversity—genetic information of all individual plants, animals and micro-organisms;
   (b) Species diversity—variety of living species;
   (c) Ecosystem diversity—variety of habitats, biotic communities and ecological processes, diversity within ecosystems in terms of habitat differences.

3. Importance of biodiveristy—Dependence of human beings for their sustenance, health, well being and enjoyment of life on fundamental biological systems and processes. Necessity of protection of derivatives of all food, medicines and industrial products from the wild and domesticated components of bio-diversity for the benefit of humanity.

4. Benefits arising from the conservation of components of bio-diversity in three groups—

   (a) Ecosystem services: The important services to be considered are:

   (i) Protection of water resources;
   (ii) Soil formation and protection;
   (iii) Nutrient storage and cycling;
   (iv) Pollution breakdown and absorption;
   (v) Contribution to climate stability;
   (vi) Maintenance of ecosystems;
   (vii) Recovery from unpredictable events;

(b) *Biological resources:*

Food-

(i) Heavy dependence of human existence (and that of most other organisms) on primary products, mainly plants.

(ii) Augmentation of narrow genetic base of established food crops providing disease resistance improved productivity and different environmental tolerances.

(c) *Medicinal resources-*

(i) Protection of different medicinal preparations and their use in orderly manner in medicines.

(ii) Protection of wild plant and micro-organism resources from destruction and for potential use in medical treatment such as treatment of cancer and other antibiotic use.

(d) *Wood Products—*

Protection of wood products as a basic commodity for better utilisation as a fuel, construction material, timber and paper industry, decorative furniture, etc.

(e) *Ornamental plants—*

Protection of plants for ornamental and horticulture purposes and flower trade.

(f) *Breeding stocks, population reservoirs—*

Protection of natural areas providing support system for commercially valuable environmental benefits and resources.

(g) *Future resources-*

(i) Developing of new bio-resources for increase in human welfare.

(ii) Conservation of bio-diversity and discovery of new biological resources.

(h) *Social benefits-*

(i) Research, education and monitoring;

(ii) Recreation;

(iii) Cultural values : conservation for future generation;

(iv) Timely action for deriving social benefits.

5. Establishment and constitution of bio-diversity authorities at national and state levels.
6. Constitution, powers and functions of such authorities and their management.
7. Duties to be performed by such authorities.
8. Responsibilities of the Central (Federal) and State Governments.
9. Guidelines for benefit sharing of biological resources.
10. Equitable sharing of benefits.

11. Bio-diversity heritage sites and their protection.
12. Notification of threatened species.
13. Repositories for different categories of biological resources.
14. National and State bio-diversity funds.

Example 2: Special Marriage legislation

The conceptual outline for this legislation would be somewhat on the following lines:

1. Special marriage-

(i) Legislation refers to a special form of marriage irrespective of person's religion or the customary law of marriage by which they are governed.

(ii) Conditions for solemnisation of marriage by the intended persons—

(a) age of parties to the marriage;
(b) valid consent;
(c) soundness of mind;
(d) degrees of prohibited relationship marriage.

(iii) Notice of intended marriage and consideration of objection received and procedure therefor.

(iv) Declaration of intention to marry, in presence of witnesses and place and form of solemnisation.

(v) Issue of certificate of marriage after solemnisation.

2. Consequences of special marriage-

(i) Solemnisation of marriage under the proposed legislation would serve the relations of the party to the marriage with the undivided family professing Hindu, Buddhist, Sikh or Jaina religion.

(ii) The rights and disabilities of the party to the marriage under his or her personal law in respect of succession not to be affected.

3. Restitution of conjugal rights and judicial separation-

(i) Right of the husband or wife to compel restitution of conjugal rights where either of them has withdrawn from the society of other without reasonable excuse.
(ii) Judicial separation where the parties default in restitution of conjugal rights.

(iii) Procedure to be followed by the district court.

4. Void and voidable marriages-

(i) Circumstances leading to declaration of void marriages.
(ii) The grounds of divorce on the basis of which marriages can be declared voidable.
(iii) Legitimacy of children of void and voidable marriages.
(iv) Alternative relief in divorce petitions and divorce by mutual consent of parties to the marriage.

(v) Prohibition on seeking divorce in the first year of Marriage and conditions therefore.

(vi) Re-marriage of divorced persons on fulfilling of certain conditions.

5. Jurisdiction of courts-

(i) Court to which petitions can be made, contents of petitions and the procedure and manner of conducting proceedings in courts.

(ii) Duties of court in passing decrees and granting relief under the legislation.

(iii) Relief to petitioners and respondents and circumstances under which such relief can be granted.

(iv) Grand of alimony and maintenance of aggrieved party, especially wife.

(v) Provisions for custody of children.

(vi) Appeals from decrees and enforcement of decrees.

6. Miscellaneous matters-

(i) Saving of validity of marriages not solemnisation under the proposed legislation.

(ii) Penalties for married person marrying during the subsistence of previous marriage.

(iii) Punishment for bigamy.

STAGE III : CHECK THE CURRENT OR EXISTING STATUTES AND THE PROVISIONS OF THE CONSTITUTION AND OTHER GENERAL LAWS

While going through the second stage of preparing the conceptual outline of the subject-matter of the legislation it is also necessary for the drafter to check on the current or existing statutes on the subject and the relevant provisions of the constitutional and other general laws such as the Code of Criminal Procedure, the Code of Civil Procedure and the Evidence Act. Not only the drafter should cross check whether there is any duplication of procedure resulting in inconsistency but shall also verify whether the existing legal provisions are sufficient to meet the mischief proposed to be met by the proposed legislation.

To illustrate the points let us see the existing legislation having bearing on bio-diversity (Example 1):

Bio-diversity related legislation (in India)-

1. The Water (Prevention and Control of Pollution) Act, 1974 (6 of 1974)
2. The Water (Prevention and Control of Pollution) Cess Act, 1977 (36 of 1977)
3. The Air (Prevention and Control of Pollution) Act, 1981 (14 of 1981)
4. The Environment (Protection) Act, 1986 (29 of 1986)
5. The Environment (Protection) Rules, 1986
6. The Hazardous Wastes (Management and Handling) Rules, 1989
7. The Manufacture, Storage and Import of Hazardous Chemical Rules, 989
8. The Manufacture, Use, Import, Export and Storage of Hazardous Micro-organisms, Genetically Engineered Microorganisms or Cell Rules, 1989
9. The Public Liability Insurance Act, 1991 (6 of 1991)
10. The Public Liability Insurance Rules, 1991
11. The Environmental (Protection) Rules -"Environmental Statement", 1992-93

12. The Environmental (Protection) Rules"Environmental Standards", 1993
13. The Environmental (Protection) Rules" Environmental Clearance", 1994

In the case of legislation on Special Marriage the relevant legislation would be (Example 2):

1. The Child Marriage Restraint Act, 1929 (19 of 1929)
2. The Dowry Prohibition Act, 1961 (28 of 1961)
3. The Family Courts Act, 1984 (66 of 1984)
4. The Hindu Adoptions and Maintenance Act, 1956 (78 of 1956)
5. The Hindu Marriage Act, 1955 (25 of 1955)
6. The Hindu Minority and Guardianship Act, 1956 (32 of 1956)
7. The Hindu Succession Act, 1956 (30 of 1956)
8. The Bihar and West Bengal Registration of Mohammedan Marriages Act, 1876
9. The Guardians and Wards Act, 1890 (8 of 1890)
10. The Muslim Personal Law (Shariat) Application Act, 1937 (26 of 1937)
11. The Dissolution of Muslim Marriages Act, 1939 (8 of 1939)
12. The Muslim Women (Protection of Rights on Divorce) Act, 1986 (6 of 1986)

The completion of three stages and finalisation of the conceptual outline of the legislation is not the end of the task of the drafter. It is necessary for the drafter to follow certain norms in preparing the legislative scheme. They are,—

(A)*Self-discipline.*—Thepreparation of a legislative scheme is a difficult task and requires a good deal of self-discipline on the part of the drafter. The drafter often neglects this vital stage, as he is always anxious to move on the actual drafting of a Bill. Every drafter will find that he is under constant pressure from the Government or the ministries to finalise the draft Bill so that it could be rushed through the current or ensuing session of Parliament. This pressure often tempts the drafter to produce a draft without paying sufficient attention to the necessity of working to a carefully prepared comprehensive legislative scheme. The example of this is the Benami Transactions (Prohibition) Act, 1988 (45 of 1988). This short legislation containing just six operative sections was enacted with the object of prohibiting transactions in which property is transacted to one person for a consideration paid or provided by another person *[See* section 2(a) of the Act]

The said legislation fails to give a well thought of scheme to provide for,—

(a) what the benami transactions actually mean,
(b) what are the different circumstances in which these transactions shall be deemed to have been performed and completed,
(c) on whom the onus of proof shall lie,
(d) what are the guidelines for the authorities to take preventive measures in this respect.

Another drawback in the scheme of this Act is that it fails to deal with the matters referred above. Being matters of substantive policy they should have been addressed in the principal legislation itself. The Act leaves every important detail to be provided by the government by means of rules—a case of delegation of principal legislative functions of Parliament to the executive government. Since the major decision of the SupremeCourt in *Delhi Laws case* (AIR 1951 SC 332: 1951 SCJ 527: 1951 SCR 747), it is now well-settled that it is not open to the legislature to delegate its legislative functions which consists in the determination of choice of the legislative policy and of formally

enacting that policy into a binding rule of conduct. _Thus it is primarily the drafter's job to see that all - these matters are necessarily included in the legislative scheme before the drafting of a Bill is taken in hand. This is, therefore, an example of how the drafter some times succumb to the pressure of urgency and has to sacrifice his well trained legal expertise to unjustified pressures from the instructive ministry. In the present case of course the drafter cannot be blamed as the Bill was directly based on the Report of the Law Commission of India on the subject.

(B) *Proper prior consultations*.-Itis necessary for the drafter to have prior consultations with the Ministries concerned and get himself well acquainted with the subject-matter of the legislation. For example, if it is the matter relating to the establishment of a Commission for telecommunication regime then he must have the proper information and facts as to,—

a) Establishment of a telecommunication commission,
b) Incorporation of the commission, whether as a company or statutory corporation under an Act of Parliament,
c) Board of Directors of the commission,
d) Their qualifications and appointment,
e) Responsibilities of the Board of Directors,
f) Term of office of the Directors,
g) Termination of the appointment of Directors,
h) Procedure at the meetings of the Board of Directors,
i) Common seal of the Board,
j) Funds of the Commission,
k) Annual estimates, Annual reports to be submitted by the Board,
l) The detail instructions about functions and duties of the commission,
m) Powers as to grant of licences and conditions subject to which the licences are to be given,
n) Licensing of radio communications,
o) Regulation for radiation of electromagnetic energy,
p) Powers for interference with radio-communication,
q) Offences relating to telecommunication, and
r) Correct and proper phraseology for defining technical termssuch as radio-communication, radio-communication stationstelecommunication apparatus, and broadcasting station.

Unless the drafter obtains the proper data and instructions, he cannot and should not proceed with the task of preparing the draft of the Bill. Initial task of the drafter is therefore to take into account the entire span of the subject-matter of the bill and discuss every detail with the concerned ministries and acquire thorough knowledge of the subject. Only then he will be able to his thoughts together and prepare a viable legislative scheme.

(C) *Familiarity of the Statute Book of the Country*.—Itis absolutely essential for the drafter to get himself familiar with the Statute Book of the country for whom he is drafting the legislation. Especially he has to study the Statute Book carefully if he is working for the country other than his own. For preparation of a legislative scheme such knowledge is absolutely essential.

(D) One Subject for one Bill.—Unless,the circumstances so demand there should be one subject for each Bill and different matters which have no connection with each other should not be

dealt with in the same Bill. Generally speaking a Bill should deal first with the basic objectives and main principles of the legislation and then with the appropriate administrative machinery required for making the Bill effective and implimentable. The best way of preparing the legislative scheme is to prepare marginal notes of the sections needed to cover the subject-matter of the legislation or rather essential provisions of the Bill. Once you have done this, consideration must be given to the order in which the sections should be arranged. This may be done by grouping the sections together, which are dealing with one aspect of the Bill such as the provisions relating to registration of voters.

(E) Division of Bill into Chapters.—Thenext task of the drafter is to divide the Bill into different chapters. This gives the Bill required clarity. The specific parts therefor should be dealt with under specific headings so that the reader gets the clear picture of the features of the Act. The great advantage of preparing a legislative scheme lies in the opportunity it gives the drafter for clarifying his thoughts. It also enables the drafter to see whether the problem dealt with by him has been covered and whether all the relevant matters are squarely dealt with. The scheme will often bring to light the additional matters required to be dealt with and the drafter can seek fresh mandate from the Ministry or the Cabinet if required. The preparation of a legislative scheme therefore helps the drafter in more than one way and should not be compromised for speedy and hasty drafting.

(F) Check list.—Legislativedrafting is a complex, lengthy and more often dry and boring assignment. The drafter should be prepared to spend long hours and burn the midnight oil in defining policy clearly and concisely in the legislative scheme before attempting to prepare and finalise the legislation.

The following comprehensive check list should help the drafter in preparing the Bill and will puthim on alert that every thing has been done while finalising the legislation.

Check List:

1. Get a clear concept of the proposal.
2. Prepare a conceptual outline, including all major ideas and objectives.
3. Get an accurate picture of existing law.
4. Check current statutes of other States. What is the experience of other States with similar legislation?
5. Review introduced Bills on the same subject or of a similar legislation.
6. Study legal limitations that may apply especially Central and State laws and rules.
7. Identify and study factual issues on the subject-matter of the Bill. Consult with Ministries, departments, relevant State agencies and interest groups.
8. Develop definitions of key words and phrases. Identify terms that require definition.
9. Remember to check statutes and case-law for terms already defined.
10. Check current statutes affected by the legislation.
11. If amending, amend all relevant sections of the concerned Act or relevant legislation.
12. Draft the text of the proposal in clear language after preparing conceptual outline.
13. Use style and language compatible to existing legislation while avoiding archaic expressions. Divide the subject into parts to achieve clarity.
14. Use short sentences and simple words to the extent possible.
15. Check for essential parts of the Bill, such as the long title, short title, commencement, etc.
16. Check citations to make sure they are correct.
17. Verify cross-references.
18. Check for omissions, misspellings, and typographical errors.

SKELETON LEGISLATION AND LEGISLATIVE SCHEME

Time and again, thedrafter, has to draft a legislation, which is nothing but a mere skeleton, providing for only a frame and the blank canvas. The filling of this canvas is left to the Executive Government under the guise of delegation of powers to legislate, which is essentially the function of the Legislature. **The normal pretext for following such a device is that the very nature of the subject is such that the filling of the details even in respect of legislative policy be left to the Executive.The ploy of a skeleton legislation has been used by the drafter very often even though there is a danger of excessive delegation and the courts had consistently disfavoured this device** and also by the citizens as it many times works against their interest.

The skeleton legislation is often resorted to for the following reasons:—

(1) Parliament in its wisdom feels that having given the frame or rather the outline of policy, the Executive is in a best position to lay down the detail policy;

(2) The details of policy, functions and powers can only be filled in with reference to the situation prevalent at a given time and may require changes from time-to-time;

(3) Parliament has no time to waste in providing details;

(4) The subject-matter of the enactment is too technical and the administrative set-up can be well addressed to by the technological experts who are bound to take into account the necessary technological developments in respect of the subject of the Bill.

The skeleton legislation always promotes, propagates and leads to the vice of excessive delegation that is likely to be disapproved by the courts. The Supreme Court of India has observed: "the Legislature cannot delegate its essential legislative functions. Legislate it must by laying down the policy and principles and delegate it may to fill in detail and carry out the policy..." "Skeleton legislation by its very nature provides for unlimited delegation and thus invites despotism uninhibited..."[1]

The truth, however, is that the drafter under compelling circumstances such as unclear or extreme technical nature of the Bill or non-specific nature of the instructions from the Government or for want of sufficient time at his disposal adopts the device of skeleton legislation. Even though in principle the skeleton legislation should be avoided and every drafter likes to avoid it, the truth remains that due to practical difficulties that arise in day-to--day working, the skeleton legislation has always been accepted as a convenient mode of drafting legislation by the drafter.

Use of the skeleton draft not only cast aspersions on the skill of the drafter but also brings the Legislature in disrepute having not considered the subject-matter of the enactment in its proper perspective. By adopting a sketchy draft the drafter not only invites avoidable criticism from the judiciary but may create a situation where the interpretation of the statute may not be possible. The quality of drafting is always a guide to the intent of the legislation and the skeleton legislation is likely to fail in this respect. An experienced drafter uses the language keeping in view of the recognised rules of interpretation of statutes.

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[1]Registrar of Co-Operative Societies v. K. Kunhambu, 1980 AIR 350 : 1980 SCR(2) 260

Skeleton legislation leaves too many gaps to be filled in and the courts can not in interpreting the statute fill in the gaps or rectify the defects. In other words, the courts cannot always come to the rescue of the drafter in supplementing the intent of the legislation not found therein due to absence of a clear legislative scheme which is the hallmark of a good legislation.

An example of the skeleton legislation is section 3 of the Import and Export (Policy Control) Act, 1947 (This Act has been repealed), which authorised the Government to prohibit, restrict or otherwise control the export from and the import into India of certain commodities. Section delegated the authority to the Government *without laying down any principle and without giving any guidance to the delegate.* To wriggle out of this the Supreme Court by reading Preamble to the Act, discovered that this enactment did not purport to lay down the material provisions for the first time, but purported to continue the previously existing provisions in this behalf. The Supreme Court read the Preamble and the relevant provisions of the predecessor Act, namely, the Defence of India Act, to find out the policy underlying the Act.[2]

The drafter should not have allowed such a sketchy draft leaving it to the Supreme Court to read the intention of the Legislature by such an elaborate and outstretched interpretation.

We had already seen the ***Benami Transactions (Prohibition) Act 1988*** *(45 of 1988) as an example of a legislation without having a proper legislative scheme. That legislation is also an example of a skeleton legislation having no comprehensive legislative scheme.* This enactment provides for prohibition of transactions in which property is transacted to one person for a consideration paid or provided by another person. The Act fails to give guidance as to,—

(1) what really Benami transactions means;
(2) what is the legal status of the ostenticible owner of the property in whose name the property has been purchased;
(3) what are the circumstances or incidents which must be taken into account before concluding that the transaction is Benami one;
(4) when the transaction is to be considered as money laundering or a case of fraud to evade the provisions of income-tax or other taxes.

Answers to all such questions should have been incorporated in the enactment itself, they being the matter of legislative policy, which are essential legislative functions and cannot therefore be delegated to the executive authority.

As against this background the **Religious Institutions (Prevention of Misuse) Act, 1988** (44 of 1988) *is an example of well-drafted piece of legislation.* It is very short containing just nine operative sections, but gives a clear legislative scheme, which deals with the subject-matter of the Act in its entirety. Preamble to the Act clearly defines the object of the Act, which is to prevent the misuse of religious institutions for political and other purposes. Section 2 of the said Act defines, in clear terms, what is meant by "political activity" and "political party". It also defines "religious institution" to mean on institution for the promotion of any religion or persuasion, and includes any place or premises used as a place of public religious worship, by whatever name or designation known. These definitions give you clear import of what a religious institution and a political party means, separating and segregating the two from each

[2]Bhatnagar& Co., v. Union of India, 1957 SCJ 547.

other. Such a scheme was essential because in the Indian context there is very thin or almost invisible line of division or demarcation between a religious body, organisation or an institution and a political party, body or a political organisation. Section 3 of the Act, which is a central theme of the legislation, prohibits the religious institution or its manager to use or allow the use of the premises of the institution for,—

(a) promoting or propagating any political activity; or
(b) harbouring persons accused of convicted of an offence under any law; or
(c) storing arms or ammunition; or
(d) keeping any goods or articles in contravention of any law; or
(e) erecting or putting up of any construction or fortification, including basements, bunkers, etc., without valid licence; or
(f) carrying on any unlawful or subversive activities; or
(g) doing any act promoting disharmony or feelings of enmity, hatred, ill-will between different religious, racial, language or regional groups or castes or communities; or
(c) carrying on of any activity prejudicial to the sovereignty, unity and integrity of India; or
(d) doing of any act in contravention of the provisions of the Prevention of Insult to National Honour Act, 1971 (69 of 1971).

Then the Act provides for specific offences and punishments therefor. *Even though the Act is short it clearly provides within its frame a clear scheme outlining the legislative policy in an unambiguous manner.*

USE OF SKELETON LEGISLATIVE SCHEME

As stated in the beginning the drafter has to resort to skeleton legislation where the subject-matter of the legislation is highly technical and the implementation of the legislation is to be left in the hands of technological experts who are bound to take into consideration the necessary technological developments. But here also *the drafter must be careful to provide sufficient details or guidelines in the principal legislation that the Legislature is not blamed that it has delegated essential legislative functions to Executive, as the Parliament is not expected to shun from outlining in the Act the essential policy matters.* The drafter is duty bound to see that the legislation is not merely a shell which may be hammered to pieces by the judiciary at the Bar of the judiciary.

The best example of providing a well thought of scheme to a purely and highly technical subject is the legislation on the information technology. The Information Technology Act, 2000 (21 of 2000) The legislation is based on the Model Law on Electronic Commerce prepared by the United Nations Commission on Trade Law and adopted by the U.N. General Assembly by resolution A/RES/51/162, dated 30 January 1997.

The Information Technology Act, 2000 (21 of 2000), is as the Preamble to the Act itself declares is based on UNICITRAL Model Law on Electronic Commerce (MODEL LAW). The MODEL LAW is a "frame work" law that does not itself set forth all the rules and regulations that may be necessary to implement the modern techniques for recording and communicatinginformation in various types of circumstances. The rules and regulations necessary to implement the guidelines given by the MODEL LAW are to besupplied by the individual States in their national law. To this extent MODEL LAW is only a frame work outlining theuniform procedure followed by the States in the interest of international trade through Electronic Commerce. The object of the MODEL LAW is two-fold. First it may help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may limit the access by business houses to international markets.

Second aspect of MODEL LAW is to remove the restrictions, to the extent possible, to the use of Electronic Data Exchange (EDI) in the national legislation, by giving it the same legal footing as is available to notions such as "writing", "signature" and "original". The MODEL LAW has, therefore, adopted a flexible standard, taking into account various layers of existing requirements of a paper-based environment. MODEL LAW adopts the "functional equivalent" approach by taking into consideration the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. What the MODEL LAW tries is to single out basic functions of paper based form requirements and provide the same or equivalent criteria for data messages so that they can have the same certainty as the written documents possess in the national legislation.

The Information Technology Act, (21 of 2000) follows these objectives and provides a regime which has enabled the Government and the trade to cope up with the advent of Information Technology in India.

Section 1(4) of the Act exempts from application of the Act documents such as negotiable instruments, Power-of-attorney, trust, will, contract of sale or conveyance of immovable property or interest in such property. It gives the Central Government unrestricted power to exempt any class of documents or transactions from the application of the Act as it deem fit. An omnibus power which if not used cautiously is likely to prove an impediment in the implementation of the Act. *But this is a risk which the drafter had to take because of the very technical nature of the regime of the Act. It is virtually impossible to give any guidelines in this respect.* The Executive will have to be trusted in analysing the documents which require to be exempted.

Act defines certain essential terminology such as "computer", "computer network", "data", "digital signature", "digital signature,“certificate", "electronic form", "electronic record" which is essential for the implementation of the Act. These definitions are given with reference to use of information technology and are essential features of this legislation. The main theme of the Information Technology Act, 2000 (21 of 2000) is the authentication of the electronic record by affixing the digital signature on it. It provides for derivation or reconstruction of original electronic record. (See Chapter II, section 3). In Chapter III the Act lays down basic principles for legal recognition of,— (i) electronic records, (ii) digital signatures,

and also for use of electronic records and digital signatures in Government and its agencies.

Next important stage is the attribution of electronic record and the manner in which such attribution shall be made by the originator of the record or by the person having authority to act on behalf of the originator.

The Act also provides for security of electronic records and digital signatures for Certifying Authorities and their regulation through licenses through Controller, their cancellation and renewal, issuing of digital signature certificates.

While the legislation provides for offences such as tampering with computer source document (section 65), hacking with computer system (section 66), it also makes provision for Cyber Regulation Appellate Tribunal.

The Act also amends the Indian Evidence Act, 1872 (1 of 1872), (Second Schedule) to give the electronic records sufficient legal footing vis-a-vis written or paper-based records or documents. New sections 65A and 65B make substantial provisions in respect of admissibility of electronic records as evidence and proving of the contents of such record to be true and authentic. Such a

provision was essential to fulfil the objective of the MODEL LAW namely to provide for "functional-equivalence" to electronic records vis-a-vis written or paper-based original records.

The legislation as discussed illustrates, how even a highly technical subject, based on a frame work MODEL LAW can be drafted in sufficient detail having a well oriented legislative scheme.

To conclude, the cardinal principle is that the drafter should not as far as possible adopt a draft legislation which is a mere skeleton and which is not based on a well formulated legislative scheme.

WHAT DO WE NEED TO KNOW ABOUT GRAMMAR?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

Legislative drafting, like any other form of official writing, must respect the standard conventions relating to grammar and usage. There is no special grammar for legislation. The way legislative sentences are structured and the way that words, expressions and parts of speech are used in them must reflect what is generally considered to be correct written English.

At the same time, as we saw in the previous Module, particular approaches have developed as to the way legislative sentences are written. If we are to examine these, we must use the accepted grammatical terminology to describe what is involved (for example noun, verb, adjective, adverb, subject, object, modifier, and so on), and be familiar with the way the concepts they refer to operate in a sentence.

These Materials assume you are already familiar with good grammar and that you write grammatical English. The purpose of this Section is to ensure that you are familiar with the grammatical terminology we use in these Materials. But it may also help you to find out whether you need to do some preliminary work on the subject. This Section also draws attention to some common mistakes. At the end of this section are two appendices containing a *Grammar Checklist* and a *List of Grammatical Terms and Usage*.

Section Objectives

By the end of this Section, you should be able to:

- explain the basic features of grammar and the terms used to refer to them;
- avoid a number of common errors of grammar.

Studying this Section

The amount of work you may need to put into this Section will depend upon the extent to which you are competent in correct grammatical forms and in working with written English.

If this subject is largely unfamiliar to you, time spent working through an elementary grammar will be fruitful. You will also need to study closely the examples in the *List of Grammatical Terms and Usage* in Appendix 2 to this Section, which explains the principal terms used in these Materials. You will come across references to grammar and syntax in later Modules. That may be a good time to remind yourself of the appropriate parts of this Module. In that way you can steadily build your familiarity with the conventions.

If you feel that you are already comfortable with sound grammar and the terms used to refer to particular grammatical features, you should be able to proceed quite quickly through this Section. But do not persuade yourself that you are at home with the subject without having first worked on the Section.

This topic is central to legislative drafting. Drafts containing sensible legal answers are too often spoiled by shortcomings in grammar and syntax.

(1) WHY IS GRAMMAR IMPORTANT FOR THE DRAFTING?

The central component of all legislative text is the sentence. Legislative counsel must have a sound understanding of how sentences are correctly structured (the principles of syntax) in order to compose legal propositions that avoid ambiguity and convey their intended meaning.

Legislative counsel must master the grammatical practices that are conventionally followed for official documents and avoid those that are considered to be errors in that context. Because legislation is especially formal, these conventions tend to be less flexible than in other settings, or at least compliance with them is routinely insisted upon. The requirements are commonly those we associate with traditional grammar.

To write grammatically, we need to understand grammatical principles as well as *why* we should write in the particular ways dictated by those principles. Accordingly, we must be comfortable with the function of subjects, predicates and objects, of nouns and pronouns, of modification (by adjectives and verbs), of phrases and clauses, of subordinate clauses, and their correct incorporation into sentences. These Materials assumes that you are familiar with standard grammar and that you already use grammatical English in your professional work.

If you need to extend or refresh your understanding of what sound grammar entails, make the effort to consult an authoritative text on English grammar (the ***Bibliography*** contains several suggestions). However, you should be sure to consult materials that relate to your locality since English usage varies in some respects across different linguistic communities.

(2) WHAT GRAMMATICAL TERMS DO WE NEED TO KNOW?

When writing legislative sentences, you need to take account of features of grammar that are of particular relevance to legislative counsel. You need to know the terms in general use to describe those features.

Appendix 2 to this Section sets out terms used in these Materials with a short explanation for each. If you are uncertain about a grammatical term, consult this appendix.

Activity 1

Read through the *List of Grammatical Terms and Usage* in Appendix 2 to this Section.

(3) WHAT COMMON GRAMMATICAL MISTAKES SHOULD WE WATCH FOR?

This Section describes the most common mistakes that less experienced legislative counsel tend to make. Appendix 1 contains a Grammar Checklist summarizing these mistakes. Use it to check your drafts, at least until you are confident that these mistakes are not occurring in your drafts.

a) <u>Verb in a predicate is missing or incomplete.</u>

Every legislative sentence must have a principal predicate that states what the subject of the sentence may, must or must not do, or how the subject is otherwise affected. Without a verb phrase to state this, the sentence is incomplete.

Example 1

A person who in a public park

(a) sells newspapers, journals or other publications;

(b) lights a fire;

(c) rides a bicycle; or

(d) damages any property belonging to the park.

There is no principal predicate in this sentence. All the verbs in the paragraphs belong to the dependent clause having "who" as its subject. There is no verb stating how the subject ("A person") is affected when engaging in any of the listed activities. The subject requires a verb phrase, for example "commits an offence".

In the same way, if the sentence contains a subordinate clause (for example "who rides a bicycle"), that clause too needs its own verb phrase to form the predicate in the clause.

Example 2

When a police officer about to search a person, the police officer must conduct the search at a police station if requested by that person.

A verb is missing from the introductory subordinate clause ("is" should be added before "about"). However, the omission of a verb from the concluding *phrase* is acceptable because it is an adjectival phrase rather than a clause, which needs a subject and its own predicate. The word "requested" can be either adjectival or verbal (the past participle of a compound verb). In this case, it is adjectival.

b) <u>Verb does not agree with its subject in number.</u>

When the sentence subject is in the singular, the verb must be in the singular too. In the same way, a plural subject needs a verb in the plural.

Example 3

A transcript of the shorthand notes that have been taken of the proceedings at the trial of a person before the High Court *are* to be made if the court so directs.

The subject "transcript" is in the singular, as should be the related verb ("is", not "are"). The relative clause ("that have been taken....") modifies "shorthand notes" and therefore has a verb in the plural.

But certain words, though in a singular form, refer to collective cases (for example, “committee”, “Board”, “Force”, “Government”). Properly, these are linked to a singular verb, but the grammatical practice varies across different English-speaking communities. For example, in the UK, a plural verb is used to emphasise that an action concerns the component parts, rather than the unit. This practice is not followed in other countries such as Canada.

Example 4

If the Board *reaches* a unanimous decision, the Secretary must inform the Registrar immediately, but if the Board *are* not in agreement after one hour of deliberation, the Chairman must adjourn the meeting.

A case that commonly causes inaccuracy concerns the word “none”, when used as a subject. This word, which is a contraction of “no-one”, is a singular word that requires a singular verb. A singular verb is needed too when “either ..... or” or “neither ..... nor” are used to distinguish two subjects both in the singular.

Similarly, the modifier “any” is properly attached to a singular noun that is accompanied by a singular verb.

Example 5

1. Members of the committee are to receive an attendance allowance, but *none is* entitled to the allowance if the meeting is adjourned for want of a quorum.

2. Neither the owner nor the occupier of land is liable to pay compensation.

3. No payment is to be made to any member of the Board who resigns from that office.

Note that in the last example, as in many cases, the indefinite article (here “a”) is usually preferred to “any”.

c) <u>Pronoun is vague or ambiguous or missing.</u>

Pronouns (for example “he”, “she”, “him”, “her”, “it”) refer back to a specific noun that appears in an early part of the sentence or in an earlier sentence. Uncertainty can arise if a pronoun is not provided when it is needed or if the pronoun does not clearly relate back to the noun intended. A pronoun is generally treated as referring back to the nearest appropriate noun, but that may not be quite what the legislative counsel intended.

Example 6

1. The police officer may require the driver to produce *his* or *her* driving licence at a police station, which *he* or *she* must designate.

“his or her” clearly relates to the driver; but does “he or she” refer to the driver or the police **officer?**

2. A person commits an offence who, having come into possession of information that has been unlawfully acquired, fails to report *it* to the Commissioner.

What precisely is the person required to report—the fact of having come into possession of the information or the information itself?

d) <u>Modifier is misplaced or ambiguous.</u>

English is such a flexible language that is possible to put a modifier in several places with a definite, but different, meaning in each. Inappropriate placing can produce unintended or even ambiguous results. Avoid two particular cases:

- when, because of its position in the sentence, the precise effect of the modifier is unclear (it could modify more than one expression);
- when the modifier could equally well apply to an expression before or after it.

Example 7

1. The Board may make a grant to any person from its general fund or from any of its other funds *with the approval of the Minister*.

Does the modifier "with the approval of the Minister" relate only to the second type of grant or to both types? It is ambiguous.

2. The police officer may request the driver *within 24 hours* to produce his identity card and driving licence.

Does "within 24 hours" qualify the request or the production? It too is ambiguous.

e) <u>Preposition is incorrect or missing.</u>

English has many prepositions. Some of them by convention are linked to particular verbs (for example to comply *with*, rather than *to*, a regulation).

Several prepositions need to be used with precision; otherwise, ambiguous or unexpected consequences may follow. So, *before*, in relation to a date, covers any time *up to*, but **not including**, that date. Similarly, *after*, in relation to a date, covers time *subsequent to*, but **not including**, that date. Again, *between*, in relation to two numbers, means that both those numbers must be **left out of** the calculation.

In a legislative sentence that attaches a verb to a series of nouns by a preposition, it may necessary to repeat the preposition before each noun to avoid ambiguity.

Example 8

1. Each council is responsible *with* providing litter bins *at* its area.

The correct prepositions are "for" and "in".

2. Applications for a dealer's licence are to be made *after* 1 January 1994.

This means that applications cannot be made earlier than 2 January.

3. A record is to be kept of all property belonging *to* the Police Force or a member of the Police Force or the Prison Service.

Does this apply to property of the Prison Service, or to the property of their members? Either "of" or "to" is required before that term.

f) <u>Article (definite or indefinite) is wrong or missing.</u>

Most nouns are accompanied by an article. "The" (the definite article) is specific, usually indicating that the noun has already been mentioned earlier or is unique. The indefinite article "a" (or "an" before a word beginning with a vowel) is used when the noun is not specific. If the article is missed out altogether, it may be unclear whether the noun is intended to be specific or unspecific.

However, the article is left out before a singular noun that is used unspecifically in the abstract (for example "food", "drink") or before plural words that refer to a class that is described in the plural (for example "cattle", "men").

Example 9

An authorised officer may order a person to leave an area designated as a designated area under section 10 if the officer finds the doing anything that, in the officer's opinion, may harm or disturb an endangered animal may order the person to leave the designated area for the purposes of protecting endangered animals in designated areas.

An indefinite article is needed for the first occurrence of *designated* area because it does not refer to a specific area. But a definite article is required for the second one because it refers back to the previously mentioned area. No article is needed for the last occurrence because it refers to a class expressed in plural terms.

g) <u>Punctuation is incorrect.</u>

Accurate punctuation in legislative sentences is important. This is discussed more fully in Section 4 of this module – *How do we punctuate and capitalise legislation?* Not only does it make sentences easier to read, but punctuation wrongly used may confuse or even result in an unintended result. The following punctuation mistakes are among the most common. (An incorrect mark is shown by "[ ]"; a correct mark by "{ }").

- Comma dividing subject from verb in a predicate

Example 10

A person who contravenes this section[,] commits an offence.

No punctuation mark should be used; the subject must not be separated from the predicate.

- Comma omitted after an introductory clause or phrase

Example 11

In this Act{,} “dog” includes wolf.

A comma marks off an introductory adverbial phrase from the principal clause.

- Punctuation for dividing a compound sentence omitted

Example 12

A person aggrieved by the decision of a council may appeal to the Minister{;} the Minister’s decision is final.

A semi-colon indicates where two linked principal clauses in the same sentence are to be separated.

- Second comma omitted at the end of a parenthetical phrase

Example 13

A person who drops litter, except into a litter bin{,} commits an offence.

The second comma indicates the end of a parenthetical phrase in a sentence, here a qualifying phrase between the subject and predicate.

- Apostrophe in the possessive “its”

Example 14

The chairman of the Board is to convene the meetings of {its} [it’s] members.

“it’s” is a contraction of “it is”, not a possessive; contractions are seldom used in legislation.

- No comma, or an unnecessary comma, in a series of words

Example 15

In this Act, “animal” means a cat{,} dog{,} sheep{,} goat[,] or cow.

A comma is not usually provided immediately before the conjunction (here “or”) in a series. However, this practice varies among linguistic communities.

h) Appendix I – grammar checklist.

This Checklist summarises the common grammatical mistakes we have just examined. Use it as a reminder of things to avoid.

1. Is the verb in every predicate complete?
2. Does every verb agree with its subject in number?

3. Are all required pronouns present, and are they unambiguous?
4. Are all modifiers placed accurately in the sentence so that none gives rise to ambiguity?
5. Are all prepositions correct and in the places they should be?
6. Are the articles (definite and indefinite) all present and correct?
7. Is all the punctuation correct? In particular:

    - have you ensured that no comma [,] separates the subject from its verb?
    - if there are introductory clauses and phrases, have you added a comma at the end of each?
    - have you added a comma between the principal predicates of compound sentences, or did you use a semi-colon?
    - have you included a comma at the end of a parenthetical expression that begins with a comma?
    - is the third person singular possessive (its) in its correct form (without an apostrophe)?

8. have you added commas after each word, term or expression in a series, except immediately before the final conjunction?

i) <u>Appendix II – list of grammatical terms and usage.</u>

The following notes are designed remind you about the terms commonly used in relation for English grammar and their proper usage.

<u>A. Some basic terms.</u>

grammar: the rules and practices governing the use of language and the relation between words as they are used in speech and writing in a language.

sentence: a set of words, grammatically complete, expressing a statement of some kind. It always has a grammatical **subject** and a **predicate**. A legislative sentence always begins with a Capital letter and ends with a full stop (period).

syntax: the arrangement of words in sentences.

subject: the person or thing about which the sentence makes a statement. It takes the form of a **noun** or **pronouns**, to which descriptive **modifiers** may be added.

predicate: makes a statement about the subject (for example what the subject does, is or may or must do). It therefore contains a **verb**.

noun: a word that names or identifies a person, place, concept, act or thing.

pronoun: a single word that refers to a noun (often the **subject** or a person or thing) that has been earlier mentioned, and is used as a substitute for it.

adjective: a word that modifies a noun.

verb: a word or group of words that expresses the action or state of a noun.

adverb: a word that modifies a noun.

clause: a distinct part of a **sentence** that contains a **subject** and a **predicate**. A clause can be either a **principal clause** conveying the main subject and action of the sentence or a **subordinate (or dependent) clause** conveying a subject and action that modify the principal clause.

phrase: a group of words that includes a noun or a verb and may also contain modifiers of the noun or verb.

modifier: an **adjective, adverb**, **phrase** or **clause** that limits the scope of the word, phrase or clause it modifies.

Some of these grammatical features are contained in the following example:

Example 16

When a magistrate commits an accused person for trial before the Supreme Court and a sitting of the Supreme Court is in progress, the magistrate, with the consent of the Director of Public Prosecutions, may commit the accused person for trial on such day during that sitting as he or she may fix.

subject = the magistrate

predicate = *may commit* [= **verb**] the accused person for trial on such day during that sitting as *he or she* [=**pronoun**]may fix.

phrase = with the consent of the Director of Public Prosecutions

clause = When a magistrate [= **noun**] commits *an accused person* [= **modified noun**] for trial before the Supreme Court and a sitting of the Supreme Court is in progress,

B. Terms used for sentences.

principal clause: a **clause** that contains the main **subject**/**predicate** of the sentence.

compound sentence: a **sentence** that contains two or more **principal clauses** that are linked by a **conjunction** (for example “and” or “or”).

dependent or subordinate clause: a **clause** that supplements and is subordinate to a **principal clause**. It modifies the principal clause by setting out conditions, circumstances, limitations, exceptions or qualifications describing when the **principal clause** takes effect.

Example 17

The following is an example of a **compound sentence**.

If an examining magistrate has begun to enquire into an offence, the magistrate may adjourn the hearing at any time and, if he or she does so, must remand the accused person.

subordinate clause = If an examining magistrate has begun to enquire into an offence

principal clause = the magistrate may adjourn the hearing at any time, and [= **conjunction**]

second **subordinate clause** = if he or she does so,

second **principal clause** = [the magistrate] must remand the accused person.

C. Terms used for nouns.

article: a form of **adjective** to particularise a **noun**. The most common are the **definite article** "the" and the **indefinite article** "a" or "an" (before a word beginning with a vowel).

relative pronoun: a **pronoun** linking a **subordinate clause** to the rest of the **sentence** (for example "which" or "who").

Example 18

The following **sentence** includes these terms, although not all cases are identified.

A [= **indefinite article**] person *who* [= **relative pronoun**] is charged with treason must not be admitted to bail except on *the* [= **definite article**] order of a *Judge* [= **proper noun**].

D. Terms used for verbs.

active voice: a **verb form** that indicates that the **subject** is acting rather than being acted upon. It often has an **object** (the thing that the **subject** acts upon).

passive voice: a **verb form** that indicates that the **subject** is acted upon rather than acting. It is often followed by a **preposition** and a **noun**, for example stating the person or thing *by* which the subject is acted upon. It is always made up by an auxiliary verb from the verb *to be*, followed by the past participle of the main verb.

object: a **noun** or **pronoun** that is affected by the action in an **active verb**.

infinitive: the basic form of the **verb** which is not attached to any **subject**. It normally begins with "to".

tense: the form a **verb** takes to indicate the time when it has effect (for example in the past, present or future).

Auxiliary verb: a **verb** that combines with the basic form of another **verb** to express the **tense** of the latter. (for example "may", "shall", "is", "has").

participle: an adjective made from a **verb**. It may be a **present** or a **past participle** (for example "receiving"; "received"). It can be added to an auxiliary verb from *to be* to make a verb in the **present** or **passive voice** (for example "is receiving"; "has received").

Example 19

The following **sentence** includes examples of the use of these terms.

A person who [verb in passive voice and past tense =] *has been* [= auxiliary verb] committed [= participle] for trial by [= **preposition**] a magistrate and who *wishes* [= **verb** in **active voice** and **present tense**] *to plead* [= **infinitive**] guilty [**verb in imperative mood** =] shall serve *a notice* [= **object**] upon the Registrar;

section 25 *applies* [= **indicative mood**] with respect to that person as if that person *were committed* [= **subjunctive mood**] for sentence.

E. Terms used for modifiers.

adjective: a word that explains, describes or qualifies a **noun**, giving it a more precise or limited meaning.

adjectival phrase: a **phrase** that explains, describes or qualifies a noun.

adjectival clause: a **clause** that explains, describes or qualifies a **noun**.

adverb: a word that explains, describes or qualifies how a **verb** takes effect, giving it a more precise or limited meaning.

adverbial phrase: a **phrase** that explains, describes or qualifies a verb.

adverbial clause: a **clause** that explains, describes or qualifies a **verb**.

Example 20

The following **sentence** includes examples of the grammatical elements expressed by some of these terms.

A magistrate before whom an application for bail is made [= **adjectival clause**] may require the accused [= **adjective**] person to bring before him persons willing to enter into recognisances on behalf of the accused [= **adjectival phrase**], as soon as practicable [= **adverbial phrase**].

F. Miscellaneous terms.

preposition: a term which links a **noun** (or **pronoun**) with another expression, indicating a particular relationship (for example of time or space) between them.

conjunction: an expression that links words, **phrases**, **clauses** or **sentences** (for example "and"; "or").

number: the form of a **noun**, **pronoun** or **verb** which indicates whether it is in the singular or the plural.

Example 21

An award of compensation or damages to a complainant under this Act releases the defendant from all other civil proceedings for the same cause.

In Example 21:

- the following are **prepositions**: *of, to, under, from, for*;
- the following is a **conjunction**: *or*;
- and the form of the **subject** of the sentence ("*an award of compensation or damages"*) is in the same **number** (singular) as the **verb** by which it is affected ("*releases*").

HOW DO WE PUNCTUATE AND CAPITALISE LEGISLATION?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

This Section deals with two minor but important features of legislative texts: punctuation and the capitalisation of words.

We often take punctuation very much for granted. It only becomes a matter of interest if it is poorly done. Although legislation does not have special punctuation, its features place special demands on punctuation and legislative counsel are expected to follow conventions as to preferred usages for legislation, often dictated by the drafting practices in their jurisdiction. The same is true for capital letters.

Section Objectives

By the end of this Section, you should be able to comply with standard drafting conventions in your jurisdiction in relation to punctuating legislative sentences and the use of capital letters.

Essential Questions

This Section is divided into two subsections organised in terms of a series of questions:

1. PUNCTUATION
    - What is the function of punctuation in legislation?
    - Do legislative counsel use punctuation differently from other writers?
    - How should we approach the punctuation of legislation?
2. CAPITAL LETTERS
    - When do we use capital letters?
    - When should we not use capital letters?

Studying this Section

This Section is written on the basis that you are familiar with the standard punctuation marks and when to use them for general purposes. But you may find it helpful to remind yourself of those matters by reading the appropriate section of a standard grammar manual.

This Section in part is designed to increase your awareness of drafting practices in your jurisdiction with respect to punctuation and capital letters. For that reason, we have provided a considerable number of activities to encourage you to look at your own jurisdiction's legislation. We have also provided many examples and several exercises to assist you in developing good practices.

Once you are familiar with what is standard practice, and why it is, you should readily recognise the places where punctuation is needed and the form it should take. Your aim is to make this second nature, so that you provide what is needed automatically without need for thought. This Section is available for reference if you are unclear on any particular occasion.

1. PUNCTUATION.

a) What is the function of punctuation in legislation?

The role of punctuation in a legislative text is the same as in any written document. It assists the reader to draw inferences about the intended meaning.

It has little importance in interpreting legislation. Judges have not always agreed about the extent to which they may take punctuation into account in interpreting legislation. However, in some jurisdictions, the Interpretation Act deals with the matter explicitly, usually by giving judges authority to take account of punctuation.

Example 1

Section 14 of the model *Interpretation Act* in the **Resource Materials** provides:

> **14.** Punctuation forms part of a written law, and regard may be had to it in construing that law.

Activity 1

Confirm whether there are any provisions dealing with punctuation in the interpretation legislation of your jurisdiction.

Even without such authority, no judge completely ignores punctuation. Its presence inevitably influences our reading. The sense of the sentence and its meaning are easier to discover because of the guidance provided by punctuation marks.

Punctuation is part of syntax. Its functions in a sentence are:

- to reinforce the sentence structure;
- to make more apparent the way that the sentence components relate to each other.

However, too much reliance should not be placed on punctuation for a number of reasons:

- the rules and practices relating to its use are based on conventions that may vary from place to place;
- practices continue to change, not least because of technological developments (for example, word processing has made a number of marks more accessible);
- punctuation mistakes occur more easily and tend to be overlooked more frequently than other features of syntax (for example, typographical errors).

Judges on occasion call punctuation in aid to *support* a particular construction indicated by the syntax and by the general purpose of the provision itself. Less commonly, they have disregarded punctuation, for example because:

- it has been used in an unconventional way; or
- other features of the sentence are stronger indicators of a meaning.

Sound punctuation facilitates reading and understanding. Since legislative sentences may be complex in their content, any aid to accessing their structure and contents takes on particular importance. It is not surprising that good legislative counsel take the task of punctuation seriously.

Activity 2

Read through the following two versions of the same sentence, one with punctuation and the other without. Which is the easier to understand?

Where a court orders money to be paid by a convicted person as a fine or penalty or compensation costs or expenses or otherwise the money may be levied on his or her movable and immovable property as provided by this section but if that person shows sufficient movable property to satisfy the order his or her immovable property may not be sold.

Where a court orders money to be paid by a convicted person as a fine or penalty, or as compensation, costs or expenses, or otherwise, the money may be levied on his or her movable and immovable property, as provided by this section; but if that person shows sufficient movable property to satisfy the order, his or her immovable property may not be sold.

Punctuation marks help us to see the individual components of a sentence and how they relate to each other and to the sentence as a whole.

b) Do legislative counsel use punctuation differently from other writers?

s in the case of syntax generally, there are no special rules of punctuation for legislation. Good drafting calls for punctuation according to the same standard conventions that apply to all writing. At the same time, punctuation of legislation has some characteristic features because:

- legislation is formatted in a distinctive way, for example, in the way it uses paragraphing; in response to this, legislative counsel have adapted standard practices on punctuation to these formats;
- most jurisdictions develop drafting practices concerning the places in which particular punctuation marks should be used, with a view to consistency, especially where alternative marks could properly be used for the same purpose;
- certain punctuation marks are almost never needed in legislation, for example: exclamation marks(!)

As a result,

- when punctuation is called for, practices in general usage are followed;
- the choice of punctuation mark is often settled by the drafting practices, though some of these may be rather unorthodox.

c) How should we approach the punctuation of legislation?

Try to include punctuation automatically as you write. Follow what you do when you are writing other formal text, drawing from your general experience of writing. At the same time, accommodate the distinctive requirements of legislative text. Make a practice of the following:

- punctuate your sentences as you compose them in accordance with the standard conventions applied to writing in English;
- use punctuation as a means to clarify the sentence structure and the relationship of the sentence components;
- only use punctuation when it serves an identifiable purpose; unnecessary and, in particular, excessive punctuation is an obstruction to communication;
- if you have an ambiguity in syntax, don't rely on punctuation to resolve it.

Example 2

The police officer must request the driver ↑within 24 hours ↑ to produce his identity card and driving licence.

The ambiguous ("squinting modifier") "within 24 hours" does not cease to be ambiguous if a pair of commas are added in the places indicated.

- follow the drafting practices in your jurisdiction as to when particular punctuation marks are to be favoured over others;
- scrutinise your sentences to check that the punctuation is complete and correct.

Punctuation marks

In this section we consider the punctuation marks that drafters put to specific use or that need special attention in legislation. These are:

- **full stop** or "period" .
- **colon** :
- **dash** -
- **colon+dash** :-
- **semi-colon** ;
- **brackets** or "parenthesis" ( ) or [ ]
- **comma** ,
- **inverted commas** or "quotation marks" " " or ' '
- **hyphen** linking words -
- **apostrophe** with an "s" '

Activity 3

As you read through the following discussion, look at practice in your jurisdiction.

Full stop

Full stops are needed:

- to indicate the end of a sentence;

- in abbreviations (but not acronyms).

Example 3

The following abbreviations are used in some jurisdictions, although the full stops may be omitted:

- a.m.
- p.m.
- m.
- km.
- U.N. (abbreviation for United Nations)

When the abbreviation constitutes an acronym (initial letters pronounced as a word), full stops are typically omitted.

UNESCO (acronym for United Nations Educational, Scientific and Cultural Organisation)

Colon

A colon may be added at the end of a phrase to introduce a series of propositions that follow on that one phrase. It is itself a visual form of *introducer*. The colon is typically used:

- to conclude the enacting formula in an Act
- to conclude a phrase that ends with, for example “the following” or “as follows”
- to introduce a series of paragraphs or a list of numbered items

Example 4

Enacted by the Parliament of Utopia**:**

The Minister may make regulations for all or any of the following purposes**:**

- (a) prescribing anything that is required to be or may be prescribed under this Act;
- (b) the manner in which applications may be made under this Act;
- (c) the fees to be paid in respect of any matter or thing done under this Act;
- (d) the returns to be made in respect of fees collected under this Act;
- (d) the proper administration of this Act.

Dash

The dash is the preferred alternative to the colon in many jurisdictions. It is used for precisely the same purposes, except that it is rarely found by itself at the end of the enacting words. Like the colon, it is an introducer. It has the merit of appearing to point forward, and is therefore a clearer introducer than the colon.

Unfortunately, in word-processing, a space is commonly inserted between the last word and the dash. As a result, when the text goes right to the end of the line, the dash is consigned, as an orphan, to the beginning of the next line. For that reason the colon is often preferred.

Example 5

The Minister may, on the advice of the Board, make regulations for the following purposes

(a) prescribing anything that is required to be or may be prescribed under this Act;

(b) the manner in which applications may be made under this Act;

(c) the fees to be paid in respect of any matter or thing done under this Act;

(d) the returns to be made in respect of fees collected under this Act;

(e) the proper administration of this Act.

The orphaned dash is illustrated.

Colon+dash

A colon and a dash are sometimes used together (: -). Some legislative counsel say "Never!" There are several reasons for this advice:

- such a punctuation mark is not used in other forms of writing;
- it combines two different marks, both performing precisely the same function; at best, it is an emphasised form of an introducer;
- there is no need for its use as these are two well accepted alternatives.

Yet the colon+dash is still part of some drafting practices.

Activity 5

Check and note, whether, in your jurisdiction, the colon, the dash or the colon+dash is used for the following purposes:

- at the end of the enacting formula
- after, for example, "as follows"
- to introduce a series of paragraphs or a tabulation

Semi-colon

Semi-colons are used within a sentence to separate text that deals with distinct but closely linked matters. They perform a similar function to conjunctions such as "and". In legislation, the semi-colon is used to mark off separate but linked clauses or paragraphs.

- Linked clauses

  Two legal propositions, each with its own subject and predicate, may be placed in the same sentence because their contents are closely connected. The technique is usually used when the second proposition follows immediately from the first. The semi-colon suggests the link between the two, and that equivalent weight should be given to both propositions.

Example 6

A person aggrieved by the refusal of a licence may appeal to the Minister**;** the Minister's decision is final.

This presentation is an exception to the typical practice by which distinct propositions are to be treated in separate sentences. But the semi-colon can be used in this way to join two propositions in a single sentence:

- that are interdependent;
- that are of no great length; and
- the second of which is legally no more important than the first.

In practice, this device is not widely used. Legislative counsel generally prefer to use a conjunction, paragraphing or separate subsections.

- Linked paragraphs

  Legislative sentences commonly use semi-colons at the end of paragraphs or subparagraphs that are listed in tabular form. It indicates the co-ordination between the items in the paragraphs.

Example 7

If a person arrested or detained under this section is not tried:

- (a) in the case of a person who is in custody or is not entitled to bail, within 2 months from the date of arrest or detention; or
- (b) in the case of a person released on bail, within 3 months from the date of arrest or detention;

he or she shall be released either unconditionally or upon such conditions as are reasonably necessary to ensure appearance for trial at a later date.

In the previous example a semi-colon is used at the end of the last paragraph. However, in many jurisdictions, it is more common for a *comma* to be used there. This uses the mark as it is used in unparagraphed sentences, to indicate the end of the introductory subordinate clause

Paragraphing is used not just to list or tabulate a series of items or alternatives. It may also be used to present the internal components of the sentence in a more readable form. For example, a context clause that contains several elements can be structured in paragraphs. In that case, a comma, rather than a semi-colon, at the end of each paragraph is the appropriate mark. The punctuation then is the same as in the sentence if it were not paragraphed.

Example 8

A police officer who:

- (a) reasonably suspects a person of having committed a summary offence, and
- (b) is unable to ascertain the name and address of that person,

may arrest that person and take him or her to the nearest police station.

This is not universally followed. There is a case for treating all paragraphing as a form of listing, and for using semi-colons distinctively at the end of every paragraph. Follow the drafting practices in your jurisdiction.

Activity 6

Note whether in your jurisdiction a semi-colon or a comma is used.

- at the end of the final paragraph of a series;
- at the end of paragraphs used to make the sentence easier to read and understand.

Brackets

Brackets (usually in rounded form when used in legislation) may be used to enclose parenthetical words into the text of legislation:

- to add further information or an explanation;
- to provide an incidental clarification; or
- to create a short definition.

Example 9

Further information:

Section 64 (*which provides for appeals to the Minister*) does not apply in respect of licences issued under this section.

Clarification:

A person commits an offence who, with intent to extort a valuable thing from another person, publishes or threatens to publish a libel upon any other person (living or dead).

Definition:

An application may be made to a court by or on behalf of a person for whose benefit a maintenance declaration has been made (in this section referred to as "the applicant") for an order under this Act against a person who is liable to maintain the applicant under that declaration (in this section referred to as "the defendant").

A parenthesis (bracketed words) adds secondary or incidental material to a sentence that is already grammatically complete. As a result:

- the sentence must make grammatical sense when it is read without the words in brackets;
- brackets should not be used around material that is legally essential.

Inserted material that is essential to the legal proposition is best marked by a pair of commas (which are used as an alternative to all the uses just described).

Example 10

Brackets instead of the commas would be unsuited to the following sentence (taken from **Example 9**). The matter is essential to the rule.

A person commits an offence who**,** with intent to extort a valuable thing from another person**,** publishes or threatens to publish a libel upon any other person (living or dead).

Commas

The comma is the most difficult and misused punctuation mark. Its effect is to cause the reader to pause. Consequently, it can be used to encourage the reader to take pauses that contribute to understanding the sentence structure. However:

- don't use the comma to resolve uncertainties in syntax;
- don't use it excessively: it should always perform some worthwhile function in reinforcing the structure of the sentence.

Generally, a comma is used at the end of a complete clause or a self-contained phrase.

The comma is useful in the following cases:

- After an introductory element

  Sentences frequently begin with a proposition that stands apart from the provisions that follow. A comma points up where the proposition ends. Typical cases to place a comma:

  - at the end of a context clause;
  - at the end of a limiting phrase.

Example 11

When the High Court decides a case on appeal**,** it must certify its judgment or order to the court that made the order appealed from.

Except as provided in subsection (2)**,** no prosecution is to be commenced without the written consent of the Attorney-General.

- Divide a compound sentence

  A legislative sentence may be made up of two fully independent clauses joined by a conjunction (such as "and" or "but"). It is usual to put a comma at the end of the first clause, immediately before the conjunction.

Example 12

If a surety to a recognisance dies before the recognisance is forfeited, the estate of the surety is discharged from all liability in that respect, but the party who gave the recognisance may be required to find a new surety.

A semi-colon can also be used, in place of the comma.

- Separate items in a series

Example 13

In this Act, "animal" means cow**,** goat**,** horse**,** pig or sheep.

- Mark off insertions

  As with brackets, commas can be used to enclose material that adds to or clarifies or explains some aspect of the sentence. Use them, in the form of two matching commas, in preference to brackets where the inserted information is legally important.

Example 14

The court or a police officer**,** as the case may be**,** must take the recognisance of the person to be released on bail and of his sureties, if sureties are required**,** conditioned for the appearance of that person at the time and place specified in the recognisance.

- Set off non-restrictive modifiers

  Clauses, phrases or words that limit the meaning of the words they modify ("**restrictive**" modifiers) are coupled to those words without a comma. But clauses, phrases or words that are *not essential to the meaning* of the words to which they are attached ("**non-restrictive**" modifiers) are set off from those words by a pair of enclosing commas.

Example 15

If the seat of a person *who is an elected member of the council* becomes vacant, that person**,** *if qualified under this Act***,** may again be elected as a member of the council.

The first italicised clause is a restrictive modifier, since it limits the meaning of "person"; it is an essential part of the expression. The second phrase, though an essential component of the rule as a whole, does not restrict the meaning of "person". It is a further element of the rule and has to be set off by a pair of enclosing commas.

- Facilitate understanding

  Commas sometimes help the quick understanding of the rule, although they are not strictly needed for any of the purposes just set out. Two such cases are the following:

  - in long sentences, a single comma can indicate the completion of an element of the sentence that might otherwise not be obvious;
  - a pair of commas can make clear that two expressions are *both* linked to another expression.

Example 16

A person who**,** without lawful authority**,** exports from Utopia**,** or puts on board any ship for the purpose of being so exported**,** an aircraft or vehicle commits an offence.

The first pair of commas marks off an important insertion.

The second pair of commas is used to enclose the second of two expressions so that both are seen to be linked to the same object ("an aircraft or vehicle").

When considering whether to use commas, bear two working practices in mind:

- keep commas to the minimum necessary: too many can interfere with the easy reading of the sentence and a ready understanding just as much as too few;
- when reading through your drafts, ask yourself whether the commas you have used in fact perform a useful function. You may find that you can manage with fewer than you had originally supplied.

Inverted commas

Inverted commas or "quotation marks" are used for precise purposes in legislation. In most jurisdictions, they take the form of two pairs of marks (opening and closing), rather than a pair of single marks.

Activity 7

Look at recent legislation in your jurisdiction that contains an interpretation section and also makes textual amendments. Note whether double or single quotation marks (or both) are used. If both, note when.

Inverted commas are used to identify words or phrases that are to be subject to some legislative action. There are three main uses:

- Defined terms

  In definition sections or other interpretation provisions, an expression that is to be given a particular meaning or construction is identified by quotation marks.

Example 17

In this Act, **"**complaint**"** means a complaint made under section 25.

In this section, **"**sentence**"** includes an order or decision of a court consequent on a conviction for an offence or a finding of guilt in respect of an offence.

- Names assigned to offices

  Sentences that create an office or institution commonly designate the official name which it is to bear. The sentence assigning that name can state the name within a pair of inverted commas.

Example 18

A commission is constituted by this Act to be called the **"**Judicial and Legal Service Commission of Utopia**"**

- Words being amended

  Word to be repealed, amended or added are identified by inverted commas in the sentences that direct their repeal, amendment or addition.

Example 19

In section 12 of the Animals Act 1979, the words **"**Supreme Court or**"** are repealed.

In section 13 of the Animals Act 1979, the following new subsection is added:

"(3A) A person who interferes with a captive animal, or the enclosure in which a captive animal is held captive, commits an offence.**"**

Hyphens

Hyphens are used for two main purposes:

- to divide words at the end of a line that are too long to be completed on that line and must run on to the next line;
- to join two words that together have a compound meaning.

- End of line

  Hyphens splitting a word typically are inserted by printers when setting up the text or automatically by word-processing software. The text should be edited to ensure that:

  - the hyphen is not used for one-syllable words;
  - the break in the word made by the hyphen does not make the word awkward to read;
  - the word is complete when the two parts are joined.

- Join words

  Hyphenation may aid in establishing the grammatical and semantic relationships among words in compounds. In many instances, a dictionary will determine whether to use a hyphen for this purpose. A small number of cases have particular legislative relevance, when the usage may be dictated by the drafting practices of the jurisdiction. These relate to:

  - fractions when stated as words (for example: "two-fifths");
  - specific official titles (for example: "Governor-General"; "Attorney-General"; "Vice-President");

- specific legal words (for example, “bye-law”; “court-”martial“; cross-examine”; “sub-lease”).

Activity 8

Check the practice in your jurisdiction whether hyphens are used in the following expressions (or, if the terms are not found in your jurisdiction, in equivalent cases).

- Auditor-General;
- court-martial;
- sub-paragraph.

For additional guidance on hyphenation, see the article entitled “Compounds and Hypenation” in the Canadian Drafting Guide, *Legistics*.

Apostrophes

Apostrophes are rarely needed in legislation. They are used widely in other documents to indicate contracted words and possessives, which are uncommon in legislation.

- Contracted words

  The apostrophe indicates a missing letter (for example: “doesn’t” for “does not”). But as these colloquial forms are not appropriate for legislation, this is rarely needed. One such case where it is found is in “o’clock” (although this term has largely been replaced by “a.m.” and “p.m.”).

- possessives

  The apostrophe is added with the letter “s” at the end of a word to indicate possession. In most legislation, possessives are typically shown by the words “of the”. So, this mark is not much used. Two cases where you will need it are:

  - in descriptive phrases, such as “a dealer’s licence”, where no particular person is referred to;
  - where the expression refers to some item or matter belonging to a person already referred to in the same sentence.

Example 20

Illustrations of the two cases are:

A person aggrieved by an order under this section may appeal to the magistrate**’**s court of the area in which the person resides.

A person aggrieved by an order under this section may appeal to a Judge in chambers; the Judge**’**s decision is final.

Note that “it’s” is a contraction of “it is”, and is unsuitable for legislative drafting. That form is *not* the possessive form of “it”; the correct possessive form of “it” is “*its*” (*without an apostrophe*).

2. CAPITALISATION.

Legislative counsel use capital letters ("upper case") largely in the same way as they are used in other types of documents. Again drafting practices in your jurisdiction may indicate specific cases when the upper case should be used as the initial letter of certain kinds of terms. Upper case is only rarely used for *all* the letters in words in legislative text.

- Standard usage

  Use capital letters:

  - for the initial letter of the first word of every sentence;
  - for the initial letter of a proper name, such as that of a person, place or country or a specific geographical area;
  - for the initial letter of the title of a specific institution, company or society, or of a particular constitutional office;
  - for initial letter of days of the week and months of the year and of the words naming holidays;
  - for abbreviations of the names of formal bodies and for acronyms made out of initial letters (for example, "UNICEF").

- Typical legislative uses

  In most jurisdictions specific words, when used to refer to primary legislative instruments or their main divisions, consistently begin with a capital letter. Individual components of legislation typically have their initial letter in lower case.

Activity 9

Note whether or not an initial capital letter is used for the following cases in your jurisdiction.

- words used to refer to legislation:
  - Act:
  - Bill:
  - Part:
  - Schedule:
  - Annex:
  - Rules of the Supreme Court

- short titles
- the first word of a section note (side-note/shoulder note)

The drafting practices in your jurisdiction may require capital letters to be used in other circumstances in legal instruments, including for complete words, for example in headings.

Activity 10

Note whether or not capital letters are used for the following purposes in your jurisdiction.

- all the letters in the *long title* of an Act, or just to begin the principal words in the title, or in the same way as in the rest of the text;
- every letter in *headings* in an Act, or only for the initial letter of the principal words of headings, or in the same way as in the rest of the text;
- the first letter of the first word of a *paragraph*;
- the first letter of all terms for which *definitions* are provided in interpretation clauses.

- Name of an entity

  From time to time, you will need to establish or refer to an entity with or by its designated name. It is usual to begin both the words of the name and any shortened version of it with capital letters.

Example 21

In this Act:

"**A**uthority" means the **M**otor **A**ccidents **A**uthority of **U**topia established under Part 7:

"**M**otor **A**ccidents **F**und" means the fund by that name established under Part 8.

Note the lower case for "fund", which is used as a general class term.

However, many other words can begin with either an upper case letter or one in lower case. Which to use may be a matter of the drafting practices in your jurisdiction.

a. When do we use capital letters?

Legislative counsel use capital letters ("upper case") largely in the same way as they are used in other types of documents. Again drafting practices in your jurisdiction may indicate specific cases when the upper case should be used as the initial letter of certain kinds of terms. Upper case is only rarely used for *all* the letters in words in legislative text.

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  Use capital letters:

  - for the initial letter of the first word of every sentence;
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  - for the initial letter of the title of a specific institution, company or society, or of a particular constitutional office;
  - for initial letter of days of the week and months of the year and of the words naming holidays;
  - for abbreviations of the names of formal bodies and for acronyms made out of initial letters (for example, "UNICEF").

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- the first letter of the first word of a *paragraph*;
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Note the lower case for "fund", which is used as a general class term.

However, many other words can begin with either an upper case letter or one in lower case. Which to use may be a matter of the drafting practices in your jurisdiction.

b. When should we not use capital letters?

Generally, don't use capital letters unless there is a positive reason or benefit from doing so. The lower case is generally easier to read and is the standard for legislation as for other documents. In particular, it is used for the following.

- Typical legislative terms

  In most jurisdictions, words used to refer to provisions in legislative texts consistently begin with lower case letters.

Activity 11

Note whether or not in your jurisdiction lower case letters are used to begin the following words (disregard their use as part of a title).

- clause
- order
- paragraph
- regulations
- rules
- rules of court
- section
- subsection
- subsidiary legislation

- Words describing general classes

  In legislation, as elsewhere, many words used to refer to a general class begin with a lower case letter, even though the same words carry capital letters when used as part of a name.

Example 22

No **c**ourt, other than the High **C**ourt, may hear an application under this section.

The Board is to consist of the **D**irector-General and 5 other **d**irectors.

However, some terms are treated as having such official standing that they always carry an initial capital letter. You can obtain guidance on most of these from the way the terms are presented in definitions in the Constitution and the Interpretation Act.

Example 23

No person shall be appointed a **M**inister of the **G**overnment unless qualified for election as a **m**ember of the **P**arliament.

Activity 12

Note whether or not in your jurisdiction a lower case letter begins the following words when used to describe one of a general class:

- board of directors
- chairman
- court
- director
- judge
- magistrate
- member [of Parliament]
- minister
- minister of religion
- police officer

registrar.

HOW DO WE PUT TOGETHER THE COMPONENTS OF LEGISLATIVE SENTENCES?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

In this Section we look in detail at ways of selecting and putting together the components of legislative sentences, building on the first principles outlined in the Module 1, Section 3 – *Why do we draft as we do in parliamentary systems?* We look at the three main components found in legislative sentences: the principal subject, the principal predicate and various kinds of sentence modifiers. The combination of these components produces the legislative sentence.

Section Objectives

By the end of this Section, you should be able to do the following:

- apply the basic principles of legislative syntax and expression to the writing of legislative sentences;
- select, compose and combine the components of simple legislative sentences.

Essential Questions

This Section is divided into three subsections. Each one is organised in terms of a series of questions:

1. PRINCIPAL SUBJECT

    - How do we select the grammatical subject of the sentence?
    - How do we decide which legal person is to be the grammatical subject?
    - How should the principal subject be described?
    - How do we choose the subject of a declaratory sentence?

2. PRINCIPAL PREDICATE

    - How do we decide on the principal predicate?
    - How should we write the principal predicate?
    - How should we select the appropriate verb for the principal predicate?
    - Do we need an auxiliary in every principal predicate?
    - How do we choose the appropriate auxiliary?

3. PREDICATE MODIFIERS

    - How should we particularise predicates?
    - How should we write context clauses?

Studying this Section

The sentence components are treated separately to make their study easier. Of course, in writing a particular sentence, you cannot separate these features as your decision in relation to one necessarily influences your decisions on the others. You may find it easier to break your study at the end of each subsection. If you do, remind yourself quickly of what you have learned in the earlier subsection before starting on the next.

You will learn a good deal by careful study of the examples. Make sure that you understand precisely how they illustrate the point made in the accompanying text. This Section contains a large number of exercises. Time spent both on completing them and then evaluating the suggested answers will contribute to your understanding of and ability to use the particular drafting techniques.

This is one of the most important sections in the Materials. Almost everything learned here is called into use when drafting legislation. Drafting legislation is made easier by having a sound grasp of the approaches and techniques examined. It will also provide an opportunity to make them part of your drafting routine. You should try to make yourself thoroughly conversant with every item and to have a clear understanding of what is called for.

1. PRINCIPAL SUBJECT.

Before considering the principal subject, it will be helpful to recall the following elements of grammar discussed in Section 2 of this Module:

- A principal subject and a principal predicate constitute the central elements of a legal provision and are typically at the heart of a legislative sentence.
- The principal subject typically is a legal person; it is that person ’s behaviour with which the provision is principally concerned.
- The principal predicate states how the behaviour or position of the legal subject is to be affected or makes a declaration about legal effects or consequences.

a) How do we select the grammatical subject of the sentence?

The main body of provisions in a legislative text is concerned to influence human activity and affairs. It has to be directed to those who have the legal capability to adjust their activities or affairs as the provisions intend. Consequently:

- the provisions should be directed towards those whom the law recognises as having legal personality or standing- a legal person.
- we select these subjects from human beings, corporate bodies, statutory entities, and associations of persons recognised by law; other things, such as animals and other property should not be chosen as they are not responsive to law.
- for each sentence we select as the subject the legal person, or class of legal persons, whose conduct or legal position is to be affected by its contents.

Typically the subject of a sentence is a noun or pronoun that describes or refers to a precise legal person or class of legal persons.

b) How do we decide which legal person is to be the grammatical subject?

Many provisions simultaneously affect two categories of persons:

- those upon whom a benefit is conferred, in the form of a right, power or privilege;
- those who can be affected by the exercise of another's right, power or privilege.

The provisions can be written having either of these as the grammatical subject.

Example 1

The Minister may appoint any number of film censors that the Minister considers expedient.

Any number of film censors are to be appointed as the Minister considers expedient.

In the second version, the Minister's power of appointment has to be implied.

It is a matter of judgment in each case as to which to choose. But the following legal persons have a good claim to be made the grammatical subject of the sentence:

- persons whose actions can be described in an active verb in the predicate;
- persons responsible for taking the action;
- recipients of a new power or duty.
- persons whose activities are curtailed or regulated.

Each of these is discussed next.

- Persons whose actions can be described by an active verb

  A sentence is generally more effective if expressed in the active voice, rather than in the passive voice. In a choice between two clearly identifiable legal persons, select as the subject the person whose required conduct can be written in the active voice.

Example 2

Compare the following. The second, in the active voice, is a more direct statement of the same rule.

If a person is released on bail on the authority of a police officer, the nearest magistrate must be informed of the release by that police officer as soon as reasonably practicable.

If a person is released on bail on the authority of a police officer, the police officer must inform the nearest magistrate of the release as soon as reasonably practicable.

- Persons responsible for taking action

  The sensible focus of a sentence is the person who has to take the initiative under the provision.

Example 3

Compare the following versions of the same provision. The second one directs the provision to the person who is to take the action it authorizes.

A person who is observed by a police officer committing a summary offence is liable to be arrested by the officer.

A police officer may arrest a person whom the officer observes committing a summary offence.

- Recipient of a power, duty or function

  The person who has the function of dealing with matters of the kind mentioned in the sentence is likely to be a suitable subject.

Example 4

In a legislative text that requires second-hand car dealers to hold a licence, sentences concerned with the issue of the licence should have the licensing authority as the grammatical subject.

If the aim of the sentence is to confer a function implementing an aspect of the legislative scheme, the person or persons who are to perform the function are likely to be the appropriate grammatical subject. It is generally unnecessary, and may not be possible, to identify the persons who may be affected sufficiently precisely for them to be made the grammatical subject.

Example 5

A provision conferring a power to search all aircraft landing in the country for drugs should be directed towards those who will use the power, rather than to the legal persons whose aircraft could be affected.

In provisions that determine the range and limits of the functions of specified persons or of those who derive their powers from them, sentences can be expected to focus on those persons, who should be considered as suitable grammatical subjects.

Example 6

A Bill regulating the prison system is concerned mainly with the extent and the exercise of the authority to detain individuals. Though the provisions may be intended to protect those in detention, most sentences will be directed to the officials of the system whose functions are being regulated.

- Persons whose activities are curtailed or regulated.

  Although the sentence may create a provision for the benefit of the general public or some class of persons, the grammatical subject should refer to those who have to govern their conduct by the provision rather than its beneficiaries.

Example 7

In legislation relating to prisons, sentences prescribing the responsibilities of prisoners will typically make those persons the grammatical subject.

Of course, the above are guidelines only. The decision as to the subject must be dictated by the needs of the particular sentence and the context of the sentences that surround it.

c) How should the principal subject be described?

You should keep in mind the following guideline when deciding how to describe the principal subject:

1. Use the singular so that the provision is seen to apply to each legal person

   If the sentence has alternative subjects, each should be expressed in the singular.

   Example 8

   A trustee or receiver must not receive remuneration for providing a service under this Act.

2. Consider the statutory context in which the term is to be used.

   Since a legislative sentence is construed in the context of the language of the legislative text overall, and in particular the surrounding sentences:

   - use the same term as you use elsewhere to express the same class of person;
   - use a different term if you are referring to a different class;
   - if you need to indicate that your provision applies to the precisely same person as is referred to in an earlier sentence, add appropriate linking words.

   Example 9

   1. An executive officer ceases to hold office if convicted of an offence punishable by imprisonment for 12 months or more.
   2. An executive officer ceasing to hold office under subsection (1) is not entitled to receive superannuation under this Act.

      The same result can be achieved by using the definite article for the subject of subsection (2):

2. The executive officer is not entitled to receive superannuation under this Act.
3. Consider the legal context in which the term is to be used.

   The general law contains provisions that apply automatically to particular categories of legal persons. For example, it imposes privileges or disabilities upon certain classes of persons, as in the case of children in respect of criminal prosecutions or the mentally incompetent in respect of certain kinds of civil transactions.

The term for the subject specifically does not need to exclude these persons from the sentence; that occurs by operation of law.

4. Use terms that clearly identify the legal person who is the subject

Legislative counsel express the subject in a wide variety of ways. The form of words that is most appropriate typically depends upon the scope of the provision. As you will have recognised, some of the following devices are interchangeable. Choose the term to describe the subject that best suits the structure of the sentence.

- a provision of universal application

In a sentence that applies to everyone, use:

- "a person";
- "any person", "each person", but only if emphasis is needed;
- "no person", in a negative rule, such as a prohibition.

Note: "person" is commonly given an extended meaning to cover non-human legal persons, such as corporations, (see section 29 of the model *Interpretation Act* in the **Resource Materials**).

Activity 1

Confirm whether the Interpretation Act in your jurisdiction has a definition of "person".

- a provision directed to a class of persons

A sentence that applies to everyone belonging to a particular class of persons normally needs a precise noun (in many cases, one that has a recognised legal meaning).

Example 10

"court" (to refer to judicial officers); "judge", "police officer", "owner", "trustee".

- a provision directed to a particular office-holder

In a sentence applying to a specific office-holder, use the title or name given to the office or to the body.

- a provision applying to limited categories

In a sentence that applies to a limited group of persons, or to specific members of a class, who share a common characteristic, use the relevant universal or class term with the addition of an appropriate modification.

Example 11

a convicted person (= adjective added)

a police officer above the rank of inspector (= prepositional phrase added)

a trustee acting through an agent (= participial phrase added)

a person who owns a dog (= relative clause added).

- a general provision applying with exceptions

  In a sentence that applies to everyone, or to everyone in a class, except for specific persons, use the relevant universal or class term with the addition of the appropriate qualification.

  Example 12

  Any person other than a public officer

  A trustee, except a trust corporation

- a provision containing the legal person in the context clause

  If the principal clause applies to a person mentioned in an earlier context clause in the same sentence, consider using a pronoun to refer back, but:

  - the legal person must be precisely identified in the context clause;
  - the pronoun must relate back to that legal person without ambiguity.

  Example 13

  When the court has reason to believe that the accused lacks mental capacity so as to be incapable of making a defence, it must hold an inquiry into that matter.

5. Also consider the following practices to simplify the expression of a subject:

   - using a term for which a definition is provided (either by the Interpretation legislation or in your legislation).
   - using an application provision to indicate a class of persons to which the legislation or section or Part does or does not apply.

   Example 14

   Definition:

   > 2.-(1) A trustee who sells property of a unit trust scheme at a discount commits an offence.…
   >
   > (5) In this section, “trustee” means the person holding the property in question on trust for the participants in the scheme.

   Application provision:

12. References in this Part to “second-hand dealer” are to be understood as explained in this section.

d) How do we choose the subject of a declaratory sentence?

A declaratory sentence may have a subject that is not a legal person, but an impersonal noun. These sentences generally make statements about the law, rather than prescribing rules that direct behaviour. The subject of the sentence is the matter to which the statement attaches legal effects or consequences. It may be a thing, a legal term or a statutory feature.

Activity 2

We saw some examples of declaratory sentences in Section 2 of this Module under the heading “How do legislative counsel write particular kinds of sentences”. Review those again.

When composing a sentence to make a legal statement, choose as the main subject the principal matter to which the legal statement relates.

- Legal statements that have general effect

  If the rule in the sentence has a general legal effect that is to be universally recognised, no particular persons are specially affected. These provisions are commonly used for stipulating procedures that are to be followed or their legal consequences.

Example 15

An original certificate that is signed by the maker and that complies in other respects with this section may be used in a trial or enquiry as prima facie evidence of the facts and opinions stated in it.

- When the legal person is obvious

  An action or activity can be made the subject if:

  - it is already referred to in an earlier sentence;
  - it can only be performed by specific legal persons already referred to in earlier sentence.

  This is a useful device for providing for continuity between sentences in the same section, without repeating too many words. But make sure that there is no ambiguity as to the legal persons whose action or activity is referred to.

Example 16

1. (1) A person must not carry on the business of dealing in second-hand motor vehicles unless that person holds a licence issued under this Act.
2. (2) *An application for a licence* is to be made to the local government council for the area in which the applicant proposes to carry on the business.

The highlighted words connect the sentence with the preceding one, and avoid the repetition of the legal person comprising its subject.

- When the provision has universal application

  An action or activity may also be made the subject if it must or may be performed by anyone falling within the terms of the rule. This too may be used in a sentence that is one of a series of sentences (for example, in a section), when the action or activity is elaborated upon in the other sentences. The full context removes doubt as to who may be affected by the sentence.

Example 17

Gaming is lawful if, and only if, it is conducted in accordance with the conditions specified in this Act.

This sentence lays the foundations for an Act that provides a complete set of conditions that determine when gaming is lawful. It is clearly of universal application, though later sentences impose conditions that determine when particular persons may rely upon the authorisation.

- Interpretation provisions

  Sentences containing statements that explain how written legal rules or expressions are to be used or interpreted have universal force, and are not focused on particular persons. The subject is the term to which the definition relates.

Example 18

In this Act, [the expression] "animal" does not include a domesticated animal.

- Application or referential provisions

  Sentences stating cases to which specific parts of the written law are to be applied or are linked are intended to be given effect by whoever uses the legislation. The subject is the term used to refer to the relevant part.

Example 19

This Part applies only to legal practitioners not holding a current practising certificate.

2. PRINCIPAL PREDICATE.

Before considering the principal predicate it will be helpful to recall the following elements of grammar discussed in Section 2 of this Module:

- The principal predicate states the effect of the provision on the subject of the sentence.
- The verb in the predicate specifies that effect.
- The verb typically includes an auxiliary that indicates how the subject is affected. However, declaratory sentences contain statements rather than directions, so auxiliaries are not needed.
- The predicate is commonly in the active voice to command the principal subject to do or not to do something or to give, limit or withdraw authority to do something.

Example 20

A person under the age of 16 years must not drive a motor vehicle.

The magistrate's court, on a remand, may admit the accused person to bail.

- Less commonly, the predicate may be:
    - in the passive voice to state how the subject is affected by a requirement that is to be carried out by someone else;
    - in the present tense to state a legal position or general legal consequences when specific action is taken, particularly in declaratory sentences.

Example 21

The person receiving a majority of the votes cast in the election is elected.

A person under the age of 16 years may not be sentenced to imprisonment.

Every magistrate is a commissioner of oaths.

A member of the council who is declared insolvent ceases to hold office.

a) How do we determine the principal predicate?

Decide on the purpose of the rule in the sentence by considering how the principal subject's behaviour is to be affected or whether a statement of the law is what is required.

- Is the purpose to prescribe how a legal person, the subject of the sentence, is to be affected in any of the following ways:
    - command the subject to do, or not do, something (with stated legal consequences for failure)
    - empower, permit or enable the subject to do something, not otherwise lawful
    - deny the subject the legal authority to do something
    - entitle the subject (confer a right) to something or to do something
    - qualify (or disqualify) the subject for something
    - impose on the subject some legal disability or burden, or remove one from the subject
    - give directions to the subject to do, or how to do (or not do), something?
- Is the purpose to make a declaratory statement as to some aspect of the law in any of the following ways:
    - declare legal effects or consequences
    - make a statement of law
    - state a principle or purpose
    - apply the legislation to specified cases
    - explain a term or feature of the legislation?

Answers to these kinds of questions put you in a position:

- to select for the main verb the most suitable term to describe the action or activity;
- where needed, to choose the right auxiliary to accompany that verb.

b) How should we write the principal predicate?

Keep the following considerations in mind when formulating the principal predicate:

- legislation should always be speaking;
- sentences in the active voice are generally more effective;
- several subject/predicates in the same sentence are confusing;
- the verb must include an appropriate auxiliary, except in declaratory statements.

These considerations are discussed below.

- Legislation should always be speaking.

  Legislation generally applies in the present to circumstances as they happen rather than to those existing at the time when it was originally written. This feature of legislation is often reflected in Interpretation Acts (see section 20 of the model *Interpretation Act* in the **Resource Materials**).

  Compose sentences to be read as applying to actions or activities as they occur from time to time. This consideration particularly affects dependent clauses which set the context in which the principal predicate operates.

Example 22

We could write:

A person who has driven a motor vehicle without holding a valid driving licence has committed [*or* has been guilty of] an offence.

A person who shall drive a motor vehicle without holding a valid driving licence shall commit [*or* shall be guilty of] an offence.

However, a context clause should be in the present tense when the requirements in the principal predicate are to take effect immediately as the events described in the clause occur.

A person who drives a motor vehicle without holding a valid driving licence commits [or is guilty of] an offence.

- Sentences in the active voice are generally more effective since the usual word order in an English sentence is:

  1. subject;
  2. verb;
  3. object.

This states actively what the subject is to do or not do. Sentences that reverse this order (object, verb, subject) state the effect on the subject passively. They are less favoured for several reasons.

- they obscure the subject

Readers of legislative texts are looking for the legal person who is responsible for taking action; the passive voice puts this person last and is more cumbersome since an auxiliary verb (from the verb “to be") has to be added (for example, “may be ordered").

- the legal person may be overlooked

In a passive construction, it is easy to miss who is responsible for taking the action described in the verb. This cannot happen when the person is the subject of the sentence. A sentence in the passive voice has to be clarified by adding in the person in an extra phrase beginning with “by".

Example 23

A person who is diagnosed as suffering from the illness must be given a copy of the diagnosis on request.

Who does the diagnosis? Who is to give the copy and to whom is the request to be made? A sentence using the active voice would answer these questions:

If a medical practitioner diagnoses a person as suffering from the illness, the practitioner must give a copy of the diagnosis to the person when the person so requests.

- they can be clumsy and lead to false subjects

Example 24

In section 12(1), there shall be added, after the word “proceedings", the words “under Section 125 of the Companies Act".

The grammatical subject is “there”. It is false as it has no substance. A simple command is shorter and more effective:

In section 12(1), "under section 125 of the Companies Act" is added after ”proceedings”.

- However, the passive voice can be useful, even preferable, in certain circumstances:
    - if the provision is of universal application to all legal subjects

Example 25A

Operating a motor vehicle on a pedestrian walkway is prohibited.

- if the action is to be performed by a member of an organization, but it does not matter which one

Example 25B

A person arrested under a warrant of arrest must be taken without unnecessary delay before a magistrate’s court.

- if the provision declares the legal status of a person or thing

Example 25C

Property deposited with the building authority and not claimed within 30 days after its deposit is forfeited to the building authority.

- to achieve greater continuity in a series of provisions

Example 25D

1. (1) The Safety Authority may require the occupier of the premises to carry out measures required to ensure the safety of the premises.
2. (2) The expenses of carrying out the measures are to be borne by the occupier of the premises.

- in a series of provisions if the first one makes it clear who is responsible for the action

Example 25E

1. 1. A person who operates a motorcycle in the park must comply with the following rules.
   - (a) the speed of the motorcycle must be kept under 30 km per hour.
   - (b) the motorcycle must not make excessive noise.
   - (c) the motorcycle must be operated only on roadways.

The passive voice avoids having to repeat "a person who operates a motorcycle in the park". Once it is clear who is responsible, the focus should be on the motorcycle. This also helps produce cohesive sentences.

- Multiple principal subjects and predicates in the same sentence are confusing.

  Readers can be confused by sentences that contain more than one subject when each of them is followed by its own predicate. If you need to confer distinct functions on different subjects, deal with each case in a new sentence.

Example 26

A police officer executing a warrant of arrest must notify the person to be arrested of its substance, and a person arrested under a warrant of arrest must be taken without unnecessary delay before a magistrate's court.

This sentence contains two distinct rules; the second appears to have wider application (extending to arrests made by other persons in addition to police officers). Separate sentences would ensure that the second is not to be construed as limited to the first case.

However, confusion is less likely in a sentence that:

- imposes a series of distinct requirements on the same subject
- imposes a series of requirements on several subjects, when all the subjects are affected by all the requirements

Example 27A

A director, a manager and an employee of a company must:

(a) provide information as required by this Act;

(b) answer all written questions communicated under section 25; and

(c) make available all company documents containing information that appears to be relevant to proceedings under this Act, whether requested or not.

- provides for two closely linked actions that arise in the same circumstances.

Example 27B

A police officer executing a warrant to arrest a person must notify the person of its substance; the person must be taken without unnecessary delay before a magistrate's court.

c) How should we select the appropriate verb for the principal predicate?

The verb is a critical element in describing what is required of the principal subject of the sentence. To select the verb, start by deciding precisely what action or result is required and the way that the subject is to be affected. It may help to ask questions such as the following:

- what kind of action or activity is needed in order to produce the desired result?
- does it involve one or a series of actions?
- is the action to be a continuing one?

Example 28

A police officer may, without a warrant, arrest and detain, a person whom the officer reasonably suspects to have committed an indictable offence.

The predicate contains two powers; both are available at all times to police officers. The first, "arrest", involves a single act; the second, "detain", involves action of a continuing nature.

To signify an arrest, a police officer must touch or restrain the body of the person being arrested, unless that person submits to the custody by word or by action.

This predicate describes, in the form of duties, how a police officer indicates the making of an arrest.

d) Is an auxiliary required in every principal predicate?

The nature of the action described in the principal predicate is a critical element. It indicates whether a legal person is to perform the action or not or whether they have a choice about performing it. The nature of the action can be indicated by using a compound verb with an auxiliary. The choice of the auxiliary is particularly important in differentiating the nature of the action.

The auxiliaries most often used are:

- must,
- shall,
- may.

Reserve these auxiliaries for use in the principal predicate only. They are generally recognised as words of command and authorisation (although there is ambiguity about "shall"). This may be reinforced by the meanings attached by your Interpretation Act to "shall" and "may".

Example 29

1. (1) When in a written law the word "may" is used in conferring a power, that word is to be interpreted to imply that the power may be exercised or not, at discretion.
2. (2) When in a written law the word "shall" is used in conferring a function, that word is to be interpreted to mean that the function so conferred must be performed.

Another, wider, definition of these terms is to be found in section 24 of the model *Interpretation Act* in the **Resource Materials**.

Activity 3

Confirm whether the Interpretation Act in your jurisdiction contains definitions of these terms.

Legislative Counsel now recognise that these terms are not necessarily the most suitable for sentences that do not command or authorise. They dispense with an auxiliary or use other auxiliaries in the principal predicate to state or declare a legal position or consequence. The following are now in common use in some jurisdictions as auxiliary to other verbs:

- is [not] liable to,
- is [not] entitled to,
- is [not] eligible to,
- is [not] to,
- is [not] required to.

Not all legislative provisions state actions in relation to legal subjects. Some of them:

- state a legal consequence or effect;
- declare a legal status.

These provisions state a legal result after some occurrence or action, or the legal position that is created by the provision. The language of command or permission is inappropriate for making a statement.

Example 30

A member of the Council ceases to be a member if convicted of an offence punishable by imprisonment.

A fund, to be known as the Motor Accidents Fund, is established by this Act.

The functions of the Benefits Authority are as prescribed in this section.

This section has effect despite the rules against hearsay.

e) How do we choose the appropriate auxiliary?

The choice of auxiliary is dictated by the nature of action to be ascribed to the subject. Different auxiliaries prescribe different responses from the subject, and therefore have different impacts. Accordingly, different auxiliaries may be needed to provide for the following:

- a command (including a prohibition)
- a power or permission
- a competence
- a right
- a qualification or disqualification
- a liability
- a privilege
- a direction.

Each of these is discussed in turn below.

Commands

If the sentence is to require the subject to act or not to act, with some adverse legal consequence for failure, the predicate must create an unqualified duty. Legislative counsel have conventionally used "shall" for this purpose. However, some jurisdictions have discontinued the use of "shall" for this purpose, largely because of the ambiguity that has developed in this term. "Must" is now frequently (although not always) uses as an alternative.

- "Shall" or "Must"?

  Driedger has argued that "shall" *creates* a duty while "must" merely asserts the existence of a duty. However, he concedes that a provision using "must" would almost certainly be construed by a court as the source of the obligation. For that reason, he advocated using "must" only if no penal consequences follow on a breach of the duty.

Example 31

Driedger gives the following as an example of where "must" might be suitable:

An agreement must contain the prescribed particulars.

These duties are sometimes referred to as "soft obligations", largely because they are ancillary to some other obligation and do not themselves attract a legal sanction for non-compliance.

Driedger's view is not universally held (see, for example the article on Expressing Obligations and Prohibitions in the Canadian drafting manual, *Legistics*). The choice between "shall" and "must" has become a matter of differing drafting practices in different jurisdictions. The terms are increasingly seen

as interchangeable. At the same time, take care not to use both in the same instrument, as this may suggest differences in meaning.

Activity 4

Is "must" now a permitted alternative or a required replacement for "shall" in your jurisdiction? Or is "shall" still the term in favour to impose an unqualified duty or prohibition?

If the duty is to refrain from acting in a prescribed way, under a threat of a penalty, most Legislative counsel use "shall not" (or "must not"). This conventionally is the strongest form of prohibition.

But could such a command equally well be given by using "may not"? Does this not deny a person the right to act?

Example 32

A person may not carry on a business of dealing in second-hand motor vehicles without a dealer's licence.

On its face, this auxiliary has the same effect as an unqualified duty. But strictly, the provision is negativing or denying the holding of a power, permission or right, rather than commanding that the person refrain from doing the act. Accordingly "may not" is more useful to emphasise that some power, permission or right provided for by law is withdrawn.

Example 33

1. (1) A trustee may apply to a Judge for directions with respect to the investment of trust funds.
2. (2) A trustee of a trust established outside Utopia may not apply under subsection (1).

- Alternative approaches

  There are cases when a term other than "shall" or "must" can be used to express a mandatory requirement. Verb phrases like "is required to" or "is to" also create obligations. These phrases can be used when the context of a provision suggests that "shall" or "must" is too strong because no penal sanction is involved to enforce the obligation.

Example 33A

The Minister is to establish the form of notice.

The inspector is required to give prior notice of any inspection under the Act.

A person who is exempted under section 5 is not required to notify the Registrar of any change in personal information.

- Universal prohibitions

  If the sentence is to create a universal prohibition (one that affects everyone or everyone in a specific class), the conventional practice is to negative the person rather than the verb: "No

person shall .....". This is both more emphatic and, strictly, the correct converse of the rule that requires everyone to do something.

Example 34

Of the following, the first version makes the stronger impact:

No person shall drop litter in a public place.

A person shall not drop litter in a public place.

Can we use "no person must ....." instead? In fact, this does not work in quite the same way. Strictly, it is a statement that no one is under an obligation to act in the prescribed way. That is not the same as commanding persons not to act in that way.

Example 35

No person must walk on the grass in a public park.

This means that no one is under a duty to walk on the grass, although they may if they wish! This is precisely what is not required.

The conventional practice is:

- introduce a universal prohibition by "No person shall".
- if you wish to use "must", adopt the following : "A person must not .....".
- if you wish to emphasise that a particular person is not under an obligation (for example, but other persons are), use "No police officer is required to ....."

Powers and Permissions

In a sentence that gives the subject a power or permission to act or not to act, the predicate must confer the necessary authority. Although power and permission are distinct concepts, they are often dealt with by the same auxiliary "may".

- Powers

A power is an authority to do something that would otherwise be illegal or tortious or legally ineffectual. It states the type of action that the subject can legally choose to initiate or is permitted to take if deciding to act. Typically, in conferring a power four questions need to be answered:

1. Is the person to have a discretion to decide whether or not to exercise the power, or must the power be exercised when specified circumstances occur?
2. Are grounds to be specified that must be fulfilled before the power is exercised? If so, is the person to have a discretion to decide whether those grounds are fulfilled?
3. Is the person to have discretion to decide the means by which the power is to be exercised or are these to be specified?

4. Is the power to be coupled with a duty, for example as to how discretion is to be exercised or as to conditions to be attached when permission is granted? If so, what are the consequences if the duty is not complied with?

In conferring a power, legislative counsel generally use “may” as the auxiliary.

Example 36

The Minister may make regulations for carrying this Act into effect.

The Minister is authorised to make any necessary regulations.

A power expressed in this way is usually taken to give the holder discretion as to whether or not to exercise it. It is not usually necessary to add words to confirm the discretion. However, it is sometimes necessary to couple a power with a duty to exercise it in prescribed circumstances. This can lead to problems of interpretation if “may” rather than “shall” or “must” is used.

Example 37

The Minister may issue a licence on payment by the applicant of the prescribed fee.

Is the Minister under a duty to issue a licence when the payment is made (does the applicant have a right to a licence merely by paying the fee? If so, “shall” or “must” is the appropriate auxiliary. Or can the Minister refuse the licence even though payment is tendered (is the Minister to have a discretion)?

The simple use of “may” is not conclusive, since it can leave unclear whether the power is discretionary or whether its exercise is obligatory. The context in which the term is used may provide the answer. For example, if the holder has to make a judgment before exercising the power, it is clearly discretionary. At the same time, the courts will insist that the holder is under a duty to go through the process of making the judgment. A statement of the factors to be considered before exercising the power allows the courts to draw such a conclusion.

Example 38

The following provision gives councils a general authority to act in this way. But it is unclear whether councils are to have a power to issue permits in their unfettered discretion.

Every local government council may issue parking permits to owners of private motor vehicles who are resident in its area.

Can a council refuse permits if it thinks proper? Further provision is needed to set the framework within which the power is to be exercised.

If the power is to be exercised only when specified conditions exist, make clear whether those conditions are to be established objectively or whether the holder is to make a judgment in that respect. Similarly, if the way the power is to be put into effect is to be determined by the holder, make clear that this feature of the power is discretionary.

Example 39

If the Registrar is satisfied that a registered person is contravening any of the provisions of this Part, the Registrar may serve that person with an enforcement notice requiring him or her to take such steps as are specified in the notice for complying with this Part.

The Registrar may arrange for the publication of such information about the operation of this Act as appear to him or her expedient to give to the public. The information is to be published in the form and manner that the Registrar considers appropriate.

In drafting a power:

- use "may" as the standard auxiliary when a person is authorised to act but need not do so, and especially where an element of discretion is involved;
- if (but only if) there is any danger that a duty will be implied when that is not intended, add an appropriate modifier, for example "in the Minister's discretion"; "if the Minister considers expedient" or "thinks fit"; "if the officer is satisfied that there are grounds for doing so";
- if a duty to act is intended, consider using "shall" or "must" in the predicate.

Practice what you have learned. It is time to complete exercise 8.

Use the "Navigation" menu on the left to click on "Activities" and then "Quizzes" to find the Exercises.

- Permissions

  Rules are often needed to regulate previously uncontrolled activities by giving permission for them to be carried on in the future, for example if prescribed conditions or requirements are met or complied with. This can be dealt with in two ways:

  - by permitting the activity (using "may") if the prescribed circumstances are fulfilled;
  - by prohibiting the activity (for example using "must not") unless the prescribed circumstances are fulfilled.

  Legislative counsel generally prefer the second of these approaches (a "qualified prohibition") even though it uses a negative form to authorise a positive activity. Although a positive form is more quickly understood, the negative states categorically that permission is wholly dependent upon fulfilling the condition. If a positive form is used, make clear that fulfilling the condition is a pre-requisite of having permission.

Example 40

A person may carry on a business of dealing in second-hand motor vehicles only if that person holds a dealer's licence issued under this Act.

No person shall carry on a business of dealing in second-hand motor vehicles unless that person holds a dealer's licence issued under this Act.

A person must not carry on a business of dealing in second-hand motor vehicles unless that person holds a dealer's licence issued under this Act.

- Denial of authority

  In a rule that precludes the subject from exercising a power or denies permission to act, the predicate must be drafted to withhold or withdraw the authority. Legislative counsel generally achieve this by using "may not". However, if you are seeking to prohibit behaviour rather than prevent the exercise of a power, it is sensible to use "shall not / must not".

Example 41

1. 12. An inspector may enter any premises at any time to inspect electrical installations, but may not enter a residence on a Sunday.
2. 20. A person contravening any provision of this Act commits an offence.

Is the inspector under a duty not to enter on Sundays, in which case a breach can be punished under section 20? Or is the purpose of the auxiliary to withhold the power of entry (breach of which might give rise to civil consequences only)?

If the former, it is clearer to write:

..... but an inspector must not enter a residence on a Sunday.

Competencies

Legislation that, for example, establishes a new body typically must state the competencies of that body: its jurisdiction, responsibilities and functions (the general activities that enable it to carry out the purposes for which it was created.

- "May" generally used to confer competencies

Example 42

The Commission may investigate complaints about judges subordinate to the High Court.

This sentence both designates the Commission as the body to carry out this activity and authorises it to do so. However, it gives the impression of a power, making the decision to investigate a matter of discretion, when its purpose is to state an activity that the body is obliged to carry out. The extent to which the body is to have discretion in performing the function is better dealt with as a distinct issue.

If the objective of a provision is to confer responsibility for a particular activity, more specific words can be used, especially if it involves a duty to act.

Example 43

The Commission has the function of investigating complaints about judges subordinate to the High Court.

A district court has jurisdiction to hear and determine actions founded on contract or tort if the debt, demand or damage does not exceed $5000.

- "Shall" to confer competencies

Legislative counsel in the past have also used “shall” to make an authority responsible for some activity. That auxiliary gives the impression of a legally enforceable duty to act when what is needed is to confer capacity to act with respect to the activity.

An acceptable alternative that gives a less unqualified obligation is to use:

- is [are] to,
- is [are] not to,
- is competent.

Example 44

Compare the two versions of each of the following sentences. The second removes any notion of compulsion in conferring competence to act.

1. The members of the Board shall be appointed by the Minister.

   The members of the Board are to be appointed by the Minister.

2. The District Court shall hear and adjudicate upon petitions for the dissolution of marriage.

The District Court is competent to hear and adjudicate upon petitions for the dissolution of marriage.

Rights

If the provision is to confer a right on the subject, legislative counsel conventionally achieve this by using “may”. Although this does not differentiate a right from a power, in most circumstances this is of little importance. A right to do things carries with it the power of action.

- Right to a benefit

  But the power of action may not be intended if you are conferring a right to receive something or be benefited in some respect. To write “may receive”, for example, leaves quite uncertain whether there is some person who is under a duty to pay or merely whether the subject is capable of being made a beneficiary of another’s power, if it is exercised. A need for such an approach can arise:

  - automatically on the happening of some stated event;
  - following the exercise of another’s discretion.

  In cases of this kind, a right is better conferred by “is entitled”.

Example 45

A child under the age of 2 years is entitled to receive free school education if the Social Welfare Officer considers that the parents of the child are unable to pay the costs of school education.

If a farm animal trespasses on land, the occupier of the land may be paid compensation, as prescribed, by the owner of the animal.

Although the second example would be construed as creating a right in the occupier, it is better stated as:

..... is entitled to be paid compensation .....

Alternatively, the sentence could be drafted in the active voice to impose a duty to pay upon the owner of the animal, but that might not fit with a legislative context that is concentrating on the legal position of occupiers of land.

- Disentitlement

  In a sentence that sets out to deny a particular class of person a right that is available to others, “is not entitled” is more effective than “may not”.

Example 46

If the owner or occupier of land kills or injures a dog in the course of protecting a farm animal threatened by that dog, the owner of the dog is not entitled to be paid compensation for the death or injury of the dog.

Qualifications

If the rule is to state that the subject is a proper person to perform a particular function, the predicate must declare the subject to be qualified. Conventionally, legislative counsel use “may”. In practice, this rarely causes confusion with powers or rights. But “is eligible” is a better auxiliary.

Example 47

The second version of the following is more explicit:

The following persons may be appointed directors of the corporation ...

The following persons are eligible to be appointed directors of the corporation ...

- Disqualifications

In a sentence that excludes the subject from some receiving a benefit or performing a function, “is not eligible” or “is not qualified” can be used instead of “may not”.

Practice what you have learned. It is time to complete exercise 9.

Use the “Navigation” menu on the left to click on “Activities” and then “Quizzes” to find the Exercises.

Liabilities

If the provision is to make the subject vulnerable to legal actions by others, the predicate must declare this liability. Conventionally, legislative counsel use the passive form “may be” or “shall be liable to be”. But this use of “shall” suggests some form of obligation, which is not the case. Those cases are better dealt with by “is liable to be”.

Example 48

A person found trespassing on land belonging to the Railway Authority is liable to be [may be] prosecuted.

Privileges

If the purpose of the rule is to prevent the subject from being liable, the predicate must create a privilege (it must negative any liability to the action of others). Some legislative counsel use "shall not be [liable]". This implies a duty in unspecified persons not to act against the subject, when in fact the case is one of absence of power or competence. It is preferable to use "is not liable to be".

Practice what you have learned. It is time to complete exercise 10.

Use the "Navigation" menu on the left to click on "Activities" and then "Quizzes" to find the Exercises.

Directions

If the provision is to give the subject directions to do or not do something, or as to how to do something, the predicate must give an instruction to the subject. Some legislative counsel use "shall" or "shall not" in these cases. But, again, this suggests that the subject is under some duty enforceable by a penalty. In many instances, that is not the aim of the sentence. Three types of direction can be distinguished, to which different auxiliaries are suited.

- Direction as to composition or persons to perform a function

  The purpose of the sentence is to indicate how a body is to be composed or which person is the competent authority. As we have seen, you can use the present tense for this case, or "must", or "is to", or similar phrases.

Example 49

1. 14. (1) The local government councils listed in the Schedule are established by this Act.
2. (2) The councils are to be [must be] composed of the numbers of members as are respectively specified in that Schedule.

- Direction as to how the subject is to perform a function

  The purpose of the sentence is to indicate how the subject, having decided to exercise a power, is to proceed. To use "shall", as has often been the practice, gives the impression that the subject is under a sanctionable duty to act in the particular way. This may be caught by a general penalty clause that provides punishments for contraventions of the Act. This is rarely required. Yet, to use "may" suggests that the process is discretionary, rather than one to be performed in the manner directed.

Example 50

1. 25. (1) A prospector who, in the course of prospecting for minerals in accordance with section 21, discovers minerals in commercial quantities may apply to the Minister for a mining licence.

2. (2) The applicant must apply in the prescribed form within 2 months after discovering the minerals.

Subsection (2) intends that the set method of application should be followed, but "must" creates a stronger form of obligation than is needed.

Consider focusing the direction as to how to act on the resulting action (the "application") into an adverbial phrase which modifies the verb stating the action itself.

1. (2) The application must be made in the prescribed form within 2 months after discovering the minerals.

Practice what you have learned. It is time to complete exercise 11.

Use the "Navigation" menu on the left to click on "Activities" and then "Quizzes" to find the Exercises.

- General direction as to procedure

  A sentence may prescribe the procedure to be followed in given circumstances. In many cases, the procedure is intended to be obligatory and some form of imperative language has to be used. Some drafters use "shall" or "must". Some use "is to", especially when setting out routine administrative procedures. However, from a legal standpoint, the important factor is the consequences that flow from failure to observe the obligation.

  These can take a variety of forms. Non-compliance can have penal consequences or invalidate the procedure or render void the outcome to which the procedure was leading. Alternatively, the procedure may be no more than the administratively convenient way of taking a matter forward without any consequences flowing from non-compliance.

  Such matters are not determined by the choice of auxiliary.

Example 51

All summonses, warrants, orders, convictions, recognisances, and all other processes, whether civil or criminal, must be issued or made, and be signed, by a magistrate or, if authorised by this Act, a justice of the peace.

Proceedings before a magistrate's court are to be instituted either by the making of a complaint or, in the case of a person arrested without a warrant, by bringing the arrested person before the court.

Here the drafting practices in your jurisdiction should provide guidance. But do not expect the courts to treat these terms as conclusive. Courts generally decide these cases by taking account of such matters as the importance of the procedure in the legislative scheme, the interests that are affected, and who will be prejudiced by non-compliance, and to what extent.

If the consequences of non-compliance are important, but may be unclear from the context, do not rely on the choice of auxiliary to make this distinction clear. State expressly what the consequences are. For example, does failure to follow a particular procedure invalidate the action or merely permit the person to whom the procedure is directed to disregard the action if they so wish (for example refuse to consider an

application not made in the correct form)? For a more extensive examination of this matter, see Duncan Berry, "Is it sufficient for legislative counsel merely to state the rules?".

Example 52

No summons, warrant, order, conviction, recognisance, or other process, whether civil or criminal, is valid unless issued or made, and signed, by a magistrate or, if authorised by this Act, by a justice of the peace.

Unlike Example 51, this draft makes clear that non-compliance renders the processes void.

Activity 5

If your Interpretation Act contains a provision equivalent to the model Interpretation Act, section 44, note the reference.

3. PREDICATE MODIFIERS.

Before considering predicate modifiers, it will be helpful to recall the following elements of legislative sentences discussed in Section 2 of this Module:

- Few provisions are intended to apply to all persons everywhere in the jurisdiction, at all times, and in all circumstances and under all conditions; most provisions must be modified to restrict their operation to a particular context.
- Many legislative sentences must contain clauses or phrases to modify the main clause containing the principal subject and predicate for this purpose; the modification may be adjectival or adverbial.
- This modification is typically done by adding into the predicate one or more modifiers that either:
    - *particularise* or limit the effect of the main clause or create exceptions to it;
    - provide *context* by determining the fact situation in which the main clause is to take effect, typically through conditional or relative clauses.

There is no fixed line between these two techniques; they can often be used interchangeably. Both are used to ensure that the sentence states precisely when the rule applies or does not apply. (In the next Subsection we look at context clauses, which are used to determine the circumstances or conditions in which the main predicate operates).

Example 53

The following sentences demonstrate the use of these techniques:

- unlimited sentence:

  A court may issue a warrant.

- adjectival modification:

A court may issue a warrant for the arrest of a person.

(not a warrant for any purpose, only for the purpose of arrest)

- modification by relative clause:

  A court may issue a warrant for the arrest of a person who refuses to attend as a witness.

  (not a warrant for the arrest of any person, only for a person who refuses to attend)

- adverbial modification:

  In response to a request by the State, a court may issue a warrant for the arrest of a person who refuses to attend as a witness.

  (The court may not issue warrants whenever it likes; only in response to a State request)

- modification by conditional clause:

  A court may issue a warrant for the arrest of a person who refuses to attend as a witness if the court is satisfied that the person's attendance is necessary.

  (The court may not issue warrants every time a witness refuses to attend, only if their attendance is necessary)

a) How should we particularise predicates?

Predicates can be given a precise focus in a variety of ways:

- by adding adjectives (including adjectival phrases or clauses) to provide clearer descriptions of nouns;
- by adding adverbs (including adverbial phrases or clauses) to provide clearer indication of how verbs take effect.

Limitations and exceptions are two forms of modifiers commonly required. Both restrict the ambit of the main clause in some way.

Limitations

Expressions added to the sentence to limit the effect of a subject/predicate need to be positioned in the sentence where they perform that function without the possibility of ambiguity. Complex provisions may need several modifiers of this kind. If the modifiers are not well positioned, confusion may be added to the complexity. Typically:

- place an adjective (whether a single word or an expression) as close as possible to the noun which it modifies;

- place an adverb (whether a single word or an expression) as close as possible to the verb which it modifies.

This leads to the word order that is used in standard English. Deviate from the standard order only if a different order is necessary:

- to avoid ambiguity; or
- to enable all the necessary components to be contained within the sentence.

You will have noticed many legislative sentences in which the adverb to the verb it is inserted between the auxiliary and the main verb. This practice (sometimes referred to as "embedding") is rarely found outside legislation; in most cases it is not necessary. Only consider using this device if that is the only way to prevent uncertainty or ambiguity.

Example 54

Here is an example of an unnecessary embedding of modification:

An appointed member of the council shall, on revocation of the appointment by the Minister, but without prejudice to re-appointment in accordance with this Act, cease to be a member of the council.

In addition, this version conceals the fact that 2 different types of modification are present. The first modifies the verb, but the second limits the ambit of the entire rule. A better draft would be:

An appointed member of the council ceases to be a member if the appointment is revoked by the Minister; but the person may be re-appointed in accordance with this Act.

Practice what you have learned. It is time to complete exercise 13.

Use the "Navigation" menu on the left to click on "Activities" and then "Quizzes" to find the Exercises.

Exceptions

The purpose of an exception is to remove specified cases from the generality of the provision. These may be cases that are dealt with in other law. Exceptions modify the sentence through added words that exclude from the ambit of the rule the cases in which the rule is not to apply. This can be achieved:

- by modifying the subject or the object or other nouns (to exclude persons or things), beginning the modifier with, for example: "other than" or "except".

Example 55

Any member of a trade union, other than [except] a member under suspension, may apply to the court of a declaration under this section.

- by modifying the verb, especially in the principal predicate (to exclude cases which would otherwise be covered by it), beginning the modifier with, for example: "unless".

Previously legislative counsel also used “provisos” for this purpose. Today, most legislative counsel no longer use them. (See LGST 553, Module 1, Section 1 - *How should we structure a legislative text?*).

In composing an exception, take steps to provide that:

- the principal predicate contains the new law; the exception provides for the situation that is being preserved or excluded;
- the exception is concerned with the minority of cases; the principal predicate deals with the standard case.

A sentence that provides only for an exception may obscure the nature of the main rule, as that has to be deduced by implication. If it is drafted in that way, ensure that no-one can be in doubt as to what that rule may be.

Example 56

A summons or a warrant may be issued and served on any day except Sunday.

A summons or a warrant may not be issued or served on a Sunday.

In the first example, both the general case and the exception are clear. In the second, the sentence is silent on the general case, though it is not too difficult to deduce it.

If a long exception is required to modify the whole sentence, consider converting it into an explanatory clause, with its own subject and predicate, at the end of the sentence and introduced by a conjunction such as “but” or “however”. This brings out strongly the relationship between the rule and the exception.

If the exception is detailed or in any way complicated to understand, convert it into a separate sentence to follow the main rule, as a further subsection. You may again need suitable linking words to indicate the relationship between the two propositions. (Linking of sentences is also considered in LGST 553, Module 1, Section 1 - *How should we structure a legislative text?*).

Example 57

A local authority may cause the body of a child who has died while in its care to be buried or cremated; but the body may not be cremated if cremation is not permitted in the practice of the child’ s religion.

1. (1) The Copra Marketing Authority shall purchase all copra of merchantable grade and all coconut products, other than coconut products specified by the Minister under section 3, that are produced in Utopia and offered and delivered to the Authority.
2. (2) Subsection (1) does not apply in respect of copra or coconut products produced in a part of Utopia designated by the Minister by order for the purposes of this section.

In the second example, the exception in subsection (1) modifies an element in the sentence. Subsection (2) creates an exception to the entire sentence.

Relative clauses

A relative clause may be used to modify any noun (or pronoun) that is a component of the subject or predicate. It is adjectival in that it defines qualities or activities of the noun to which it is attached, typically by a relative pronoun (for example “who”; “whom”; “which”; “that”).

Example 58

A mental health authority may transfer the guardianship of a patient who is for the time being subject to the guardianship of a person to another person with that other person’s consent.

A person who fails to comply with an enforcement notice commits an offence.

In drafting a relative clause:

- make sure that the relative pronoun can only refer to the intended noun, and no other;
- do not attach to the same noun relative clauses of both types (one that describes qualities and another that defines an action) since they perform different functions.

Conditional clause

As the term implies, a conditional clause may be added to the predicate to state the conditions that must exist or be fulfilled before the action has effect. As a result it is used adverbially, to modify the verb.

Example 59

The mental health officer must inform the nearest relative in writing of his or her reasons if the officer decides not to make an application under this section.

A mental health officer may not make an application for admission of a patient to a mental health hospital unless:

(a) requested to do so by a medical practitioner who is attending the patient; and

(b) two medical recommendations have been made in accordance with subsection (2).

In these examples, the clause is incorporated into the main predicate to provide continuity in the way the proposition is expressed. However, such clauses are often positioned as a subordinate clause at the opening of the sentence. This practice is discussed next.

b) How should we write context clauses?

ontext clauses are subordinate clauses containing their own subject and predicate. They give additional meaning to the principal clause by creating the context or legal setting in which that clause is to operate. They typically determine such matters as:

- the fact situation in which a provision is to operate (for example: the time, place, circumstances);
- the action taken by some person that triggers the application of a provision;
- a condition that is to be met before a provision can take effect.
- the event that brings the rule into operation;

Example 60

Fact situation:

1. (1) Where [or if] persons wish to marry, one of the parties to the intended marriage must give notice in the prescribed form to the registrar of the district in which the marriage is intended to take place.

Prior action:

1. (2) When notice of an intended marriage is given, the registrar must cause the particulars of the notice to be entered into a register, to be called the "Register of Marriage Notices".

Condition:

1. (3) If, at the end of 21 days after the date of the notice, the registrar has received no objection in writing to the intended marriage, the registrar must issue a licence in the prescribed form authorising the parties to marry.

Event:

1. (4) If the marriage is not solemnised within 3 months after the date of the notice, the notice and licence cease to have legal effect.

Context clauses must have a subject and predicate, but the conventions concerning these components are more flexible than they are for the principal clause.

Subject of a context clause

Unlike the principal clause, a context clause need not focus on specific legal persons. It is generally descriptive in content, and so it may relate to persons or things, activities or events. Therefore:

- the grammatical subject may be a legal person or an animate or inanimate thing, or an action or activity (in the singular or plural);
- if the grammatical subject is a person, it may refer to the person who is the legal subject of the sentence or to a different person.

Let the grammatical subject of the clause be dictated by what enables you to describe the subject-matter best. If you are following up an aspect of the previous sentence, the grammatical subject may be suggested by the contents of that sentence.

Example 61

1. 13. When a notice is given under section 12, the Registrar-General must file it and enter the particulars of it in the register kept for the purpose and must post a copy of it in a conspicuous place in the registry.

The context clause builds upon section 12, which laid down rules about the giving of notices. Its grammatical subject (a "notice") relates back to the matter in that section.

Verb in a context clause

In context clauses we see most clearly the impact of the convention that legislation is always speaking. These clauses continuously describe the circumstances and conditions in which the provision operates. Therefore:

- use the present tense if the verb describes a state of affairs that has to coincide with the operation of the principal clause (this is by far the most typical case);
- use the present tense when the provision is to operate immediately once the circumstances described arise.

Example 62

If a person who is over the age of 21 years and resident outside Utopia wishes to marry in Utopia, he or she may apply to the Registrar-General for permission to marry by proxy.

The power to apply is available to anyone who fulfils the requirements of the context clause as soon as they are fulfilled, and continues as long as they continue to be fulfilled.

When a marriage is solemnised by a registrar, the registrar must enter immediately the particulars of the certificate of marriage in a register kept for the purpose (to be called the "District Marriage Register").

Although the marriage is solemnised before the registrar can act, the duty to register arises as soon as the marriage has taken place.

- use the past tense or the present perfect tense if you wish to emphasise that a state of affairs or an action must have occurred or have been completed before the principal clause can take effect. This is likely to be the case when:
    - the context clause provides for the happening of a single event, rather than events of a kind that are likely to be frequently arising;
    - the context clause lays down a pre-condition that must be fully met before the rule can operate.

Example 63

When a marriage was solemnised outside Utopia, either party to the marriage may petition the High Court for dissolution of that marriage under this Act.

If a person has been ordained a minister of religion, the Minister may appoint that person to be a marriage officer in Utopia.

When drafting context clauses:

- never use “shall” (either as a future tense or as a command) or “may” in a context clause: these should be confined to the principal predicate;
- prefer the active voice to the passive voice (as in a principal clause); at the same time, passives with impersonal subjects are a useful way to connect the sentence with a previous sentence (as in Example 61).

Introducing a context clause

The terms that legislative counsel typically use to begin context clauses are:

- if,
- when,
- where.

These are especially favoured when the context clause is at the beginning of the sentence. But:

- these terms tend to be used a little differently from the ways in which they are used in non-legislative writing;
- they are not always used in exactly the same way by all legislative counsel;
- they are frequently used interchangeably.

Legislative counsel have traditionally tended to use “where” in cases when “if” and “when” are more consistent with day-to-day use. In a number of jurisdictions, “if” is now used to begin both clauses that express the contingency that activates the main predicate (as in the past) and for clauses that describe recurrent or habitual circumstances in which the main predicate operates (in substitution for “where”): see, for example, the article on If, When and Where in the Canadian drafting manual, *Legistics*.

When writing a context clause, ask yourself which of the three terms best introduces the matter in the clause. However, you must give due regard to the drafting practices in your jurisdiction.

Activity 6

Check the drafting practices in your jurisdiction for any drafting directive in use or from recent legislation.

Let us look how these terms are conventionally used and when they might be used.

Common practices	**Better practices**	
"where"	to introduce circumstances that: • are likely to arise frequently; • are of a continuing nature or describe the factual setting in which the provision operates.	to introduce • an adverbial clause that refers to a physical place;
"when"	to introduce circumstances that: • are unlikely to arise frequently; or • can only occur on one occasion.	to introduce an event or action: • when time or timing is a factor; or • about which greater certainty is required than is offered by "if".
"if"	to describe a prior condition that triggers the application of a provision.	to introduce: • a condition that is a prerequisite to the operation of the main predicate; or • a fact situation in which the main predicate is to operate.

Other terms are used to introduce context clauses, though usually where the clauses are placed later in the sentence, especially at the end. They include:

- unless,
- until,
- after
- before,
- as soon as.

Legislative counsel use these terms in the same way as they are used in other forms of writing. They typically introduce a full clause (with a subject and verb), but you may be able to use shortened versions.

Example 64

Shorter versions are achieved by leaving out the words in brackets.

The registrar must not issue the certificate of marriage unless [he is] satisfied that there is no legal impediment to the marriage.

The registrar must not issue a certificate of marriage before notification [is made] under section 12.

Placing a context clause

Many legislative counsel still follow Coode's advice to place context clauses at the very beginning of the sentence (before the principal clause). There are several benefits:

- it indicates to the reader at once that the provision is not of universal application;
- it allows readers to discover whether the context of the provision applies to their case before looking in depth at the entire sentence;
- it can be used to provide a link with an earlier sentence, by building upon information already known to the reader;
- it frequently conforms to the time frame for the operation of the provision by putting a pre-condition or circumstance before its consequences.

Example 65

1. (2) If a certificate of a marriage cannot be issued under subsection (1) by reason of the residence outside Utopia of one of the parties, a magistrate's court may dispense with the issue of the certificate of marriage and issue a licence authorising the solemnisation of the marriage.

The condition in the context clause in this example must be satisfied before the provision can have effect. The rest of the sentence is relevant only if the condition is satisfied.

But this order may make the sentence unnecessarily difficult to understand, particularly if the context clause covers several alternatives or embraces both circumstances and conditions. Readers generally find sentences that are "front-loaded" in this way difficult to work with. For example:

- they have to read the entire sentence to find the core subject and predicate so as to understand the purpose of the context clause;
- they are asked to carry information forward in their short-term memory until the rest of the sentence has been understood.

Example 66

1. 12. If a marriage has been solemnised by a person who is not a marriage officer or if either of the parties to the marriage married under a false name or if the marriage has been solemnised without the authority of a certificate of marriage, the marriage is void.

The entire section has to be read and the various alternatives considered before its full import is clear. (This would, of course, be eased by a helpful section note, for example: "Void marriages.").

A sentence is easier to understand if it begins with the subject and predicate followed by the context clause. Legislative counsel now tend to avoid front-loading unless they have a good reason, such as making a link with a preceding provision. Accordingly, context clauses should occupy the place in the sentence that best contributes to communicating the provision. Choose a sentence order that leads to the most effective expression. For example:

- a conditional clause may be more effective if it follows the main clause (this is usually the case when it is to begin with "unless");
- a series of conditional clauses (beginning with "if") can follow the main predicate in a series of paragraphs.

Practice what you have learned. It is time to complete exercise 15.

Use the "Navigation" menu on the left to click on "Activities" and then "Quizzes" to find the Exercises.

You may find it easier to determine the order of the sentence components if you use a different kind of modifier instead of a full context clause, for example:

- a phrase introduced by a preposition;
- a relative clause introduced by a relative pronoun (for example: "who", "which" or "that").

A context clause can often be easily converted into one of these forms without a change of meaning or loss of effect.

Practice what you have learned. It is time to complete exercise 16.

Use the "Navigation" menu on the left to click on "Activities" and then "Quizzes" to find the Exercises.

You can make a context clause more prominent by putting it either at the beginning or at the end of the sentence. But bear in mind the draw-backs of front-loading. For example, do not transfer the essential elements of the principal clause to a front-loaded context clause to achieve that prominence. This was a common practice with offence provisions in the past. Consider rather whether the prominent position at the sentence start should be occupied by the main clause (the core subject and predicate) with the modifying clause at the end.

Example 67

If a person at a public gathering behaves in a noisy or disorderly manner or uses or distributes a document containing threatening, abusive or insulting words with intent to provoke a breach of the peace or by which a breach of the peace is likely to be occasioned, that person commits an offence and is liable to imprisonment for 12 months.

This draft requires the reader to wade through a detailed context clause containing the forbidden behaviour before finding out that it is that behaviour that is made a crime.

HOW SHOULD WE STRUCTURE A LEGISLATIVE TEXT?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

1. GENERAL CONSIDERATIONS.

This Section deals with the ways in which legislative sentences are structured and linked in a legislative text to make a coherent set of provisions. Legislative counsel need to be able to structure and link both sentences within a single section and sections within a single legislative text.

This Section also deals with the ways in which legislative texts may be formally divided and how provisions in other legislation may be linked or incorporated to provide consistency in the general body of law.

Section Objectives

By the end of this Section, you should be able:

- to order and link legislative sentences to make a logical section;
- to make effective use of paragraphing in setting out components of a legislative sentence;
- to order and link legislative sentences into a rational structure in a legislative text;
- to determine when provisions in other legislation should be linked with a legislative text or incorporated into it;
- to decide when a legislative text needs to be formally divided, and how those parts should be organised.

Essential Questions

This Section is divided into 9 subsections organised in terms of a series of questions:

1. General Considerations
    - Why is structuring important?
    - What are the basic characteristics of structuring?
    - What guidelines should we follow in structuring legislation?
2. DRAFTING SECTIONS
    - How should we approach individual sections?
    - How can we tell which matters should be covered by the same section?
    - How long should a section be?
    - How should the section note be selected?
3. Drafting Sentences in Sections
    - How long should a sentence in a section be?
    - What can be done to keep sentences as short as possible?
4. Paragraphing
    - How can paragraphing help?
    - When might paragraphing be used?
    - What factors should be borne in mind when drafting paragraphs?
    - What can go wrong with paragraphs?
    - How can we find flaws in paragraphs?

5. Numbering
    - What numbering systems do we use to identify legislative provisions?
    - How should we number new provisions inserted into existing ones?
6. Arranging and Linking Sentences in a Section
    - How should sentences in a section be arranged ?
    - When should sentences in a section be linked?
    - How should sentences in a section be linked?
    - Should we use a proviso as a linking device?
    - What alternatives to the proviso should be used?
    - Can we dispense with linking words between sentences?
7. Linking Sections
    - What is different about linking sections?
    - How can sections be linked?
    - How should cross-references be drafted?
8. Incorporation by Reference
    - When can we incorporate provisions from one part of a text to another?
    - When can we incorporate provisions from other legislation?
    - Can provisions be incorporated from the legislation of another jurisdiction?
9. Grouping Sections
    - When should we have formal groupings of sections?
    - What groupings are conventionally used?
    - When might groupings be of particular value?
    - When should the decision be made about grouping sections?
    - What should be borne in mind in grouping sections?
    - How should group headings be expressed?

Studying this Section

You will see from the long list of questions that there is much to cover in this Section. You may find that some of its parts call for at least a full study session of their own. You may also find that the Exercises require more time, as necessarily the text with which we are now dealing is longer. The Section deals with many matters that are also mentioned elsewhere in these Materials, for example, paragraphing as a technique for organising detailed or elaborate provisions into an easily accessible form. This Section explores at greater length their use and flaws that you must avoid.

In studying this Section you may find it helpful to draw up your own Checklist of things to do or not to do when structuring legislation. This should help to confirm what you are learning, but it also becomes a handy reminder and reference point for the future. Once the routines become standard practice for you, you can dispense with the Checklist.

a) Why is structuring important?

Most legislative texts are composed of units each dealing with a particular aspect of the subject-matter. These units are often referred to as “enactments” (although that term can also be used to describe an entire statute or instrument, see for example subsection 25(1) of the model *Interpretation Act* in the Resource Materials). In this context, we mean a complete legal proposition, put into force by legislation, from which specified legal results follow when the facts to which it relates arise.

Bills and the statutes they enact are generally divided into separate sections, each containing a distinct substantive enactment. When this practice was first introduced in 1850 (by Lord Brougham's *Interpretation of Acts Act*), a section had to contain a single sentence. Since each section contained an enactment, it had to hold a complete legal proposition. So, all elements of the proposition, including qualifications and exceptions to it, had to be contained in the single section and so expressed as a single sentence.

However, such sentences tended to be lengthy and packed with details that made the text complex and difficult to use. As a result, in the interests of better communication, legislative counsel have adopted structuring techniques designed to make enactments clearer and easier to understand. In particular, current forms of structuring allow shorter sentences to be used and introduce "white space" on the page, both of which make the text easier to read. At the same time, the section remains the basic legislative unit.

These structuring techniques include:

- dividing sentences into sections and subsections;
- paragraphing and sub-paragraphing within sentences to point up their grammatical parts;
- spreading the effects of the legal proposition, or modifications or exceptions to it, over more than one section, especially if they are extensive or complex;
- grouping the sections that contain related features of the legislative scheme into separate parts or divisions;
- labelling sections (section notes), parts and divisions (headings);
- adopting numbering systems that enable readers to identify where they are in the text and to refer to particular elements with precision;
- assigning matter of secondary or incidental importance to Schedules.

b) What are the basic characteristics of structuring?

The basic characteristics of legislative structuring include:

- a section or a subsection (if the section is divided) typically contains a single sentence (although multiple sentences may be used to avoid long sentences);
- "a unity of purpose" or common theme or idea runs through a section, whether it comprises a single or several sentences;
- the contents of a section are accordingly linked by the fact that they comprise one or more legal propositions dealing with the same theme or idea;
- legislative sentences that do not contain the complete legal proposition must be linked in some manner with the sentences that contain the other parts of the proposition;
- paragraphs are used to point up parallel grammatical elements of a sentence and how the different elements relate to each other; they also reduce repetition and avoid ambiguity;
- lengthy legislative texts, and especially those dealing with a complex and detailed subject, are divided into distinct parts in which related sections are grouped together in a logical order.

The following example illustrates the use of

- subsections to contain related legal propositions in a single section,
- paragraphing to differentiate cases, and
- more than one section to cover the necessary components of the proposition.

Example 1

Assaulting, obstructing, etc. police officers

> **62.** (1) A person commits an offence who:
>
> > (a) assaults, obstructs or resists, or
> >
> > (b) aids or incites another person to assault, obstruct or resist, or
> >
> > (c) uses abusive or insulting language to,
> >
> > a member of the Police Force in execution of his duty or a person acting in aid of such a member of the Police Force.
>
> (2) The magistrate before whom the person is charged must commit that person to stand trial at the High Court if the magistrate is of the opinion that the matter should be tried on indictment.

Penalties.

> **75.** A person convicted of an offence under this Part [which includes section 62] is liable to a fine of $1000 or to imprisonment for 3 months or, if convicted on indictment, to a fine of $2500 or to imprisonment for 12 months.

Note

Subsection 62(1) creates several offences (shown by the paragraphing), and so contains several legal propositions in a single sentence. Linked procedure - itself a distinct enactment - is dealt with in its own sentence in subsection 62(2).

Section 75 contains a distinct legal proposition as it deals with consequences of other sections but it completes section 62(1).

Note too that the “white space” makes it much easier to work out how the sentence components relate to each other.

c) What guidelines should we follow in structuring legislation?

The account we have just considered suggests certain guidelines for structuring legislation:

1. the main focus of composition is the individual legislative units that together make up the full legislative scheme;
2. the principal vehicle for expressing each of these units is the *section*;
3. the section may comprise a single sentence, or a series of sentences, in which case they are usually set out as individual subsections;
4. the sentences in a section are linked by a common theme;
5. collectively the sentences in a section constitute one or more legal propositions complete in themselves or linked with other sections;

6. sections that are not complete legal propositions are linked with the sections that complete them, either through a common subject-matter or by formal devices (for example, cross-references);
7. paragraphs and subparagraphs may be used within a sentence to present its contents in a more accessible form or to prevent ambiguity or repetition;
8. in substantial legislative texts, sections containing related matter are grouped together into separate parts.

Schedules are used to remove secondary or incidental material from the main body of the text, particularly if it may obscure the central elements of the legislative scheme.

2. DRAFTING SECTIONS.

a) How should we approach individual sections?

In analysing drafting instructions, your task is to identify, as far as is possible at that stage, the particular matters that must be made the subject of a legal provision. Your aim should be to treat each of the matters needing its own legal proposition as a candidate for a separate section (or in a Bill often referred to as a "clause" for the purposes of parliamentary procedure). A legal proposition is a statement of a concept that is necessary to the legislative scheme, much as a single idea is the unifying factor for a paragraph in prose writing.

The actual length of the proposition varies according to its complexity, or to the amount of detail that must be included to make it complete, or to the number of qualifications or exceptions or other modifications required. The main theme of the proposition has to be expanded upon to include all the cases or circumstances to which the proposition applies. This typically calls for several sentences, and corresponding subsections.

Confining a proposition to a single section is often not possible. The longer or more complex the proposition the greater the case for breaking it up into linked sections.

b) How can we tell which matters should be covered by the same section?

Each sentence in a section must throw some light upon the common theme of the section. You should be able to describe that theme in five or six words in answer to the question "which feature of the legislative scheme is this section intended to provide for?". In LGST 557, Module 2, Section 2 (*How do we work with drafting instructions?*), we recommend that, in analysing the proposed legislative scheme, you describe each matter calling for a separate enactment in the form used for section notes. This represents the common theme. A provision that does not fall within that summary is likely to be unsuitable for inclusion in that section. So, test whether a provision is appropriately included in a particular section by whether you can provide a note for the section that covers the provision. If you cannot do that, the section needs reconsideration.

Example 2

Appointment and duties of film censors.

5. (1) The Minister may appoint any number of film censors as he or she considers expedient.

(2) The film censors are to carry out the duties assigned to them in accordance with any general directions that the Minister may give to them.

(3) A film must not be exhibited unless a certificate of censorship, in force, in respect of it, that is granted by a film censor in the manner set out in section 6.

Note

Subsection (3) is an important proposition but it does not fall within the theme of the section note. Indeed, no simple note, and so no section, can cover both organisational arrangements and a basic substantive rule.

c) How long should a section be?

Generally speaking, a section that contains more than six subsections should be reconsidered, especially if each subsection is a substantial sentence. One test is whether the section, when printed, will take up most of the page. Readers find text intimidating if there are no breaks of the kind made by section notes. As a rule of thumb, if there are fewer than two section starts on each page, you should consider whether you have too many subsections, even though they are linked thematically. Most long sections have a major theme and several sub-themes. It should be possible to divide these between linked sections.

d) How should the section note be selected?

Notes are attached to sections to help users find provisions easily and not to interpret them (see subsection 13(2) of the model *Interpretation Act* in the Supplementary Materials). They have a variety of names, including “shoulder notes”, “side notes” and “marginal notes”. They perform the role of topic indicators, that is, they give the reader a foretaste of what is in the section. Readers comprehend the meaning of individual provisions, and their relationship to each other, much more easily if they have an idea of their main thrust before turning to the details. When collated at the beginning of a legislative text, section notes also provide a useful table of contents and a quick guide to its structure and coverage.

Although you may have made a note as a guide to yourself as to the matter to be dealt with in a particular section, reconsider each case from the standpoint of the user. Good section notes:

- fairly describe the main and common theme of the section;
- provide guidance to the readers as to the general subject matter of the section;
- highlight terms that a user may be looking out for, particularly terms for the main concepts used in the legislative text;
- are short and to the point (rarely more of than 5 or 6 words), use a note form (omit definite and indefinite articles and active verbs) and, as an exception to the strict drafting convention, may use “etc.” to save listing similar items or concepts;
- do not contradict the contents of the section.

Example 3

	Typical section notes
Interpretation.	Licence applications.
Regulations.	Issue of permits.

Search warrants.	Forfeiture of instruments used in committing theft.
Powers of police officers.	Magistrate to sit in open court.
Appointment of film censors.	Limitation of actions.
Application of Part II.	Offences.
Restriction on sale of poisons.	Determination of appeals.

Opportunities arise for more imaginative notes. You can form some into questions. This is eye-catching but it is restrictive, since the contents of the section must then contain no matters other than the answer to the question.

Example 4

What legislative instruments are to be registered?

> **13.** A legislative instrument must be registered under this Act if:
>
> (a) it is made on or after 1 January 1994;
>
> (b) it was made before 1 January 1994 and is in force on that date.

Practice varies as to the position of the section note:

- on the line immediately above the first line of the section, in emboldened type (sometimes referred to as a "shoulder note" or "section heading");
- in the margin, beside the first lines of the section, in a smaller type-face (generally referred to as a "marginal note" or "side note");
- as part of the first line of the section, in emboldened type, immediately after the section number and before the first words subsection.

The first of these is increasingly preferred. As a heading, it takes the most prominent position; it is emphasised by being in bold type; it is less complicated than a marginal note to produce in a word-processing system.

Activity 1

Note the type of section note used in your jurisdiction and any special printing features (for example, different type size, emboldening) and whether it finishes with a full stop.

Note

When you are scrutinising your final draft, check:

- whether any section note needs to be altered as a result of changes you have made to the section in the course of drafting;
- that any collation of the notes in an Arrangement of Clauses (however called) exactly reproduces the individual section headings. (These can usually be produced automatically by a word-processing package.

Practice what you have learned.

3. DRAFTING SENTENCES IN SECTIONS.

a) How long should a sentence in a section be?

The length of a section is perhaps less important than the length of the sentences in it and its overall structure. The length of the section is dictated by the amount of detail required by the topic being covered. But the length of the individual sentences and the section structure should be dictated by the needs of logical and orderly communication.

Linguistic research offers some considerations to bear in mind in writing individual sentences:

- sentences of less than 20 words in length are generally not difficult to understand; three subsections of 20 words each are better than one section of 60 words;
- large blocks of unbroken text are particularly difficult to work with, especially slabs of text more than 5 lines long (the "5 line" rule);
- if the sentence must exceed 5 lines, paragraphing of some parts of the text into conveniently short components greatly helps reading and comprehension;
- paragraphing is particularly valuable if the reader needs to retain several separate components in mind in order to understand the overall thrust of the proposition.

Activity 2

Compare the ease with which you can work with the following alternative presentations of the same text.

> **12**. Where the plaintiff in any action where the damages are ascertained at any time before final judgment proves on oath that he has a good cause of action and that the absence of the defendant from the Island will materially prejudice him in the prosecution of his action or where the defendant after judgment gives notice of appeal, if the plaintiff proves by evidence on oath to the satisfaction of a Judge or magistrate that there is probable cause for believing that the defendant is about to quit the Island unless he be apprehended, the Judge or magistrate, as the case may be, may by order under his hand, order such defendant to be arrested and imprisoned for a period not exceeding six months unless and until he sooner gives security to be approved of by such Judge or magistrate in a sum not exceeding the amount claimed and the probable costs of the action or not exceeding the amount ordered to be paid and the probable cost of the appeal, as the case may be, that he, the defendant will not go out of the Island without the leave of the court.

Detention of civil defendants likely to leave Utopia.

> **12.** (1) A Judge or magistrate may order, by a signed order, the defendant in an action to be arrested and imprisoned if:
>
> > (a) the plaintiff proves, by evidence on oath, probable cause for believing that the defendant is about to leave Utopia; and
> >
> > (b) either:
> >
> > > (i) before final judgment in an action for damages, the plaintiff proves on oath:

(A) a good cause of action; and

(B) that the absence of the defendant from Utopia will materially prejudicethe prosecution of the action; or

(ii) the defendant has given notice of appeal against judgment.

(2) Imprisonment under subsection (1) may not exceed 6 months.

(3) A defendant who gives security not to leave Utopia without the permission of the court may not be arrested or remain in imprisonment under subsection (1).

(4) The security must be approved by the Judge or magistrate in a sum that does not exceed, as the case may be:

(a) the amount claimed and the probable costs of the action; or

(b) the amount ordered to be paid and the probable costs of the appeal.

b) What can be done to shorten sentences

Legislative sentences frequently try to do too much at the same time. Long and complex sentences are used in some jurisdictions for tactical reasons. It is easier and quicker to steer a Bill through a legislative chamber or assembly and its committees if it comprises a few long clauses rather than many short ones. If the elements of a legal proposition are compressed together and tightly linked in their syntax, opponents have difficulty in formulating amendments to elements of the sentence. The trend is away from these practices, since they lead to continuing problems for the ultimate user.

In writing a section, try to use a separate sentence for each main feature of the legal proposition you are dealing with, at least when the feature runs to a substantial number of words. The following matters, if long or detailed, can be placed in separate sentences:

- the main element of the proposition (for example, a basic requirement or power);
- alternative propositions, if there is a series of them;
- the context in which the main proposition is to operate;
- the cases to which the proposition applies;
- specific features of the main proposition that require detailed treatment;
- the procedure to be followed in giving effect to, or consequent upon, the proposition if that is detailed;
- the exceptions or qualification to the main proposition;
- consequences following from the main proposition.

Example 5

16. A magistrate, on being satisfied upon information on oath that there is good reason to believe that any instruments or appliance for gaming are likely to be found on any person, may by warrant authorise any police officer to arrest such person and to bring him immediately before a

magistrate, who shall thereupon cause such person to be searched in his presence and if any such instrument or appliance be found upon his person, he shall be detained in custody or held to bail until he can be dealt with according to law.

A redrafted version is much easier to follow:

Arrest of persons likely to be found with gaming instruments.

16. (1) A magistrate may issue a warrant if satisfied on oath that there is good reason to believe that an instrument or appliance for gaming is likely to be found upon a person.

(2) The warrant is to be issued to a police officer authorising the officer to arrest the person and to bring him or her immediately before a magistrate.

(3) The magistrate must cause the person to be searched in the magistrate's presence.

(4) If an instrument or appliance for gaming is found as a result of the search, the person must be detained in custody or held on bail until he or she can be dealt with according to law.

As Example 5 demonstrates, separating the elements into short sentences makes it easier to write in a direct manner and highlights those distinct features that together make up the legal proposition. But only limited savings in the total number of lines or words are likely. Indeed, the reverse may be true. In the example, the redraft required 8 lines compared with the 6 of the original. You may also need to add words to ensure clear links between the separated sentences (as we see below).

However, do not to take this process too far, so as to produce a section made up of a series of very short sentences. This is irritating and difficult to work with, especially if they have to be linked, both in the drafting and in the reading, before their collective sense is clear.

Example 6

Subsection (1) in the redraft in Example 5 could have been written:

(1) A warrant may be issued by a magistrate under this section.

(2) Before issuing the warrant, the magistrate must be satisfied on oath that there is good reason to believe that an appliance or instrument for gaming is likely to be found on any person.

(3) The magistrate may issue the warrant to a police officer.

(4) The warrant authorises the police officer to arrest the person and to bring him or her forthwith before a magistrate.

Subsections (1) and (2) are in fact so closely inter-related that they must be read together for the basic proposition to be understood. There is no gain in further dividing the subsection in this way. Much the same can be said of subsections (3) and (4) as well.

Try to keep a balance between providing a coherent legal proposition, which requires an unavoidable minimum of information, and the desire for an acceptable length. Considerations of length are less

important than communicating unambiguously and grammatically what has to be said. In particular, do not obscure the core of a sentence—the subject-predicate—by excessive modification or by a confusing word order. Elaborate context clauses at the beginning of a sentence ("front-loading") make for difficulty in finding the way to the heart of the proposition.

If a long sentence is necessary to state features of a legal proposition that should be kept together, so be it. But ask yourself whether it is organised so that:

- the basic theme of the sentence is prominent;
- the syntactic structure of the sentence is both obvious and uncomplicated;
- the physical appearance of the sentence assists communication and understanding.

4. PARAGRAPHING.

a) How can paragraphing help?

Paragraphing can make a sentence easier to understand in a number of ways:

- it separates features of the sentence that grammatically are distinct elements;
- because paragraphs are indented on the page their contents and separateness are immediately apparent;
- distinct features in the sentence syntax are physically highlighted, allowing the reader to gain an immediate insight into the sentence structure;
- it indicates certain of the components of the sentence that can be absorbed one at a time as we read; it helps us pace our reading of the sentence;
- it can be used to mark out alternatives or cumulative elements, enabling us to see, at a glance, how these features fit into the structure of the sentence.

It also offers other benefits:

- *reducing repetition*: the same words can be made to apply to all the paragraphs by placing them either as part of the introductory phrase to the paragraphs or immediately after the series;
- *eliminating ambiguity*: you can avoid dangling modifiers by incorporating the modifier into the paragraph to which it belongs or, if it applies to each of the paragraphs, by placing it with the words introducing or following the series.

Finally, it is worth noting that a legislative counsel experienced in using paragraphs thinks about composing the sentence in that way from the start. If you can break the material into distinct components as part of your thinking about the contents, you will automatically set them down in paragraphs when actually composing. Paragraphing becomes a tool for effective analysis, as well as a device for clearer presentation. Try to think in paragraphs.

b) When might paragraphing be used?

Paragraphing is a flexible device that can be used in several different ways. Here are examples of its use.

Tabulating or enumerating

Paragraphs may be used to tabulate (or enumerate) a series of alternatives or a list of cases or a number of requirements or a set of conditions (which may be cumulative or alternatives).

Example 7

1. In this Act, "disciplined force" means:

- (a) a naval, military or air force;
- (b) the Police Force;
- (c) the Prisons Service;
- (d) the Fire Service.

2. An order under this section may provide for:

- (a) the supply and distribution of food, water, fuel, light and other necessities;
- (b) maintaining the means of transportation by land, air or water and the control of transport of persons or things;
- (c) the taking of possession or control of any property or undertaking;
- (d) the payment of compensation and remuneration to persons affected by the order.

3. At every inquest, the coroner must:

- (a) enquire as to the place, time and manner of the death of the deceased person; and
- (b) determine whether any person is criminally concerned in the cause of death.

Stating a sequence of events in an orderly manner

Paragraphing may be used to set out a sequence of events or circumstances, for example, in the order in which they are likely to occur. This makes it easier to follow the theme of the section. It is particularly useful in a context clause to describe the circumstances in the order in which they are likely to occur before the rule applies, or to prescribe the series of actions in the order that the subject must or may follow in specified circumstances.

Example 8

The court must send a certified copy of an order to the Minister for transmission to the Registration Office in that country when:

- (a) the court has made a maintenance order against a person; and
- (b) it is proved to the court that the person is resident in a country outside Utopia.

If the Minister considers that the question of removal of an officer ought to be investigated, then:

- (a) the Minister must appoint a tribunal under section 7; and
- (b) the tribunal must enquire into the matter and report on the facts to the Minister.

Reducing repetition

Provisions that deal with related matters may be brought together into a single sentence. You can avoid some repetition by attaching to the paragraph that contains the individual items the element common to them all.

Example 9

Paragraphing allows the following provisions to be brought together (although some rewording is needed to produce the common element):

- (1) A Minister ceases to hold office if he or she ceases to be a member of the Assembly for any reason other than its dissolution.
- (2) If, at the first sitting of the Assembly after a general election of members, a Minister is not a member of the Assembly, he or she must vacate the office of Minister.

becomes

- A Minister ceases to hold office if:
    - (a) he or she ceases to be a member of the Assembly for any reason other than its dissolution; or
    - (b) at the first sitting of the Assembly after a general election of members, he or she is not a member of the Assembly.

Avoiding ambiguity

Paragraphing can overcome ambiguities in syntax such as dangling modifiers.

Example 10

This section applies to a Senator and a member of the House of Representatives who is appointed to public office.

The ambiguity of the modifier ("who is appointed to public office") can be avoided as follows:

1. This section applies to:
    - (a) a Senator; and
    - (b) a member of the House of Representatives who is appointed to public office.
2. This section applies to the following persons appointed to public office:
    - (a) a Senator; and
    - (b) a member of the House of Representatives.

c) What factors should be borne in mind when drafting paragraphs?

Respect the conventions of syntax and grammar when using paragraphs. They are only a way of presenting some components of the sentence in a more convenient way. As Driedger advises (*Composition of Legislation*, p.73):

All words when read from the beginning to the end without regard to the paragraph designations must be a complete and correct sentence.

The following considerations then are important:

- ensure that each paragraph has exactly the same relationship with the rest of the sentence in its grammar, function and type of matter covered.

Example 11

The seat of an appointed member of the Council becomes vacant:

- (a) if the member resigns the seat in writing addressed to the Minister;
- (b) but the Minister, before accepting the resignation, may request the member to reconsider it.

In this example paragraphing should not be used. Paragraph (a) is a subordinate clause modifying the verb in the principal clause; paragraph (b) is an independent clause.

- link each paragraph with the words introducing them (the "umbrella words") both in substance and grammatically.

  Each paragraph when read with the umbrella words must produce a correct grammatical statement so that all the paragraphs have the same grammatical construction.

Example 12

Nothing in this section authorises the President to delegate:

- (a) any power to issue warrants of appointment;
- (b) to make proclamations;
- (c) any function the delegation of which is expressly forbidden by law.

Paragraph (b) in this example does not make grammatical sense if read with the umbrella words.

- if the sentence continues after the series of paragraphs, link the words that follow with each of the paragraphs in substance and grammatically.

  Again, the test is: can each of the paragraphs be read with the words that follow to produce a correct grammatical proposition?

Example 13

When:

- (a) a day on which a notice of dishonour of an unpaid promissory note is to be given; or
- (b) a bill of exchange is to be presented for acceptance; is a public holiday, the notice is to be given and the bill of exchange presented on the day next following the public holiday.

Paragraph (b) in this example does not make grammatical sense when read with the words that follow.

- include in each paragraph all the words necessary to link it with the umbrella words.

  Make sure that you have not included words in the umbrella words that properly belong to the paragraphs. In particular, do not split words that grammatically should be kept together in a paragraph merely to avoid repetition.

Example 14

> **1**. Except as otherwise provided in this Part, the provisions of this Part that relate to:
>
> - (a) public officers apply to police officers; and
> - (b) police officers apply to prison officers.

If you read out loud the full sentence in this example leaving out the paragraph numbers, it does not make sense. The paragraphs contain grammatically distinct components: one completes a subordinate clause ("that relate to …") while the other completes the principal clause ("the provisions … apply to"). The phrase "the provisions of this Part that relate to" must be repeated in each paragraph.

> **2**. A person must not keep a quantity of explosives exceeding:
>
> - (a) 10 Kilograms, within 50 metres of any building; or
> - (b) 100 Kilograms, within 250 metres of any building.

Read the sentence aloud without the paragraph numbers. The paragraphing has broken the grammatical continuity. The paragraphs contain phrases as to distances that modify the verb in the umbrella words ("keep"). But the paragraphs are supposed to complete the phrase that modifies the noun "quantity" in the opening words.

Practice what you have learned……

- indicate how the paragraphs are related to each other including a conjunction ("and" or "or") or indicating the relationship in the opening words.

  When a legislative text sets out a series of items (a "list") in two or more paragraphs, the reader needs to know what the logical relationship between the list elements is. Generally speaking, there are three possible logical relationships: (1) *all* of the elements in the list; (2) *one* of the elements in the list; and (3) *any* of the elements in the list in any combination.

  The conjunction "and" is used to indicate the first relationship. The conjunction "or" is used to indicate the second relationship. But both conjunctions are used to indicate the third relationship, which is usually better indicated by opening words such as "any of". Opening words can also be used to avoid any ambiguity about the first to relationships ("all of" / "one of").

Example 15

1. A person is entitled to be registered as a voter in a council area if they are:i
   - (a) a citizen of Utopia;
   - (b) aged 18 years or over; and
   - (c) resident in that council area.

2. An accused person on arraignment for an offence may plead that:
    - (a) he or she has been previously convicted or acquitted, as the case may be, of the same offence; or
    - (b) he or she has obtained a pardon for the offence.

In the first case, the elements in each of the paragraphs must be fulfilled. In the second, the elements are true alternatives. Only one can be invoked at any one time.

No conjunction is needed if the paragraphs comprise a simple list that is added into a sentence that is otherwise grammatically complete.

Example 16

1. The Minister may make regulations for all or any of the following:
    - (a) prescribing anything that under this Act is to be or may be prescribed;
    - (b) fixing the fees that may be charged under this Act;
    - (c) prescribing the forms for the purposes of this Act;
    - (d) generally carrying this Act into effect.

This tabulation in this example merely lists matters that may be selected. A conjunction adds nothing.

When there are more than two paragraphs, a conjunction is generally included only at the end of the second last paragraph. It is redundant to put it after the preceding paragraphs. However, the practice in some jurisdictions is to include it after these paragraphs to make their relationship absolutely clear.

- format the paragraphing correctly, according to local conventions.

  Formatting involves indentation, punctuation and numbering. These features vary across jurisdictions.

    - indentation

  Paragraphs are printed as indented text to distinguish them from the rest of the sentence (which should then not be indented). Sub-paragraphing within a paragraph requires further indentation.

    - punctuation

  Typically, a punctuation mark is used at the end of the umbrella words as an introducer. This may be a colon or a dash. (It should not be both). Some legislative counsel advocate that no mark is needed unless it is used in ordinary writing (for example, before a simple list). But others object that this leaves a naked space. Follow your house-style here as elsewhere.

  Typically too, each paragraph except the last ends with a semi-colon; the last concludes with a comma unless it is the end of the sentence. Some legislative counsel finish every paragraph including the last with a semi-colon, to emphasise where each paragraph ends.

  However, commas can be used at the end of all the paragraphs if paragraphing has been used to facilitate the reading of a continuous piece of text (as in the first set of paragraphs in Activity 3

below), rather than creating a list of items. This is said to emphasise the continuity in the sentence.

- paragraph numbers and initial letters

Each paragraph or subparagraph must have its distinctive numbering according to the sequence to which it belongs (see above). The first word after the number typically does not begin with a capital letter (unless that is required by the particular word), as paragraph contents are internal elements of the sentence.

Activity 3

Compare the indentation, punctuation, numbers and initial letters in the following with practice in your jurisdiction, noting any significant differences.

31. (1) If:

- (a) a person is committed by a magistrate for trial before the High Court, and
- (b) it appears to the magistrate that the attendance of a witness at the trial is unnecessary by reason of the formal nature of the evidence given,

the magistrate:

- (aa) may bind the witness over to appear at the trial conditionally on notice given to him or her; and
- (bb) must transmit to the High Court:
  - (i) a statement in writing of the name and address of the witness; and
  - (ii) a transcript of the evidence given before the magistrate.

d) What can go wrong with paragraphs?

Paragraphing ceases to be a useful device if it is misused. We have already seen in earlier Examples cases in which you need to take particular care. Here are some other cases where paragraphing is incorrect or inappropriate:

- "sandwich" clauses

  A sandwich clause is one in which a series of paragraphs is preceded and followed by other text. Non-lawyers in particular are unfamiliar with this practice, although it has been a common drafting device. It is easy to overlook the fact that words before and after the paragraph series have to be read together to ascertain the complete clause. The problems are accentuated when the concluding words of the clause, as well as the umbrella words, have to be read as belonging to each of the paragraphs.

  This practice can usually be overcome by restructuring the clause to eliminate one slice of the sandwich loaf, typically the piece that follows the paragraph series.

Example 17

A person who procures:

- (a) his or her name to be registered on the register of persons qualified to practise law; or
- (b) a certificate of the registration of any person on that register,

by wilfully making or producing , either orally or in writing, a declaration or representation that he or she knows to be false or fraudulent commits an offence.

This example can be readily restructured to position all the linking elements as part of the umbrella words.

A person commits an offence who procures, by wilfully making or producing, either orally or in writing, a declaration or representation that he or she knows to be false or fraudulent:

- (a) his or her name to be registered on the register of persons qualified to practise law; or
- (b) a certificate of the registration of any person on that register.

- running on

  Text that belongs to another part of the sentence must not be incorporated into a paragraph. Printers may run the words that follow the final paragraph into that paragraph. (It is for that reason some legislative counsel prefer to end the final paragraph with a semi-colon).

Example 18

If in respect of a financial year it is found:

- (a) that the amount appropriated by the Appropriation Act for any purpose is insufficient; or
- (b) that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act, *a supplementary estimate showing the sums required shall be laid before each House of the National Assembly and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill*.

The italicized clause in paragraph (b) does not belong to the paragraph series.

- including matter in paragraphs that is not part of the paragraphing sequence

  Do not interpolate matter which does not fit with the grammatical structure of the paragraph sequence as a whole.

Example 19

Disqualification of voters

62. No person who:

- (a) has been sentenced by a court to imprisonment for more than 2 months;

Provided that if 3 years or more have elapsed since the end of the imprisonment, the person convicted shall not be disqualified from registration as a voter by reason only of such conviction; or

- (b) is adjudged to be of unsound mind; or
- (c) is disqualified from registering as a voter or from voting under another Act;

shall be registered as a voter or, being registered, shall be entitled to vote.

Read the sentence aloud without a break. This shows immediately that the proviso is misplaced.

- including words in paragraphs that repeat or belong to the umbrella words

  The umbrella words are intended to be read as part of each of the paragraphs. Take care not to repeat words that perform the same function in both the umbrella words and the paragraphs: this is ungrammatical.

Example 20

(2) A magistrate conducting an inquiry under this section must:

- (a) read over and explain to the accused person the charge and must explain that the accused person will have an opportunity to make a statement, if he or she so desires, later in the inquiry;
- (b) the magistrate must then require the prosecutor to tender to the court the written statement of any witness which it is intended to call at the trial of the accused person and must read every such statement to the accused person.

The subject of the sentence (the magistrate) and the auxiliary verb (must) appear in the umbrella words and are repeated in the paragraphs.

- slicing phrases or expressions

Because a word is repeated at the beginning of each paragraph does not automatically make it a candidate for inclusion in the umbrella words. Words that are part of a phrase or constitute an expression should not be broken up by paragraphing. So an article or adjective shared by all the nouns (for example, "any") starting the paragraphs should be repeated with each noun in the paragraph.

Example 21

The court has may make an order granting a:

- (a) acquittal;
- (b) reduced sentence; or
- (c) new trial.

Each paragraph should start with the appropriate article (“a” or “an”).

- uncertainty as to whether words are intended to apply to all paragraphs

Words in one paragraph cannot be treated as part of any other paragraph. If they apply to all, they must be included in the umbrella words or the following words or repeated in each paragraph.

Example 22

A licensed dealer shall display:

- (a) in a conspicuous place at the entrance to the dealer's premises, a copy of the dealer's licence; and
- (b) a sign-board in the prescribed form.

The place for display is clearly intended to apply to both cases. The phrase must be added to the umbrella words or as the concluding expression after the paragraphs.

- obscuring the principal subject-predicate

  Paragraphing is an aid to understanding. Try to make it easy to find the heart of the sentence (the principal subject-predicate). Knowing that, the reader can better understand how the paragraphs fit with it. Try not to separate the sentence subject from its predicate by a long series of paragraphs.

Example 23

A member of a council who:

- (a) has a pecuniary interest, direct or indirect, in the contract or other matter; and
- (b) is present at a meeting of the council at which the contract or other matter is to be considered,

must:

- (c) when the matter comes under consideration by the meeting; or
- (d) at such earlier time, as the presiding officer directs,
- (e) disclose that interest and withdraw from the meeting.

The subject and the predicate are widely distributed between three separate places. This can be redrafted in a much more accessible form.

A member of a council must:

- (a) disclose a pecuniary interest, direct or indirect, that he or she has in a contract or other matter that is to be considered at a meeting of the council:
  - (i) when the matter comes under consideration by the meeting; or
  - (ii) at such earlier time, as the presiding officer directs, and
- (b) withdraw from the meeting.

- too many short paragraphs

Except in the case of paragraphs making a simple list of items, a series of very short paragraphs can confuse, especially if it involves a series of shortly expressed alternative and cumulative actions or circumstances. Consider combining or abandoning some of the paragraphs.

Example 24

This sentence is unnecessarily fragmented:

10. A person, having the care of a child under the age of 15, who:

- (a) wilfully:
  - (i) assaults the child;
  - (ii) ill-treats the child;
  - (iii) neglects the child;
  - (iv) abandons the child;
  - (v) exposes the child to unnecessary suffering or injury to health (including injury to, or loss of, sight or hearing, or a limb or organ of the body, or any mental illness); or
- (b) causes or procures the child:
  - (i) to be assaulted;
  - (ii) ill-treated;
  - (iii) neglected;
  - (iv) abandoned; or
  - (v) exposed in such a manner,

commits an offence.

e) How can we find flaws in paragraphing?

Keep in mind Driedger's excellent words of advice (*Composition of Legislation*, p.76):

Read the provision aloud without referring to the paragraphing or subparagraphing. If it does not make sense without speaking words that are not there, or if the provisions cannot be read without stumbling and hesitating or without going back and re-reading portions of it, there is something wrong with it.

5. NUMBERING.

a) How should legislative provisions be numbered?

Numbering is an essential feature of legislative texts that allows provisions to be located, identified and referred to with precision. Numbering requires a sequential series of characters that is known to the reader. Because children are taught numerals and letters from an early age, they are the two most popular choices.

More than one series of characters is usually needed to differentiate the various units of text (parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses). This differentiation is

especially important for simplifying cross-references. For example, a reference to subparagraph (i) of paragraph (a) of subsection (2) of section 4 can be stated in compounded form as "paragraph 4(2)(a)(i)".

Letters are used for a series that is unlikely to exceed 26 units. They can be used for longer series by doubling or further multiplying them (aa), but there is no universal consensus on the order of multiple letters: does (aa) go between (a) and (b) or after (z)? Also, the more letters in a multiple, the harder it is to read and the greater the risk of reading error.

Numerals do not produce the same problems as letters because they are infinite. However, Arabic numerals (1, 2, 3, 4, ...) should be used because they are easier to understand than Roman numerals (I, II, III, IV, ...), particularly for large numbers (MIM — 1999).

Numeric systems accommodate approaches that can indicate levels in a hierarchy of provisions. For example, if a text contains Parts, the sections in each Part can be numbered with the first digits corresponding to the Part number as follows:

- Part 1 contains sections 101, 102, 103, ...
- Part 2 contains sections 201, 202, 203, ...

These approaches help readers navigate through long pieces of legislation.

The following is an example of a numbering convention commonly used to differentiate units of text:

Sections: Arabic numerals	1, 2, 3 …
Subsections: Arabic numerals in parentheses	(1), (2), (3)…
Paragraphs: lower case letters in parentheses	(a), (b), (c)…
Subparagraphs: lower case roman numerals in parentheses	(i), (ii), (iii)…
Sub-subparagraphs/clauses: upper case letters in parentheses	(A), (B), (C)…

Activity 4

Note the system for numbering legislative provisions in your jurisdiction

Sections
Subsections
Paragraphs
Subparagraphs
Sub-subparagraphs

You will have noted that these divisions are only to five levels. As a rule of thumb, reconsider the contents of any section that needs to be divided beyond *four*. Almost certainly, you are trying to do too much in too short a space.

A particular numbering difficulty arises if you wish to use paragraphs in a section or subsection for two sets of different provisions.

Example 25

Two different paragraph sequences are used in the following, one concerned with actions and the other with the effect of those actions. The first is numbered in the standard way, but how should we deal with the second so that its different function is obvious?

> (1) A person commits an offence who, in a public place or at a public meeting, without lawful authority:
>
> - (a) makes a statement;
> - (b) publishes or distributes written matter; or
> - (c) behaves, or incites another person to behave in a manner,
>
> that is intended or is likely to incite or induce another person:
>
> - (**?**) to kill or do physical injury to any person;
> - (**?**) to destroy or damage any property; or
> - (**?**) to deprive any person, by force or fear, of the permanent or temporary possession or use of any property.

In some jurisdictions, all the paragraphs are numbered consecutively in the same alphabetic sequence (in Example 25, (d) to (f) would be used for the second series). But this appears to connect two different sequences. In other jurisdictions, different numbering is used for the second sequence, for example doubled letters (in Example 25, "(aa); (bb); (cc)" would be used for the second series) so as to indicate a separate sequence but using the same type of numbering that is used for paragraphs.

Activity 5

Look in your legislation for examples of the case just discussed and note down how the second sequence is typically numbered.

The better practice is to avoid paragraphing involving different series since it not only creates this numbering problem, it is also difficult for many readers to understand and requires careful attention to indentation.

b) How should we number new provisions inserted into existing ones?

One of the greatest numbering challenges is how to number new units that are to be inserted between existing units. There are two basic approaches: alpha-numeric numbering and decimal numbering.

Alpha-numeric Numbering

This approach involves combining characters from two different series. For example, if sections are numbered using Arabic numerals and a unit is to be added, for example, after section 5, the letter A is added to 5 to create 5A for a new section between 5 and 6. If another section is to be added between 5A and 6, it is given labelled 5B. Similarly, if a series of units is labelled with letters, numerals can be added to them to accomplish the same thing. For example, a new paragraph between (a) and (b) would be (a.1).

The alpha-numeric approach works well for the first round of amendments, but if later amendments add more units among those that have already been added, the result can be quite cumbersome if not confusing. For example, does 5AA go between 5A and 5B? What goes between 5 and 5A? In these cases, the best approach is often to renumber the provisions, although this is not ideal, as discussed in LGST 555, Module 2, Section 2 (*How should we repeal and amend legislation?*).

Decimal Numbering

Decimal numbering is the system used for computing and measurement. It has an infinite capacity for insertion of new units, although it too can lead to cumbersome labels. The following is an example of a series of numbers in the decimal system:

5, 5.1, 5.11, 5.2, 6.

Each one is numerically larger than the one before it. To appreciate this, it may help to keep in mind that they could also be written with zeros added on right without altering their value. If these numerals are used to label a series of sections and a new section is to be added between 5.1 and 5.11, it would be 5.101.

6. ARRANGING AND LINKING SENTENCES IN A SECTION.

a) How should sentences in a section be arranged?

The first sentence should contain the most important feature of the proposition. If there are variations or conditions, qualifications or exceptions to the proposition that you intend to deal with in several subsections, try to cover the essential idea in the first subsection. If readers have the basic idea clear, then modifications or elaborations of it fall into place more readily. Indeed, it is also easier to draft the later provisions, since the foundations are set by the first sentence.

When drafting the subsequent subsections, keep the following considerations in mind:

- sentences containing modifications and elaborations should follow as closely as possible the provision on which they depend;
- sentences containing qualifications and exceptions should follow, as closely as possible, the provision they affect;
- if the section deals with a series of actions (for example, procedural steps), the sentences prescribing the actions should follow the chronological order of the events;
- sentences dealing with minor and consequential details (for example, particulars of administration) should follow the substantive provisions they expand;
- procedural requirements that apply in every case should be set out before those that will be used only occasionally;
- procedures that will be more regularly used should come before those that will be rarely needed;
- definitions or interpretation provisions (limited to the section) should come at the beginning of the section, if central to its understanding, or as the final subsection.

Similar considerations apply to paragraphs. If the paragraph contains a tabulation, the matters should be set out in order of importance; lists of items can often be dealt with alphabetically according to the first letter of each item.

b) When should sentences in a section be linked?

Enactments have historically been considered self-contained propositions of law. This has resulted in very precise language to indicate relationships among different components of a legislative text. In modern drafting practice this formalism has given way to the recognition that enactments are generally intended to work together to achieve a common legislative purpose. However, in complex legislative texts, care must still be taken to ensure that the relationships among their various provisions are clear. This is particularly true when the related provisions are contained in different parts of the legislative text. (We look at this below).

In the past, legislative counsel made frequent use of devices to link sentences in the same section. But today good practice makes far less use of linking devices for this purpose. This is particularly true of provisions within a single section, which are to be treated as parts of the same proposition. In addition, the order of a series of provisions can be used to indicate their intended relationship. This following example taken from earlier legislation illustrates past practice:

Example 26

Gun licences.

> (1) Subject to subsection (5), no person shall possess a gun unless he holds a licence issued by the Commissioner of Police under this section for the purpose.
>
> (2) The Commissioner of Police may issue such a licence to any such person on application in the prescribed form and on the payment of the prescribed fee.
>
> (3) No licence shall be issued under this section unless the Commissioner of Police is satisfied that person referred to in subsection (2) is a fit person to hold such a licence, and so certifies.
>
> (4) Such a licence is not transferable.
>
> (5) This section does not apply to a member of the Armed Forces having, using or carrying a gun in the performance of his duties.

Links of the kind in this example were included to remove any doubt that each sentence is concerned with the same matters dealt with elsewhere in the section and not with matters in another section. In practice, it is evident that they are all concerned with the same matter, and are unnecessary. Legislative counsel today use a more narrative style that makes clear that the same matters are referred to, precluding the need to use back-references to bond the subsections together.

Example 26 can be rewritten to avoid almost all back-references:

Example 27

Gun licences.

> (1) A person must not possess a gun unless he or she holds a gun licence issued by the Commissioner of Police for the purpose.

(2) The Commissioner of Police may issue a gun licence to a person on application in the prescribed form and on the payment of the prescribed fee.

(3) However, the Commissioner of Police must not issue a gun licence unless the Commissioner is satisfied that the applicant is a fit person to hold it, and so certifies.

(4) A gun licence is not transferable.

(5) The section does not apply to a member of the Armed Forces having, using or carrying a gun in the performance of the member's duties.

As this example illustrates, legislative counsel today:

- use a definite article ("the") to refer back to an earlier noun;
- avoid "such" (or "the same") in making back reference to particular items;
- omit "subject to subsection(*)", when the later subsection makes clear its effect as qualifying or excepting from the section;
- omit "under this section" if the item is an item already mentioned in the section;
- use pronouns (for example, "it") or a demonstrative article (for example, "that");
- point up a qualification made by a sentence by beginning it with "However".

You do not lose precision by this approach. Further, the style has more in common with general writing usage. But that said, you should add linking words if there is doubt that a reference back is intended or that one sentence is intended to take priority over another in given circumstances.

Example 28

(1) The Minister, by order, may deprive a person who is a citizen by registration of his or her citizenship if satisfied that the registration was obtained by fraud.

(2) The Minister may not deprive a citizen of citizenship under this section if it appears to the Minister that as a consequence the person would become stateless.

c) How should sentences in a section be linked?

The following are useful linking words for referring back when that is necessary.

- [a person] "referred to in subsection (1)", when subsection (1) incidentally directs attention to the person;
- [a person] "mentioned in subsection (2)", when subsection (2) makes provision with respect to the person;
- [a person] "specified in subsection (3)", when subsection (3) expressly designates or lists persons;
- [a person] "described in subsection (4)", when subsection (4) lays down characteristics of a person that are relevant in the section making the back reference.

The following are conventionally used (typically at the beginning of the sentence) to indicate priority between subsections:

- "subject to subsection (2)", when subsection (2) is to take priority over the sentence containing the back reference;
- "despite" (or, in older forms, "notwithstanding") subsection (3)", when subsection (3) is to give way to the subsection using the phrase;
- "without prejudice to subsection (4)", when the sentence containing the phrase is not to diminish the effect of subsection (4);
- "except as provided in subsection (5)" when subsection (5) creates an exception to the sentence containing the phrase;
- "subsection (6) does not apply if [or to]", when the sentence containing the phrase states circumstances in which the effect of subsection (6) is to be diminished.

Some legislative counsel are now using forms of linking sentences within a section that are more in keeping with general usage. The following are sometimes used at the beginning of a subsection to bring out its relationship with the previous subsection:

- "But", when the subsection makes an exception to the preceding subsection;
- "However", when the subsection qualifies the effects of the preceding subsection;
- "Nevertheless", when the subsection operates despite the preceding provisions;
- "In addition" or "Moreover", when the subsection adds a further requirement to those in the preceding provisions;
- "Alternatively", when the subsection may be resorted to rather the preceding one;
- "Instead", when the subsection contains a positive requirement that is to have effect after a negative requirement found in the preceding subsection.

Example 29

Disposal, etc, of public roads.

> **1.** (1) The Minister may not sell, lease or otherwise dispose of a public road under the State Lands Act until it has been closed under section 12.
>
> (2) However, the Minister may grant easements, licences or permits over or in respect of any public road.

Regulations.

> **2**. (1) The Minister may make regulations prescribing all matters required or permitted by this Act to be prescribed.
>
> (2) But the Minister may not make regulations prescribing any fee unless the Minister of Finance is consulted.

We will look at these linking words further in the next part dealing with linking sections. In that part we will consider how to make cross-references and look at an additional linking technique: a labeling definition. This technique is also occasionally used to link sections within a section.

Linking devices are needed within a section only if the relationship between subsections could be misunderstood. In most cases, that relationship can be made clear by the words used in the later subsections and by the order in which the subsections are arranged.

d) Should we use a proviso as a linking device?

From as far back as Coode, legislative counsel have been advised to avoid provisos. Yet they are still used and remain a source of uncertainty as to the intended relationship with the sentence to which they are attached. The legislative use of the proviso is unique to the law - and totally unnecessary. You can achieve the same results with more certainty by following the practices we have just discussed.

How have provisos been used?

Conventionally, the proviso is used in two different ways:

1. Create a particularised exception to the proposition in the sentence to which it is attached.

Example 30

1. Every legal practitioner must pay an annual fee according to the scale set out in the Schedule:

Provided that this section does not apply with respect to a legal practitioner who is not in actual practice.

2. A resolution under this section remains in force for such period not exceeding 6 months as may be specified in it:

Provided that the resolution may be extended from time to time by a further resolution under this section.

2. Elaborate the proposition in the sentence to which it is attached.

Example 31

3. An order under this section is binding on all persons on whom notice of the order is served:

Provided that a person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

The "true proviso" is said to be the first of these - to exclude a particular case from the general operation of a rule. The courts therefore tend to treat the proviso as qualifying the provisions to which it is attached (as an elaboration), and not as an additional enactment. Accordingly, interpretation of the proviso is dictated by the terms of the sentence that it qualifies and the meaning of the principal provision may be affected by the terms of the proviso. An elaborating provision is treated as a legal proposition in its own right.

Neither of these uses is the way that the expression "provided that" is used in common usage, when it expresses a condition (an emphasised form of "if"):

"I will give you first option to buy my car provided that you exercise that option within a month."

Driedger (pp.93-95) suggests that the legal usage derives from a contraction of enacting words once used in the English statutes "and it is further provided that". He concludes that the proviso "is an all-purpose conjunction invented by lawyers but not known to or understood by grammarians". Accordingly, avoid provisos altogether.

e) What alternatives to the proviso should be used?

Provisos link sentences in the same subsection. Once you are clear about the intended relationship, use one of the approaches we have just considered. The order of the sentences and the way you express the particular matter may be enough to show how the qualification fits with the earlier sentence.

- exceptions or qualifications

An exception or a qualification to a previous (more general) proposition can be stated in a few words, making it part of the sentence it qualifies:

- in the case of a true exception, beginning with the expression “except that”;
- in the case of a qualification, in a separate clause at the end of the sentence, beginning with “nevertheless” or “but”;

Example 32

The second example in Example 30 can be redrafted as:

> 2. (2) A resolution under this section remains in force for such period not exceeding 6 months as may be specified in it; but the resolution may be extended from time to time by a resolution under this section.

- add the qualification to the sentence, as a modifier, if it can be converted easily into that form.

Example 33

The first example in Example 30 can be redrafted as:

> 1. Every legal practitioner must pay an annual fee according to the scale set out in the Schedule, unless he or she is not in actual practice.

But if the exception is lengthy, place it into a separate subsection immediately after the subsection it qualifies, if necessary beginning with appropriate linking words in one or other of the subsections (or exceptionally both) to indicate their relationship.

Example 34

Possession of narcotic

> **125**. (1) A person who possesses a narcotic commits an offence.
>
> (2) Subsection (1) does not apply to a qualified medical practitioner who possesses the narcotic for medical purposes.

- elaboration

If the additional matter develops or adds to the general proposition in some way, consider the following:

- if you can express the matter shortly, add it at the end of proposition, linking it with appropriate words such as “and” or, if it makes a contrast, “but”.
- if it is rather long, place it in a separate subsection later in the section, with suitable linking words where needed.

Example 35

Example 31 can be redrafted in different ways:

> **3.** (1) Subject to subsection (2), an order under this section is binding on all persons on whom notice of the order is served.
>
> (2) A person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

> **3.** (1) An order under this section is binding on all persons on whom notice of the order is served.
>
> (2) However, a person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

> **3**. An order under this section is binding on all persons on whom notice of the order is served; but any person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

f) Can we dispense with linking words between sentences?

Linking words should only be included to perform a useful function: connecting sentences that might not otherwise be treated as linked. If it is clear that the sentences are linked, then linking words are not needed. Often the connection is obvious from the fact that the sentences appear in the same section. The continuity of the contents of the sentences that follow each other may well be enough.

Always question whether linking words are needed at all within a section.

Example 36

> (1) The Governor-General may delegate to any Minister any function that is vested in the Governor-General by a written law.
>
> (2) Nothing in subsection (1) authorises the Governor-General to delegate a power to make proclamations.
>
> (3) Notwithstanding subsection (2), a power that is expressed, under a written law, to be signified by proclamation may be delegated; but upon the delegation, the signification must be by notice in the Gazette.

The linking words in subsection (2) are necessary, and some link between subsections (2) and (3) is sensible. But “However,” in subsection (3) instead of the linking words used there would be equally effective and more natural?

7. LINKING SECTIONS.

a) What is different about linking sections?

The contents of a section are bound by their unity of purpose. A careful ordering of the sentences and a narrative style is usually enough to provide continuity among the various provisions of a legislative text. You can also rely on the interpretive approach that prevails in the courts of reading a statute and any subsidiary legislation as a whole. Accordingly, the meaning given to particular provisions is influenced by their statutory surroundings.

In short and uncomplicated legislation you may need little linking or cross-referencing between sections. But more may be needed in lengthy or complicated legislation. You must make sure that a matter referred to in one context is the same matter referred to in another if that is the intention.

A complex statute may impose the same or different obligations on the same or different persons, or regulate a series of similar matters in different ways. Your draft must leave no doubt as to which of the provisions apply to which of the persons or matters. In cases of this kind you may need to refer specifically to the principal provision that identifies a particular person or case intended.

Example 37

1. 1. A person who holds a second-hand dealer's licence issued under section 12 or a metal dealer's licence issued under section 14 must register his business name with the Registrar of Business Names.
2. 2. On conviction of an offence under section 16, the court may cancel a certificate of registration.
3. 3. The registrar must enter in the register details of all information given to him as required by sections 17 to 25 of this Act and by section 14 of the Companies Act.

Linking is required when two different sections are capable of applying to a particular case if certain circumstances occur, for example, if a broad provision applies to a wide range of cases and another narrower one applies to one of those cases. Can both be relied on when those circumstances happen? If not, which is to have priority in the case of such an overlap? Linking provides the answer.

Example 38

The following sections are widely separated in the legislation.

Tenure of Police Commission members.

106. A member of the Police Service Commission ceases to hold office:

- (a) at the end of 3 years beginning on the date of appointment; or

- (b) if circumstances arise that would cause him or her to be disqualified for appointment to that office.

Removal from office.

124. A person may be removed from holding any of the following offices for inability to discharge the functions of the office or for misbehaviour:

- (a) director of a statutory corporation;
- (b) member of any Service Commission; or
- (c) member of the Electoral Commission.

Section 106 is not a complete statement of when membership in the PSC ends if it is also intended to be terminated under section 124. This intention can be clarified by adding linking words, such as "subject to section 124", at the beginning of section 106.

b) How can sections be linked?

There are two ways to link sections.

- Labelling definitions

Consider using a labelling definition for a term that appears in several sections. This ensures that each use of the term refers to the same case without saying so each time.

Example 39

In this Act, "gun licence" means a gun licence issued under section 5.

This definition not only permits the shortened defined term to be used; it also removes the need to refer to the section from which the concept is derived.

- Linking words

Legislative counsel generally use linking words as follows:

- "subject to section 12", when section 12 is to take priority in an overlap with the section containing the phrase
- "despite" (or, in older forms, "notwithstanding") section 15", when the section containing the phrase is to have effect even though overlapping with section 15
- "without prejudice to section 20", when both the sentence containing the phrase and section 20 may be relied upon in circumstances when they overlap

It is sufficient to include the linking words in only one or the overlapping provisions. It is not necessary to include "subject to" in one and "despite" in the other.

Some legislative counsel also use "subject to this Act" to indicate that the particular section is not self-contained, but is subordinate to several other sections. This practice may technically serve this purpose, but it provides little guidance and typically states the obvious since the section must be read in its statutory context. Don't use these words as a way of escaping from one of your principal responsibilities of drafting clearly. As part of the planning of your legislative text and of scrutinising the various drafts, pay particular attention to the question of overlapping provisions to ensure that they do not contradict each other. Be aware of possible contradictions of these kinds so that you can add the specific linking words as necessary.

Linking words are useful

- to draw attention to an earlier or later section which overlaps the matters covered in the present section, especially when they are widely separated in the legislative text;
- in the case of inconsistency in the application of two or more sections, to establish which takes priority;
- to indicate which of two or more sections applies, or whether both or either may apply.

Example 40

> **12**. Subject to section 17, a person who satisfies the Registration Committee that he or she holds a qualification as a medical practitioner in a country listed in the Schedule is entitled to be registered under this Act as a medical practitioner in Utopia.
>
> **17**. A person must not be registered under this Act if
>
> - (a) he or she has been convicted at any time in any place of an offence for which he or she was punished by imprisonment for 2 years or more; or
> - (b) in the opinion of the Registration Committee, he or she is otherwise not of good reputation or character.

Without linking words, the two provisions are contradictory. The linking words draw attention to the existence in section 17 of a qualification to section 12 that confers an apparently unqualified right.

Similar considerations apply rather more strongly when the overlap is with a section in another statute or subsidiary instrument. Bear this possibility in mind when researching the existing law as it applies to the subject matter of the legislative text you are drafting.

c) How should cross-references be drafted?

Make your cross-references as precise as possible, setting out the number of the section or subsection and the citation of the legislation that contains it. Current practices, sometimes supported by Interpretation Acts, enable you to express these references in a compounded form, as shown in Example Box 41.

Example 41

Preferred style:

Subject to section 12(2)(a), ...

Do not use the following:

Subject to paragraph (a) of subsection (2) of section 12 ....

Subject to the provisions of section 12(2)(a) .....

They are cumbersome and harder to understand. Also, do not use the following or similar forms:

“in the foregoing/preceding / following section”;

“as hereinbefore / hereinafter referred to”.

They are archaic and imprecise. They may also become inaccurate if additional sections are added before or after the section in which they are used.

Cross-references to paragraphs give rise to different considerations. Typically, paragraphs contain only one component of a sentence. Most cross-references need to include other parts of the sentence to make the reference complete. It is only if the reference is to an item as described fully in the paragraph that you should refer to the paragraph number alone.

Example 42

Possession of dangerous things in public places prohibited.

> **12.** No person in a public place shall carry or have in his possession:
>
> - (a) a firearm;
> - (b) an article made or adapted for use for causing injury;
> - (c) any noxious fluid.

2. Arrest of persons contravening section 12

> **14.** A police officer may arrest, without a warrant, a person contravening section 12(a).

The cross-reference in section 14 is incomplete. An improved version might read:

> **14**. A police officer may arrest a person who is contravening section 12 in respect of the item in paragraph (a).

But a better version disposes of the paragraph reference altogether:

> **14**. A police officer may arrest a person who is carrying or in possession of a firearm in contravention of section 12.

8. INCORPORATION BY REFERENCE.

a) When can we incorporate provisions from one part of a text to another

In a text of some size, you may find that two classes of cases require to be treated in essentially the same way in one or more of their features, but because, in other respects, the two matters are distinct, they are best dealt with in separate parts of the text. Should the common ground be covered by repeating the same provisions in each case? The alternative is to provide for the common matters in respect of one of the cases and then rely upon a cross-reference to them in the other place. This device of incorporation by reference (or referential legislation) should have a place in your drafting kit.

Example 43

1. **165**. Part V (which relates to the winding-up of companies formed and registered under this Act) applies with respect to the winding-up of an unregistered company.

Several benefits may follow from using the technique in this example:

- since precisely the same rules apply to registered and unregistered companies, both will be dealt with in the same way, securing uniformity of administration;
- lengthy repetition is avoided;
- the length of the legislative text is reduced, which will likely also reduce the time and resources needed to prepare the legislative text and have it enacted as well as the publication costs.

But this device must be used with care. The same provisions can be applied to a second case only if they are to operate in exactly the same way, and if they are capable of operating in the same way in both contexts. If the two legal settings are not, in fact, the same, the provisions may need modification in order to produce an equivalent effect in the second case or to take account of different features of that case.

Before provisions are incorporated by reference, they must be tested in the second context to make sure that they can be applied without any modification. If they cannot, the incorporating provision must specify what modifications are to be made in in applying them. It is rarely sufficient to give a general instruction of the kind in the next example.

Example 44

165. Part V (which relates to the winding-up of companies formed and registered under this Act) applies, *with the necessary adaptations and modifications*, with respect to the winding-up of an unregistered company.

The italicized phrase in this example (which replaces the traditional Latin phrase *mutatis mutandis)* leaves it to the reader to work out the necessary modifications. Disputes about the intended meaning of these phrases often end up in court. They should only be used for changes in formal references (as to names, or titles, or designations), and not for difference of substantive law. If the latter are necessary, provide for them expressly.

If a large number of modifications are needed, it may be better to restate the original rules in their modified form, rather than to ask readers to compare different pages of the legislation and to work out

how specified modifications affect the original provisions. The savings made by the referential incorporation are not justified if they lead to uncertainty or poor communication.

When you use the device, make sure, as with all referential provisions, that the cross-references are precise and complete and incorporate only those provisions that are required.

b) When can we incorporate provisions from other legislation?

In principle, similar justifications can be made for incorporating provisions from existing law into a new piece of legislation. You may receive instructions that a case in your legislation is to be dealt with in the same way as another under existing legislation. In those circumstances, incorporation by reference is the most straightforward way of giving effect to the policy.

There are cases where Government does not wish to reopen for debate a matter that is already well settled by existing legislation. This may occur if the same provisions are repeated in new legislation. Referential legislation helps ensure the implementation of a common policy in the treatment of related matters. It is a particularly valuable way of applying tried and tested legal requirements or procedures to new matters or similar circumstances (for example, procedural rules for tribunals; standard court processes).

Example 45

1. **25.** Sections 5 to 9 of the Employment Act (which relates to the provision of written contracts of service to persons employed in Utopia) apply with respect to contracts of service of persons employed on board ships registered in Utopia.
2. **104**. For the purposes of paying contributions and to receiving pensions under the Pensions Act, a member of the staff of the National Assembly is to be treated as if the member were a public officer within the meaning of that Act.

Both of these provisions extend an existing policy to a new, but similar, category of case.

Referential incorporation is also useful for linking two pieces of legislation that, in some particular respect, are concerned with the same subject matter. This may be achieved by an appropriate definition referring to a concept in another legislative text. But there is no point in incorporating a definition from another text unless it brings with it the sense of the defined term in the context of its application in that other text (as in the next example). If this is not intended, you should include a complete definition using the same terms as the original.

Example 46

1. **2**. In this Act, "registered firearm" has the meaning given to the expression by the Firearms Act.

This usefully ensures that a concept (as it is regulated in the earlier legislation) will operate in the new Bill.

Using referential legislation calls for caution:

- two separate pieces of legislation must be consulted to understand the effects of the incorporation;

- there must be common ground or equivalence between these pieces of legislation, but the underlying policy and circumstances regulated may actually be different in the two cases;
- the more the original provisions need to be modified for the new circumstances, the weaker the case for incorporation;
- the incorporated provisions become part of the new legislation as they stood at the time of incorporation and amendments made subsequently do not take effect automatically unless the incorporating provision otherwise provides;
- this also means that repeal of the original legislation does not affect the incorporated provisions and that, if the original provisions are amended or repealed, the legislation into which they are incorporated must be amended to incorporate the same changes;
- it is often easy to overlook the existence of incorporated provisions once they have been incorporated.

Accordingly, great care is needed in deciding whether incorporation by reference is desirable and feasible and whether the same result can be better achieved by amending the original legislation to extend to the new case. The advantages and disadvantages of incorporation by reference should be considered at the research and planning stage and discussed with the instructing officer, when the advantages and disadvantages can be weighed.

When using incorporation by reference, you should do the following:

- check the terms of the original provisions (including any amendments) as they will operate in the new context, in order to ensure their consistency with both that context and the language of the legislative text;
- if you find inconsistencies, provide express modifications that state how the inappropriate terms in the original are to be treated in the new context;
- include a full citation of all the provisions to be incorporated and the correct citation of the legislation that contains them);
- provide a short note, in parenthesis, after the reference, to guide readers as to the contents of the incorporated provisions (as in Example Box 44);
- if the incorporated provisions rely on definitions in the original legislation, include them among the provisions you incorporate;
- when scrutinising your draft, compare and check the original text and of the incorporating text, especially the incorporating provisions, to ensure that the two can be easily read together and the effects understood and that they are consistent in law and language;
- confirm that the incorporation will achieve the intended aims in using the device.

c) Can provisions be incorporated from the legislation of another jurisdiction?

Many Commonwealth countries still rely upon United Kingdom legislation that has been incorporated as part of their law by general or specific reference. Some incorporating provisions are “ambulatory” they authorise continuing incorporation to take account of changes in the UK legislation. However, this can cause problems since this practice:

- relies upon the law of another country, which does not legislate with other countries in mind;
- is fraught with legal uncertainty as the legislation is rarely completely compatible with local circumstances;
- may be unconstitutional if it is characterized as a delegation of authority to an external body to make local law, which is the prerogative of the Legislature established by the Constitution.

If you believe, after careful research, that a precedent from another jurisdiction suits your needs, use its contents as a precedent for drafting your legislation. In general, it is only in exceptional circumstances that incorporation of external legislation by reference can be justified, especially if it is to have ambulatory effect. However, different considerations may apply in two situations.

The first involves the drafting of legislation intended to facilitate intergovernmental cooperation in matters that concern them jointly, for example international trade or the regulation of private law disputes involving parties from more than one jurisdiction. In these cases, incorporation by reference makes great sense and is usually ambulatory.

The second situation involved dependent territories where consistency with the metropolitan legislation is required for a subject matter that has transnational effect (for example, shipping, communications) and for which the metropolitan country has international responsibility.

Different considerations may also be found for jurisdictions within a federal system. It is generally open to subnational jurisdictions to incorporate federal legislation that applies in federal matters so that it applies to comparable matters within the subnational jurisdiction (or vice versa) as long as it does not breach the division of legislative competence. This secures uniformity or harmonisation. But again incorporation may give rise to constitutional issues if it is characterized as delegating power to legislate.

9. GROUPING SECTIONS.

a) When should we have formal groupings of sections?

Short legislative texts rarely need to be separated into formal divisions. Legislation with a small number of short sections is easy to use. Its coverage and structure are unlikely to be complicated; readers should be able to gain an overview from a quick glance at the section notes.

But as the number and length of sections increase, consider ways of assisting users to find out how the legislation is organised, what range of matters it deals with and where in the legislation they can be found. One way is to provide topic indicators at frequent intervals throughout the legislation. They enable readers to grasp much more quickly the nature of the items that identified by the indicator and the relationship between the principal topics covered by the Legislation. Headings perform this function well. The more headings you can introduce, the more readily that users will see the overall picture.

This means that provisions must be grouped together when they have subject matter in common. The groups can then be placed into Parts or Divisions or other subdivisions to each of which you can add an informative heading. It is a matter of judgment, in each case, whether to divide in this way. Ask yourself whether dividing will contribute to easing access to the content and structure of the legislation. The longer the legislative text, the more likely your answer will be positive. Section 2 looks at how these matters may be worked on when developing a legislative plan.

b) What groupings are conventionally used?

he following is a typical hierarchy of groupings and the names associated with them:

- **Part**: a group of sections, each group comprising a distinctive segment of the legislative scheme, and numbered appropriately.
- **Division (or Chapter)**: A group of sections within a Part, comprising a distinctive component of that Part, and numbered appropriately.
- **Subdivision (sometimes called "fascicule")**: a group of sections within a Division or Chapter, each dealing with one or more of its features; or alternatively in a shorter legislative text a group of sections when more formal divisions are not suitable. These are not numbered.

The headings for each of these groupings are printed in distinctive fonts and may be centred or left justified, depending on the jurisdictional practice.

In terms of numbering, the use of Roman numerals (for example, "IV" or "IX") has given way to more familiar Arabic numerals (for example,"4" or "9").

Example 47

This table shows the way groupings and their headings can be distinguished using numbering and fonts.

Group Designation	**Numbering**	**Font**
PART I	Roman	Capital letters, 14pt, bold
Division/Chapter 1	Arabic	Lower case, 12 pt, bold, italics
[*Unnamed Grouping*]	Arabic	Lower case, 12pt, italics

Activity 6

Look at a substantial Act in your jurisdiction (preferably recently enacted) that has formal groupings (for example, a penal code, companies legislation or an Income Tax Act). Using the entries in Example 47 as a guide, identify the Names, numbering and font attributes associated with each grouping.

First level (for example, a Part)

Second level (for examples, a Division or Chapter)

Third level (un-named grouping)

c) When might groupings be of particular value?

Bills are debated following a formal procedure. The Ministerial introduction and the debates and committee examination can be easier to structure if the distinctive segments of the Bill can be considered separately. Groupings may secure your clients' interests in the facilitating passage of the Bill through the legislative chamber or assembly.

Formal groupings may also be helpful in dealing with drafting problems. When legislation is formally divided into Parts and Divisions, courts assume that this is a deliberate decision by the legislative counsel to treat the various items within them separately and exclusively from others. In consequence, they assume that a section in one division is not intended to be read into another division, though it may appear to deal with a similar matter. They will do this only if driven to conclude that the section has been misplaced. (Informal divisions are not seen as creating exclusive divisions; they are merely topic

indicators.) Dividing into Parts then is a valuable device if you wish to ensure that groups of sections intended to be exclusive of others will be treated in that way.

Example 48

A *Companies Act*, which includes general rules for setting up, operating and winding up companies in the jurisdiction, commonly contains separate parts for other categories of corporate bodies that are to be subject to regulation, for example:

Corporations set up under different legislation

Overseas or external companies

Non-profit companies

You should consider using separate groupings of sections for matters that:

- deal with a particular stage in an administrative scheme;
- regulate the activities of a particular group of persons affected by the scheme;
- create a new legal entity and confer its functions;
- determine the membership and rights and duties of the membership of a new body;
- deal with part of an administrative scheme that is to come into effect at a later stage than the rest of the statute;
- apply to special cases only;
- apply to limited categories of persons or places.

One useful approach is to separate any group of provisions that form an exception to the general application or operation of the legislation.

Example 49

This Part applies with respect only to companies that are registered in a country outside Utopia.

This Part applies with respect to Scotland only.

This section applies for the interpretation of this Part.

This Part comes into force on a date to be fixed by the Minister by notice in the Gazette.

d) When should the decision be made about grouping sections?

Decisions on grouping sections should be carefully considered.

Formal divisions

Whether or not to make formal divisions should be part of the designing of your initial legislative outline (which is considered in the next Section). You are likely to see a need to make them as a result of your analysis, because, for example:

- the legislation will be of some length;
- there are features of the scheme which appear to fall into distinct segments;
- alternatively, the legislation deals with a number of separate subjects that are largely unrelated and should therefore be kept apart.

Informal groupings

Whether or not, or where, to introduce informal groupings generally emerges in the later stages of composing a legislative text, when your systematic ordering of the sections is well advanced. Assigning an informal heading can help break up provisions that covers many pages. It is a useful reminder to you to group together provisions that are concerned with aspects of the Part that are closely related in their substance.

e) What should be borne in mind in grouping sections?

The contents of formal groups are treated as exclusive of others. So take care not to include in one group a provision that properly belongs to another. It may be construed as confined to the context in which it is placed, and not as applying more broadly. However, if a section in one Division or a Part is to have effect in the context of another Part, link them by appropriate cross-referencing.

Example 50

Sections 214 to 221 (which relate to winding up of companies) apply in relation to the winding up of a company registered under this Part.

Alternatively, move the section to another Part that contains general provisions that are to apply to the entire legislative text, unless the section is integrally linked with others in the original Part.

Parts and Divisions are devices for providing a rational and orderly structure for the content of the legislation that is likely to accord with users' expectations and needs. They must be planned with that as a prime objective. Provisions should be grouped, as far as possible, with others with the same subject theme. It is there that the reader will look.

f) How should group headings be expressed?

Give both formal and informal divisions a helpful heading that indicates the gist of the provisions they cover. Remember that they are intended to be topic indicators.

In drafting them you should:

- choose a short set of words (a part or a whole of one line is, typically, sufficient; never more than 2 lines);
- describe the contents by a general expression, yet one that provides an accurate guide (it can never be comprehensive);
- align the heading in accordance with your jurisdictional practice (centred or left justified).

Accuracy is an important consideration. In many jurisdictions headings can be taken account of for the purposes of interpretation (see subsection 13(1) of the model *Interpretation Act* in the Resource Materials).

Activity 7

Can headings be used to assist in the construction of legislation in your jurisdiction? Make a note of any provisions of your *Interpretation Act* on the matter.

If a heading appears not to cover all sections, it is possible that there is insufficient common ground to join them in the same grouping. You should consider whether:

- any section should be placed in a different group;
- the group should be confined to only some of the present group of sections;
- a different heading can be devised that will cover all sections.

Headings tend to be added and altered as the drafting proceeds. Check them all again as the final stage in completing the final draft. Changes in the contents of divisions commonly require some modification to the heading.

Activity 8

Read through the table of contents (called "Analysis") of the Smoke-free Environments Act 1990, No.108 of New Zealand. Note the structure of the Act and the way it uses various divisions and headings for them.

HOW SHOULD WE ORGANISE A LEGISLATIVE TEXT?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

This Section deals with the ways in which legislative sentences are structured and linked in a legislative text to make a coherent set of provisions. Legislative counsel need to be able to structure and link both sentences within a single section and sections within a single legislative text.

This Section also deals with the ways in which legislative texts may be formally divided and how provisions in other legislation may be linked or incorporated to provide consistency in the general body of law.

Section Objectives

By the end of this Section, you should be able:

- to order and link legislative sentences to make a logical section;
- to make effective use of paragraphing in setting out components of a legislative sentence;
- to order and link legislative sentences into a rational structure in a legislative text;
- to determine when provisions in other legislation should be linked with a legislative text or incorporated into it;
- to decide when a legislative text needs to be formally divided, and how those parts should be organised.

Essential Questions

This Section is divided into 9 subsections organised in terms of a series of questions:

1. General Considerations
    - Why is structuring important?
    - What are the basic characteristics of structuring?
    - What guidelines should we follow in structuring legislation?
2. DRAFTING SECTIONS
    - How should we approach individual sections?
    - How can we tell which matters should be covered by the same section?
    - How long should a section be?
    - How should the section note be selected?
3. Drafting Sentences in Sections
    - How long should a sentence in a section be?
    - What can be done to keep sentences as short as possible?
4. Paragraphing
    - How can paragraphing help?
    - When might paragraphing be used?
    - What factors should be borne in mind when drafting paragraphs?
    - What can go wrong with paragraphs?
    - How can we find flaws in paragraphs?
5. Numbering
    - What numbering systems do we use to identify legislative provisions?
    - How should we number new provisions inserted into existing ones?

6. Arranging and Linking Sentences in a Section
    - How should sentences in a section be arranged ?
    - When should sentences in a section be linked?
    - How should sentences in a section be linked?
    - Should we use a proviso as a linking device?
    - What alternatives to the proviso should be used?
    - Can we dispense with linking words between sentences?
7. Linking Sections
    - What is different about linking sections?
    - How can sections be linked?
    - How should cross-references be drafted?
8. Incorporation by Reference
    - When can we incorporate provisions from one part of a text to another?
    - When can we incorporate provisions from other legislation?
    - Can provisions be incorporated from the legislation of another jurisdiction?
9. Grouping Sections
    - When should we have formal groupings of sections?
    - What groupings are conventionally used?
    - When might groupings be of particular value?
    - When should the decision be made about grouping sections?
    - What should be borne in mind in grouping sections?
    - How should group headings be expressed?

Studying this Section

You will see from the long list of questions that there is much to cover in this Section. You may find that some of its parts call for at least a full study session of their own. You may also find that the Exercises require more time, as necessarily the text with which we are now dealing is longer. The Section deals with many matters that are also mentioned elsewhere in these Materials, for example, paragraphing as a technique for organising detailed or elaborate provisions into an easily accessible form. This Section explores at greater length their use and flaws that you must avoid.

In studying this Section you may find it helpful to draw up your own Checklist of things to do or not to do when structuring legislation. This should help to confirm what you are learning, but it also becomes a handy reminder and reference point for the future. Once the routines become standard practice for you, you can dispense with the Checklist.

1. GENERAL CONSIDERATIONS.

    a) Why is structuring important?

Most legislative texts are composed of units each dealing with a particular aspect of the subject-matter. These units are often referred to as “enactments” (although that term can also be used to describe an entire statute or instrument, see for example subsection 25(1) of the model *Interpretation Act* in the Resource Materials). In this context, we mean a complete legal proposition, put into force by legislation, from which specified legal results follow when the facts to which it relates arise.

Bills and the statutes they enact are generally divided into separate sections, each containing a distinct substantive enactment. When this practice was first introduced in 1850 (by Lord Brougham's *Interpretation of Acts Act*), a section had to contain a single sentence. Since each section contained an

enactment, it had to hold a complete legal proposition. So, all elements of the proposition, including qualifications and exceptions to it, had to be contained in the single section and so expressed as a single sentence.

However, such sentences tended to be lengthy and packed with details that made the text complex and difficult to use. As a result, in the interests of better communication, legislative counsel have adopted structuring techniques designed to make enactments clearer and easier to understand. In particular, current forms of structuring allow shorter sentences to be used and introduce "white space" on the page, both of which make the text easier to read. At the same time, the section remains the basic legislative unit.

These structuring techniques include:

- dividing sentences into sections and subsections;
- paragraphing and sub-paragraphing within sentences to point up their grammatical parts;
- spreading the effects of the legal proposition, or modifications or exceptions to it, over more than one section, especially if they are extensive or complex;
- grouping the sections that contain related features of the legislative scheme into separate parts or divisions;
- labelling sections (section notes), parts and divisions (headings);
- adopting numbering systems that enable readers to identify where they are in the text and to refer to particular elements with precision;
- assigning matter of secondary or incidental importance to Schedules.

b) What are the basic characteristics of structuring?

The basic characteristics of legislative structuring include:

- a section or a subsection (if the section is divided) typically contains a single sentence (although multiple sentences may be used to avoid long sentences);
- "a unity of purpose" or common theme or idea runs through a section, whether it comprises a single or several sentences;
- the contents of a section are accordingly linked by the fact that they comprise one or more legal propositions dealing with the same theme or idea;
- legislative sentences that do not contain the complete legal proposition must be linked in some manner with the sentences that contain the other parts of the proposition;
- paragraphs are used to point up parallel grammatical elements of a sentence and how the different elements relate to each other; they also reduce repetition and avoid ambiguity;
- lengthy legislative texts, and especially those dealing with a complex and detailed subject, are divided into distinct parts in which related sections are grouped together in a logical order.

The following example illustrates the use of

- subsections to contain related legal propositions in a single section,
- paragraphing to differentiate cases, and
- more than one section to cover the necessary components of the proposition.

Example 1

Assaulting, obstructing, etc. police officers

62. (1) A person commits an offence who:

(a) assaults, obstructs or resists, or

(b) aids or incites another person to assault, obstruct or resist, or

(c) uses abusive or insulting language to,

a member of the Police Force in execution of his duty or a person acting in aid of such a member of the Police Force.

(2) The magistrate before whom the person is charged must commit that person to stand trial at the High Court if the magistrate is of the opinion that the matter should be tried on indictment.

Penalties.

75. A person convicted of an offence under this Part [which includes section 62] is liable to a fine of $1000 or to imprisonment for 3 months or, if convicted on indictment, to a fine of $2500 or to imprisonment for 12 months.

Note

Subsection 62(1) creates several offences (shown by the paragraphing), and so contains several legal propositions in a single sentence. Linked procedure - itself a distinct enactment - is dealt with in its own sentence in subsection 62(2).

Section 75 contains a distinct legal proposition as it deals with consequences of other sections but it completes section 62(1).

Note too that the “white space” makes it much easier to work out how the sentence components relate to each other.

c) What guidelines should we follow in structuring legislation?

The account we have just considered suggests certain guidelines for structuring legislation:

1. the main focus of composition is the individual legislative units that together make up the full legislative scheme;
2. the principal vehicle for expressing each of these units is the *section*;
3. the section may comprise a single sentence, or a series of sentences, in which case they are usually set out as individual subsections;
4. the sentences in a section are linked by a common theme;
5. collectively the sentences in a section constitute one or more legal propositions complete in themselves or linked with other sections;
6. sections that are not complete legal propositions are linked with the sections that complete them, either through a common subject-matter or by formal devices (for example, cross-references);
7. paragraphs and subparagraphs may be used within a sentence to present its contents in a more accessible form or to prevent ambiguity or repetition;

8. in substantial legislative texts, sections containing related matter are grouped together into separate parts.

Schedules are used to remove secondary or incidental material from the main body of the text, particularly if it may obscure the central elements of the legislative scheme.

2. DRAFTING SECTIONS.

a) How should we approach individual sections?

In analysing drafting instructions, your task is to identify, as far as is possible at that stage, the particular matters that must be made the subject of a legal provision. Your aim should be to treat each of the matters needing its own legal proposition as a candidate for a separate section (or in a Bill often referred to as a "clause" for the purposes of parliamentary procedure). A legal proposition is a statement of a concept that is necessary to the legislative scheme, much as a single idea is the unifying factor for a paragraph in prose writing.

The actual length of the proposition varies according to its complexity, or to the amount of detail that must be included to make it complete, or to the number of qualifications or exceptions or other modifications required. The main theme of the proposition has to be expanded upon to include all the cases or circumstances to which the proposition applies. This typically calls for several sentences, and corresponding subsections.

Confining a proposition to a single section is often not possible. The longer or more complex the proposition the greater the case for breaking it up into linked sections.

b) How can we tell which matters should be covered by the same section?

Each sentence in a section must throw some light upon the common theme of the section. You should be able to describe that theme in five or six words in answer to the question "which feature of the legislative scheme is this section intended to provide for?". In LGST 557, Module 2, Section 2 (*How do we work with drafting instructions?*), we recommend that, in analysing the proposed legislative scheme, you describe each matter calling for a separate enactment in the form used for section notes. This represents the common theme. A provision that does not fall within that summary is likely to be unsuitable for inclusion in that section. So, test whether a provision is appropriately included in a particular section by whether you can provide a note for the section that covers the provision. If you cannot do that, the section needs reconsideration.

Example 2

Appointment and duties of film censors.

5. (1) The Minister may appoint any number of film censors as he or she considers expedient.

(2) The film censors are to carry out the duties assigned to them in accordance with any general directions that the Minister may give to them.

(3) A film must not be exhibited unless a certificate of censorship, in force, in respect of it, that is granted by a film censor in the manner set out in section 6.

Note

Subsection (3) is an important proposition but it does not fall within the theme of the section note. Indeed, no simple note, and so no section, can cover both organisational arrangements and a basic substantive rule.

c) How long should a section be?

Generally speaking, a section that contains more than six subsections should be reconsidered, especially if each subsection is a substantial sentence. One test is whether the section, when printed, will take up most of the page. Readers find text intimidating if there are no breaks of the kind made by section notes. As a rule of thumb, if there are fewer than two section starts on each page, you should consider whether you have too many subsections, even though they are linked thematically. Most long sections have a major theme and several sub-themes. It should be possible to divide these between linked sections.

d) How should the section note be selected?

Notes are attached to sections to help users find provisions easily and not to interpret them (see subsection 13(2) of the model *Interpretation Act* in the Supplementary Materials). They have a variety of names, including "shoulder notes", "side notes" and "marginal notes". They perform the role of topic indicators, that is, they give the reader a foretaste of what is in the section. Readers comprehend the meaning of individual provisions, and their relationship to each other, much more easily if they have an idea of their main thrust before turning to the details. When collated at the beginning of a legislative text, section notes also provide a useful table of contents and a quick guide to its structure and coverage.

Although you may have made a note as a guide to yourself as to the matter to be dealt with in a particular section, reconsider each case from the standpoint of the user. Good section notes:

- fairly describe the main and common theme of the section;
- provide guidance to the readers as to the general subject matter of the section;
- highlight terms that a user may be looking out for, particularly terms for the main concepts used in the legislative text;
- are short and to the point (rarely more of than 5 or 6 words), use a note form (omit definite and indefinite articles and active verbs) and, as an exception to the strict drafting convention, may use "etc." to save listing similar items or concepts;
- do not contradict the contents of the section.

Example 3

	Typical section notes
Interpretation.	Licence applications.
Regulations.	Issue of permits.
Search warrants.	Forfeiture of instruments used in committing theft.
Powers of police officers.	Magistrate to sit in open court.
Appointment of film censors.	Limitation of actions.
Application of Part II.	Offences.
Restriction on sale of poisons.	Determination of appeals.

Opportunities arise for more imaginative notes. You can form some into questions. This is eye-catching but it is restrictive, since the contents of the section must then contain no matters other than the answer to the question.

Example 4

What legislative instruments are to be registered?

> **13.** A legislative instrument must be registered under this Act if:
>
> (a) it is made on or after 1 January 1994;
>
> (b) it was made before 1 January 1994 and is in force on that date.

Practice varies as to the position of the section note:

- on the line immediately above the first line of the section, in emboldened type (sometimes referred to as a "shoulder note" or "section heading");
- in the margin, beside the first lines of the section, in a smaller type-face (generally referred to as a "marginal note" or "side note");
- as part of the first line of the section, in emboldened type, immediately after the section number and before the first words subsection.

The first of these is increasingly preferred. As a heading, it takes the most prominent position; it is emphasised by being in bold type; it is less complicated than a marginal note to produce in a word-processing system.

Activity 1

Note the type of section note used in your jurisdiction and any special printing features (for example, different type size, emboldening) and whether it finishes with a full stop.

Note

When you are scrutinising your final draft, check:

- whether any section note needs to be altered as a result of changes you have made to the section in the course of drafting;
- that any collation of the notes in an Arrangement of Clauses (however called) exactly reproduces the individual section headings. (These can usually be produced automatically by a word-processing package.

Practice what you have learned…….

3. DRAFTING SENTENCES IN SECTIONS.

    a) **How long should a sentence in a section be?**

The length of a section is perhaps less important than the length of the sentences in it and its overall structure. The length of the section is dictated by the amount of detail required by the topic being covered. But the length of the individual sentences and the section structure should be dictated by the needs of logical and orderly communication.

Linguistic research offers some considerations to bear in mind in writing individual sentences:

- sentences of less than 20 words in length are generally not difficult to understand; three subsections of 20 words each are better than one section of 60 words;
- large blocks of unbroken text are particularly difficult to work with, especially slabs of text more than 5 lines long (the "5 line" rule);
- if the sentence must exceed 5 lines, paragraphing of some parts of the text into conveniently short components greatly helps reading and comprehension;
- paragraphing is particularly valuable if the reader needs to retain several separate components in mind in order to understand the overall thrust of the proposition.

Activity 2

Compare the ease with which you can work with the following alternative presentations of the same text.

> **12**. Where the plaintiff in any action where the damages are ascertained at any time before final judgment proves on oath that he has a good cause of action and that the absence of the defendant from the Island will materially prejudice him in the prosecution of his action or where the defendant after judgment gives notice of appeal, if the plaintiff proves by evidence on oath to the satisfaction of a Judge or magistrate that there is probable cause for believing that the defendant is about to quit the Island unless he be apprehended, the Judge or magistrate, as the case may be, may by order under his hand, order such defendant to be arrested and imprisoned for a period not exceeding six months unless and until he sooner gives security to be approved of by such Judge or magistrate in a sum not exceeding the amount claimed and the probable costs of the action or not exceeding the amount ordered to be paid and the probable cost of the appeal, as the case may be, that he, the defendant will not go out of the Island without the leave of the court.

Detention of civil defendants likely to leave Utopia.

> **12.** (1) A Judge or magistrate may order, by a signed order, the defendant in an action to be arrested and imprisoned if:
>
> (a) the plaintiff proves, by evidence on oath, probable cause for believing that the defendant is about to leave Utopia; and
>
> (b) either:
>
> (i) before final judgment in an action for damages, the plaintiff proves on oath:
>
> (A) a good cause of action; and
>
> (B) that the absence of the defendant from Utopia will materially prejudicethe prosecution of the action; or

(ii) the defendant has given notice of appeal against judgment.

(2) Imprisonment under subsection (1) may not exceed 6 months.

(3) A defendant who gives security not to leave Utopia without the permission of the court may not be arrested or remain in imprisonment under subsection (1).

(4) The security must be approved by the Judge or magistrate in a sum that does not exceed, as the case may be:

(a) the amount claimed and the probable costs of the action; or

(b) the amount ordered to be paid and the probable costs of the appeal.

b) What can be done to shorten sentences

Legislative sentences frequently try to do too much at the same time. Long and complex sentences are used in some jurisdictions for tactical reasons. It is easier and quicker to steer a Bill through a legislative chamber or assembly and its committees if it comprises a few long clauses rather than many short ones. If the elements of a legal proposition are compressed together and tightly linked in their syntax, opponents have difficulty in formulating amendments to elements of the sentence. The trend is away from these practices, since they lead to continuing problems for the ultimate user.

In writing a section, try to use a separate sentence for each main feature of the legal proposition you are dealing with, at least when the feature runs to a substantial number of words. The following matters, if long or detailed, can be placed in separate sentences:

- the main element of the proposition (for example, a basic requirement or power);
- alternative propositions, if there is a series of them;
- the context in which the main proposition is to operate;
- the cases to which the proposition applies;
- specific features of the main proposition that require detailed treatment;
- the procedure to be followed in giving effect to, or consequent upon, the proposition if that is detailed;
- the exceptions or qualification to the main proposition;
- consequences following from the main proposition.

Example 5

1. **16.** A magistrate, on being satisfied upon information on oath that there is good reason to believe that any instruments or appliance for gaming are likely to be found on any person, may by warrant authorise any police officer to arrest such person and to bring him immediately before a magistrate, who shall thereupon cause such person to be searched in his presence and if any such instrument or appliance be found upon his person, he shall be detained in custody or held to bail until he can be dealt with according to law.

A redrafted version is much easier to follow:

Arrest of persons likely to be found with gaming instruments.

1. **16.** (1) A magistrate may issue a warrant if satisfied on oath that there is good reason to believe that an instrument or appliance for gaming is likely to be found upon a person.
2. (2) The warrant is to be issued to a police officer authorising the officer to arrest the person and to bring him or her immediately before a magistrate.
3. (3) The magistrate must cause the person to be searched in the magistrate's presence.
4. (4) If an instrument or appliance for gaming is found as a result of the search, the person must be detained in custody or held on bail until he or she can be dealt with according to law.

As Example 5 demonstrates, separating the elements into short sentences makes it easier to write in a direct manner and highlights those distinct features that together make up the legal proposition. But only limited savings in the total number of lines or words are likely. Indeed, the reverse may be true. In the example, the redraft required 8 lines compared with the 6 of the original. You may also need to add words to ensure clear links between the separated sentences (as we see below).

However, do not to take this process too far, so as to produce a section made up of a series of very short sentences. This is irritating and difficult to work with, especially if they have to be linked, both in the drafting and in the reading, before their collective sense is clear.

Example 6

Subsection (1) in the redraft in Example 5 could have been written:

- (1) A warrant may be issued by a magistrate under this section.
- (2) Before issuing the warrant, the magistrate must be satisfied on oath that there is good reason to believe that an appliance or instrument for gaming is likely to be found on any person.
- (3) The magistrate may issue the warrant to a police officer.
- (4) The warrant authorises the police officer to arrest the person and to bring him or her forthwith before a magistrate.

Subsections (1) and (2) are in fact so closely inter-related that they must be read together for the basic proposition to be understood. There is no gain in further dividing the subsection in this way. Much the same can be said of subsections (3) and (4) as well.

Try to keep a balance between providing a coherent legal proposition, which requires an unavoidable minimum of information, and the desire for an acceptable length. Considerations of length are less important than communicating unambiguously and grammatically what has to be said. In particular, do not obscure the core of a sentence—the subject-predicate—by excessive modification or by a confusing word order. Elaborate context clauses at the beginning of a sentence (“front-loading”) make for difficulty in finding the way to the heart of the proposition.

If a long sentence is necessary to state features of a legal proposition that should be kept together, so be it. But ask yourself whether it is organised so that:

- the basic theme of the sentence is prominent;
- the syntactic structure of the sentence is both obvious and uncomplicated;
- the physical appearance of the sentence assists communication and understanding.

4. PARAGRAPHING.

a) How can paragraphing help?

Paragraphing can make a sentence easier to understand in a number of ways:

- it separates features of the sentence that grammatically are distinct elements;
- because paragraphs are indented on the page their contents and separateness are immediately apparent;
- distinct features in the sentence syntax are physically highlighted, allowing the reader to gain an immediate insight into the sentence structure;
- it indicates certain of the components of the sentence that can be absorbed one at a time as we read; it helps us pace our reading of the sentence;
- it can be used to mark out alternatives or cumulative elements, enabling us to see, at a glance, how these features fit into the structure of the sentence.

It also offers other benefits:

- *reducing repetition*: the same words can be made to apply to all the paragraphs by placing them either as part of the introductory phrase to the paragraphs or immediately after the series;
- *eliminating ambiguity*: you can avoid dangling modifiers by incorporating the modifier into the paragraph to which it belongs or, if it applies to each of the paragraphs, by placing it with the words introducing or following the series.

Finally, it is worth noting that a legislative counsel experienced in using paragraphs thinks about composing the sentence in that way from the start. If you can break the material into distinct components as part of your thinking about the contents, you will automatically set them down in paragraphs when actually composing. Paragraphing becomes a tool for effective analysis, as well as a device for clearer presentation. Try to think in paragraphs.

b) When might paragraphing be used?

Paragraphing is a flexible device that can be used in several different ways. Here are examples of its use.

Tabulating or enumerating

Paragraphs may be used to tabulate (or enumerate) a series of alternatives or a list of cases or a number of requirements or a set of conditions (which may be cumulative or alternatives).

Example 7

1. **1.** In this Act, “disciplined force” means:
    - (a) a naval, military or air force;
    - (b) the Police Force;
    - (c) the Prisons Service;
    - (d) the Fire Service.
2. **2.** An order under this section may provide for:

- (a) the supply and distribution of food, water, fuel, light and other necessities;
- (b) maintaining the means of transportation by land, air or water and the control of transport of persons or things;
- (c) the taking of possession or control of any property or undertaking;
- (d) the payment of compensation and remuneration to persons affected by the order.

3. **3.** At every inquest, the coroner must:
    - (a) enquire as to the place, time and manner of the death of the deceased person; and
    - (b) determine whether any person is criminally concerned in the cause of death.

Stating a sequence of events in an orderly manner

Paragraphing may be used to set out a sequence of events or circumstances, for example, in the order in which they are likely to occur. This makes it easier to follow the theme of the section. It is particularly useful in a context clause to describe the circumstances in the order in which they are likely to occur before the rule applies, or to prescribe the series of actions in the order that the subject must or may follow in specified circumstances.

Example 8

The court must send a certified copy of an order to the Minister for transmission to the Registration Office in that country when:

- (a) the court has made a maintenance order against a person; and
- (b) it is proved to the court that the person is resident in a country outside Utopia.

If the Minister considers that the question of removal of an officer ought to be investigated, then:

- (a) the Minister must appoint a tribunal under section 7; and
- (b) the tribunal must enquire into the matter and report on the facts to the Minister.

Reducing repetition

Provisions that deal with related matters may be brought together into a single sentence. You can avoid some repetition by attaching to the paragraph that contains the individual items the element common to them all.

Example 9

Paragraphing allows the following provisions to be brought together (although some rewording is needed to produce the common element):

- (1) A Minister ceases to hold office if he or she ceases to be a member of the Assembly for any reason other than its dissolution.
- (2) If, at the first sitting of the Assembly after a general election of members, a Minister is not a member of the Assembly, he or she must vacate the office of Minister.

becomes

- A Minister ceases to hold office if:

- (a) he or she ceases to be a member of the Assembly for any reason other than its dissolution; or
- (b) at the first sitting of the Assembly after a general election of members, he or she is not a member of the Assembly.

Avoiding ambiguity

Paragraphing can overcome ambiguities in syntax such as dangling modifiers.

Example 10

This section applies to a Senator and a member of the House of Representatives who is appointed to public office.

The ambiguity of the modifier ("who is appointed to public office") can be avoided as follows:

1. This section applies to:
   - (a) a Senator; and
   - (b) a member of the House of Representatives who is appointed to public office.
2. This section applies to the following persons appointed to public office:
   - (a) a Senator; and
   - (b) a member of the House of Representatives.

c) What factors should be borne in mind when drafting paragraphs?

Respect the conventions of syntax and grammar when using paragraphs. They are only a way of presenting some components of the sentence in a more convenient way. As Driedger advises (*Composition of Legislation*, p.73):

All words when read from the beginning to the end without regard to the paragraph designations must be a complete and correct sentence.

The following considerations then are important:

- ensure that each paragraph has exactly the same relationship with the rest of the sentence in its grammar, function and type of matter covered.

Example 11

The seat of an appointed member of the Council becomes vacant:

- (a) if the member resigns the seat in writing addressed to the Minister;
- (b) but the Minister, before accepting the resignation, may request the member to reconsider it.

In this example paragraphing should not be used. Paragraph (a) is a subordinate clause modifying the verb in the principal clause; paragraph (b) is an independent clause.

- link each paragraph with the words introducing them (the "umbrella words") both in substance and grammatically.

  Each paragraph when read with the umbrella words must produce a correct grammatical statement so that all the paragraphs have the same grammatical construction.

Example 12

Nothing in this section authorises the President to delegate:

- (a) any power to issue warrants of appointment;
- (b) to make proclamations;
- (c) any function the delegation of which is expressly forbidden by law.

Paragraph (b) in this example does not make grammatical sense if read with the umbrella words.

- if the sentence continues after the series of paragraphs, link the words that follow with each of the paragraphs in substance and grammatically.

  Again, the test is: can each of the paragraphs be read with the words that follow to produce a correct grammatical proposition?

Example 13

When:

- (a) a day on which a notice of dishonour of an unpaid promissory note is to be given; or
- (b) a bill of exchange is to be presented for acceptance; is a public holiday, the notice is to be given and the bill of exchange presented on the day next following the public holiday.

Paragraph (b) in this example does not make grammatical sense when read with the words that follow.

- include in each paragraph all the words necessary to link it with the umbrella words.

  Make sure that you have not included words in the umbrella words that properly belong to the paragraphs. In particular, do not split words that grammatically should be kept together in a paragraph merely to avoid repetition.

Example 14

1. **1**. Except as otherwise provided in this Part, the provisions of this Part that relate to:
   - (a) public officers apply to police officers; and
   - (b) police officers apply to prison officers.

If you read out loud the full sentence in this example leaving out the paragraph numbers, it does not make sense. The paragraphs contain grammatically distinct components: one completes a subordinate clause ("that relate to …") while the other completes the principal clause ("the provisions … apply to"). The phrase "the provisions of this Part that relate to" must be repeated in each paragraph.

2. **2**. A person must not keep a quantity of explosives exceeding:
    - (a) 10 Kilograms, within 50 metres of any building; or
    - (b) 100 Kilograms, within 250 metres of any building.

Read the sentence aloud without the paragraph numbers. The paragraphing has broken the grammatical continuity. The paragraphs contain phrases as to distances that modify the verb in the umbrella words ("keep"). But the paragraphs are supposed to complete the phrase that modifies the noun "quantity" in the opening words.

Practice what you have learned. …….

- indicate how the paragraphs are related to each other including a conjunction ("and" or "or") or indicating the relationship in the opening words.

  When a legislative text sets out a series of items (a "list") in two or more paragraphs, the reader needs to know what the logical relationship between the list elements is. Generally speaking, there are three possible logical relationships: (1) *all* of the elements in the list; (2) *one* of the elements in the list; and (3) *any* of the elements in the list in any combination.

  The conjunction "and" is used to indicate the first relationship. The conjunction "or" is used to indicate the second relationship. But both conjunctions are used to indicate the third relationship, which is usually better indicated by opening words such as "any of". Opening words can also be used to avoid any ambiguity about the first to relationships ("all of" / "one of").

Example 15

1. A person is entitled to be registered as a voter in a council area if they are:i
    - (a) a citizen of Utopia;
    - (b) aged 18 years or over; and
    - (c) resident in that council area.
2. An accused person on arraignment for an offence may plead that:
    - (a) he or she has been previously convicted or acquitted, as the case may be, of the same offence; or
    - (b) he or she has obtained a pardon for the offence.

In the first case, the elements in each of the paragraphs must be fulfilled. In the second, the elements are true alternatives. Only one can be invoked at any one time.

No conjunction is needed if the paragraphs comprise a simple list that is added into a sentence that is otherwise grammatically complete.

Example 16

1. The Minister may make regulations for all or any of the following:
    - (a) prescribing anything that under this Act is to be or may be prescribed;
    - (b) fixing the fees that may be charged under this Act;
    - (c) prescribing the forms for the purposes of this Act;
    - (d) generally carrying this Act into effect.

This tabulation in this example merely lists matters that may be selected. A conjunction adds nothing.

When there are more than two paragraphs, a conjunction is generally included only at the end of the second last paragraph. It is redundant to put it after the preceding paragraphs. However, the practice in some jurisdictions is to include it after these paragraphs to make their relationship absolutely clear.

- format the paragraphing correctly, according to local conventions.

  Formatting involves indentation, punctuation and numbering. These features vary across jurisdictions.

  - indentation

  Paragraphs are printed as indented text to distinguish them from the rest of the sentence (which should then not be indented). Sub-paragraphing within a paragraph requires further indentation.

  - punctuation

  Typically, a punctuation mark is used at the end of the umbrella words as an introducer. This may be a colon or a dash. (It should not be both). Some legislative counsel advocate that no mark is needed unless it is used in ordinary writing (for example, before a simple list). But others object that this leaves a naked space. Follow your house-style here as elsewhere.

  Typically too, each paragraph except the last ends with a semi-colon; the last concludes with a comma unless it is the end of the sentence. Some legislative counsel finish every paragraph including the last with a semi-colon, to emphasise where each paragraph ends.

  However, commas can be used at the end of all the paragraphs if paragraphing has been used to facilitate the reading of a continuous piece of text (as in the first set of paragraphs in Activity 3 below), rather than creating a list of items. This is said to emphasise the continuity in the sentence.

  - paragraph numbers and initial letters

  Each paragraph or subparagraph must have its distinctive numbering according to the sequence to which it belongs (see above). The first word after the number typically does not begin with a capital letter (unless that is required by the particular word), as paragraph contents are internal elements of the sentence.

Activity 3

Compare the indentation, punctuation, numbers and initial letters in the following with practice in your jurisdiction, noting any significant differences.

1. **31.** (1) If:
   - (a) a person is committed by a magistrate for trial before the High Court, and
   - (b) it appears to the magistrate that the attendance of a witness at the trial is unnecessary by reason of the formal nature of the evidence given,
2. the magistrate:

- (aa) may bind the witness over to appear at the trial conditionally on notice given to him or her; and
- (bb) must transmit to the High Court:
  - (i) a statement in writing of the name and address of the witness; and
  - (ii) a transcript of the evidence given before the magistrate.

d) What can go wrong with paragraphs?

Paragraphing ceases to be a useful device if it is misused. We have already seen in earlier Examples cases in which you need to take particular care. Here are some other cases where paragraphing is incorrect or inappropriate:

- "sandwich" clauses

  A sandwich clause is one in which a series of paragraphs is preceded and followed by other text. Non-lawyers in particular are unfamiliar with this practice, although it has been a common drafting device. It is easy to overlook the fact that words before and after the paragraph series have to be read together to ascertain the complete clause. The problems are accentuated when the concluding words of the clause, as well as the umbrella words, have to be read as belonging to each of the paragraphs.

  This practice can usually be overcome by restructuring the clause to eliminate one slice of the sandwich loaf, typically the piece that follows the paragraph series.

Example 17

A person who procures:

- (a) his or her name to be registered on the register of persons qualified to practise law; or
- (b) a certificate of the registration of any person on that register,

by wilfully making or producing , either orally or in writing, a declaration or representation that he or she knows to be false or fraudulent commits an offence.

This example can be readily restructured to position all the linking elements as part of the umbrella words.

A person commits an offence who procures, by wilfully making or producing, either orally or in writing, a declaration or representation that he or she knows to be false or fraudulent:

- (a) his or her name to be registered on the register of persons qualified to practise law; or
- (b) a certificate of the registration of any person on that register.

- running on

  Text that belongs to another part of the sentence must not be incorporated into a paragraph. Printers may run the words that follow the final paragraph into that paragraph. (It is for that reason some legislative counsel prefer to end the final paragraph with a semi-colon).

Example 18

If in respect of a financial year it is found:

- (a) that the amount appropriated by the Appropriation Act for any purpose is insufficient; or
- (b) that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act, *a supplementary estimate showing the sums required shall be laid before each House of the National Assembly and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill*.

The italicized clause in paragraph (b) does not belong to the paragraph series.

- including matter in paragraphs that is not part of the paragraphing sequence

  Do not interpolate matter which does not fit with the grammatical structure of the paragraph sequence as a whole.

Example 19

Disqualification of voters

1. **62.** No person who:
   - (a) has been sentenced by a court to imprisonment for more than 2 months;
2. Provided that if 3 years or more have elapsed since the end of the imprisonment, the person convicted shall not be disqualified from registration as a voter by reason only of such conviction; or
   - (b) is adjudged to be of unsound mind; or
   - (c) is disqualified from registering as a voter or from voting under another Act;
3. shall be registered as a voter or, being registered, shall be entitled to vote.

Read the sentence aloud without a break. This shows immediately that the proviso is misplaced.

- including words in paragraphs that repeat or belong to the umbrella words

  The umbrella words are intended to be read as part of each of the paragraphs. Take care not to repeat words that perform the same function in both the umbrella words and the paragraphs: this is ungrammatical.

Example 20

(2) A magistrate conducting an inquiry under this section must:

- (a) read over and explain to the accused person the charge and must explain that the accused person will have an opportunity to make a statement, if he or she so desires, later in the inquiry;
- (b) the magistrate must then require the prosecutor to tender to the court the written statement of any witness which it is intended to call at the trial of the accused person and must read every such statement to the accused person.

The subject of the sentence (the magistrate) and the auxiliary verb (must) appear in the umbrella words and are repeated in the paragraphs.

- slicing phrases or expressions

Because a word is repeated at the beginning of each paragraph does not automatically make it a candidate for inclusion in the umbrella words. Words that are part of a phrase or constitute an expression should not be broken up by paragraphing. So an article or adjective shared by all the nouns (for example, "any") starting the paragraphs should be repeated with each noun in the paragraph.

Example 21

The court has may make an order granting a:

- (a) acquittal;
- (b) reduced sentence; or
- (c) new trial.

Each paragraph should start with the appropriate article (“a” or “an”).

- uncertainty as to whether words are intended to apply to all paragraphs

  Words in one paragraph cannot be treated as part of any other paragraph. If they apply to all, they must be included in the umbrella words or the following words or repeated in each paragraph.

Example 22

A licensed dealer shall display:

- (a) in a conspicuous place at the entrance to the dealer’s premises, a copy of the dealer’s licence; and
- (b) a sign-board in the prescribed form.

The place for display is clearly intended to apply to both cases. The phrase must be added to the umbrella words or as the concluding expression after the paragraphs.

- obscuring the principal subject-predicate

  Paragraphing is an aid to understanding. Try to make it easy to find the heart of the sentence (the principal subject-predicate). Knowing that, the reader can better understand how the paragraphs fit with it. Try not to separate the sentence subject from its predicate by a long series of paragraphs.

Example 23

1. A member of a council who:
    - (a) has a pecuniary interest, direct or indirect, in the contract or other matter; and
    - (b) is present at a meeting of the council at which the contract or other matter is to be considered,

2. must:
    - (c) when the matter comes under consideration by the meeting; or
    - (d) at such earlier time, as the presiding officer directs,
    - (e) disclose that interest and withdraw from the meeting.

The subject and the predicate are widely distributed between three separate places. This can be redrafted in a much more accessible form.

1. A member of a council must:
    - (a) disclose a pecuniary interest, direct or indirect, that he or she has in a contract or other matter that is to be considered at a meeting of the council:
        - (i) when the matter comes under consideration by the meeting; or
        - (ii) at such earlier time, as the presiding officer directs, and
    - (b) withdraw from the meeting.

- too many short paragraphs

  Except in the case of paragraphs making a simple list of items, a series of very short paragraphs can confuse, especially if it involves a series of shortly expressed alternative and cumulative actions or circumstances. Consider combining or abandoning some of the paragraphs.

Example 24

This sentence is unnecessarily fragmented:

10. A person, having the care of a child under the age of 15, who:

- (a) wilfully:
    - (i) assaults the child;
    - (ii) ill-treats the child;
    - (iii) neglects the child;
    - (iv) abandons the child;
    - (v) exposes the child to unnecessary suffering or injury to health (including injury to, or loss of, sight or hearing, or a limb or organ of the body, or any mental illness); or
- (b) causes or procures the child:
    - (i) to be assaulted;
    - (ii) ill-treated;
    - (iii) neglected;
    - (iv) abandoned; or
    - (v) exposed in such a manner,

commits an offence.

e) How can we find flaws in paragraphing?

Keep in mind Driedger's excellent words of advice (*Composition of Legislation*, p.76):

Read the provision aloud without referring to the paragraphing or subparagraphing. If it does not make sense without speaking words that are not there, or if the provisions cannot be read without

stumbling and hesitating or without going back and re-reading portions of it, there is something wrong with it.

5. NUMBERING.

a) How should legislative provisions be numbered?

Numbering is an essential feature of legislative texts that allows provisions to be located, identified and referred to with precision. Numbering requires a sequential series of characters that is known to the reader. Because children are taught numerals and letters from an early age, they are the two most popular choices.

More than one series of characters is usually needed to differentiate the various units of text (parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses). This differentiation is especially important for simplifying cross-references. For example, a reference to subparagraph (i) of paragraph (a) of subsection (2) of section 4 can be stated in compounded form as "paragraph 4(2)(a)(i)".

Letters are used for a series that is unlikely to exceed 26 units. They can be used for longer series by doubling or further multiplying them (aa), but there is no universal consensus on the order of multiple letters: does (aa) go between (a) and (b) or after (z)? Also, the more letters in a multiple, the harder it is to read and the greater the risk of reading error.

Numerals do not produce the same problems as letters because they are infinite. However, Arabic numerals (1, 2, 3, 4, ...) should be used because they are easier to understand than Roman numerals (I, II, III, IV, ...), particularly for large numbers (MIM — 1999).

Numeric systems accommodate approaches that can indicate levels in a hierarchy of provisions. For example, if a text contains Parts, the sections in each Part can be numbered with the first digits corresponding to the Part number as follows:

- Part 1 contains sections 101, 102, 103, ...
- Part 2 contains sections 201, 202, 203, ...

These approaches help readers navigate through long pieces of legislation.

The following is an example of a numbering convention commonly used to differentiate units of text:

Sections: Arabic numerals	1, 2, 3 …
Subsections: Arabic numerals in parentheses	(1), (2), (3)…
Paragraphs: lower case letters in parentheses	(a), (b), (c)…
Subparagraphs: lower case roman numerals in parentheses	(i), (ii), (iii)…
Sub-subparagraphs/clauses: upper case letters in parentheses	(A), (B), (C)…

Activity 4

Note the system for numbering legislative provisions in your jurisdiction

Sections
Subsections
Paragraphs
Subparagraphs
Sub-subparagraphs

You will have noted that these divisions are only to five levels. As a rule of thumb, reconsider the contents of any section that needs to be divided beyond *four*. Almost certainly, you are trying to do too much in too short a space.

A particular numbering difficulty arises if you wish to use paragraphs in a section or subsection for two sets of different provisions.

Example 25

Two different paragraph sequences are used in the following, one concerned with actions and the other with the effect of those actions. The first is numbered in the standard way, but how should we deal with the second so that its different function is obvious?

1. (1) A person commits an offence who, in a public place or at a public meeting, without lawful authority:
    - (a) makes a statement;
    - (b) publishes or distributes written matter; or
    - (c) behaves, or incites another person to behave in a manner,
2. that is intended or is likely to incite or induce another person:
    - (**?**) to kill or do physical injury to any person;
    - (**?**) to destroy or damage any property; or
    - (**?**) to deprive any person, by force or fear, of the permanent or temporary possession or use of any property.

In some jurisdictions, all the paragraphs are numbered consecutively in the same alphabetic sequence (in Example 25, (d) to (f) would be used for the second series). But this appears to connect two different sequences. In other jurisdictions, different numbering is used for the second sequence, for example doubled letters (in Example 25, "(aa); (bb); (cc)" would be used for the second series) so as to indicate a separate sequence but using the same type of numbering that is used for paragraphs.

Activity 5

Look in your legislation for examples of the case just discussed and note down how the second sequence is typically numbered.

The better practice is to avoid paragraphing involving different series since it not only creates this numbering problem, it is also difficult for many readers to understand and requires careful attention to indentation.

b) How should we number new provisions inserted into existing ones?

One of the greatest numbering challenges is how to number new units that are to be inserted between existing units. There are two basic approaches: alpha-numeric numbering and decimal numbering.

Alpha-numeric Numbering

This approach involves combining characters from two different series. For example, if sections are numbered using Arabic numerals and a unit is to be added, for example, after section 5, the letter A is added to 5 to create 5A for a new section between 5 and 6. If another section is to be added between 5A and 6, it is given labelled 5B. Similarly, if a series of units is labelled with letters, numerals can be added to them to accomplish the same thing. For example, a new paragraph between (a) and (b) would be (a.1).

The alpha-numeric approach works well for the first round of amendments, but if later amendments add more units among those that have already been added, the result can be quite cumbersome if not confusing. For example, does 5AA go between 5A and 5B? What goes between 5 and 5A? In these cases, the best approach is often to renumber the provisions, although this is not ideal, as discussed in LGST 555, Module 2, Section 2 (*How should we repeal and amend legislation?*).

Decimal Numbering

Decimal numbering is the system used for computing and measurement. It has an infinite capacity for insertion of new units, although it too can lead to cumbersome labels. The following is an example of a series of numbers in the decimal system:

5, 5.1, 5.11, 5.2, 6.

Each one is numerically larger than the one before it. To appreciate this, it may help to keep in mind that they could also be written with zeros added on right without altering their value. If these numerals are used to label a series of sections and a new section is to be added between 5.1 and 5.11, it would be 5.101.

6. ARRANGING AND LINKING SENTENCES IN A SECTION.

a) How should sentences in a section be arranged?

The first sentence should contain the most important feature of the proposition. If there are variations or conditions, qualifications or exceptions to the proposition that you intend to deal with in several subsections, try to cover the essential idea in the first subsection. If readers have the basic idea clear, then modifications or elaborations of it fall into place more readily. Indeed, it is also easier to draft the later provisions, since the foundations are set by the first sentence.

When drafting the subsequent subsections, keep the following considerations in mind:

- sentences containing modifications and elaborations should follow as closely as possible the provision on which they depend;
- sentences containing qualifications and exceptions should follow, as closely as possible, the provision they affect;

- if the section deals with a series of actions (for example, procedural steps), the sentences prescribing the actions should follow the chronological order of the events;
- sentences dealing with minor and consequential details (for example, particulars of administration) should follow the substantive provisions they expand;
- procedural requirements that apply in every case should be set out before those that will be used only occasionally;
- procedures that will be more regularly used should come before those that will be rarely needed;
- definitions or interpretation provisions (limited to the section) should come at the beginning of the section, if central to its understanding, or as the final subsection.

Similar considerations apply to paragraphs. If the paragraph contains a tabulation, the matters should be set out in order of importance; lists of items can often be dealt with alphabetically according to the first letter of each item.

b) When should sentences in a section be linked?

Enactments have historically been considered self-contained propositions of law. This has resulted in very precise language to indicate relationships among different components of a legislative text. In modern drafting practice this formalism has given way to the recognition that enactments are generally intended to work together to achieve a common legislative purpose. However, in complex legislative texts, care must still be taken to ensure that the relationships among their various provisions are clear. This is particularly true when the related provisions are contained in different parts of the legislative text. (We look at this below).

In the past, legislative counsel made frequent use of devices to link sentences in the same section. But today good practice makes far less use of linking devices for this purpose. This is particularly true of provisions within a single section, which are to be treated as parts of the same proposition. In addition, the order of a series of provisions can be used to indicate their intended relationship. This following example taken from earlier legislation illustrates past practice:

Example 26

Gun licences.

1. (1) Subject to subsection (5), no person shall possess a gun unless he holds a licence issued by the Commissioner of Police under this section for the purpose.
2. (2) The Commissioner of Police may issue such a licence to any such person on application in the prescribed form and on the payment of the prescribed fee.
3. (3) No licence shall be issued under this section unless the Commissioner of Police is satisfied that person referred to in subsection (2) is a fit person to hold such a licence, and so certifies.
4. (4) Such a licence is not transferable.
5. (5) This section does not apply to a member of the Armed Forces having, using or carrying a gun in the performance of his duties.

Links of the kind in this example were included to remove any doubt that each sentence is concerned with the same matters dealt with elsewhere in the section and not with matters in another section. In practice, it is evident that they are all concerned with the same matter, and are unnecessary. Legislative counsel today use a more narrative style that makes clear that the same matters are referred to, precluding the need to use back-references to bond the subsections together.

Example 26 can be rewritten to avoid almost all back-references:

Example 27

Gun licences.

1. (1) A person must not possess a gun unless he or she holds a gun licence issued by the Commissioner of Police for the purpose.
2. (2) The Commissioner of Police may issue a gun licence to a person on application in the prescribed form and on the payment of the prescribed fee.
3. (3) However, the Commissioner of Police must not issue a gun licence unless the Commissioner is satisfied that the applicant is a fit person to hold it, and so certifies.
4. (4) A gun licence is not transferable.
5. (5) The section does not apply to a member of the Armed Forces having, using or carrying a gun in the performance of the member's duties.

As this example illustrates, legislative counsel today:

- use a definite article ("the") to refer back to an earlier noun;
- avoid "such" (or "the same") in making back reference to particular items;
- omit "subject to subsection(*)", when the later subsection makes clear its effect as qualifying or excepting from the section;
- omit "under this section" if the item is an item already mentioned in the section;
- use pronouns (for example, "it") or a demonstrative article (for example, "that");
- point up a qualification made by a sentence by beginning it with "However".

You do not lose precision by this approach. Further, the style has more in common with general writing usage. But that said, you should add linking words if there is doubt that a reference back is intended or that one sentence is intended to take priority over another in given circumstances.

Example 28

1. (1) The Minister, by order, may deprive a person who is a citizen by registration of his or her citizenship if satisfied that the registration was obtained by fraud.
2. (2) The Minister may not deprive a citizen of citizenship under this section if it appears to the Minister that as a consequence the person would become stateless.

c) How should sentences in a section be linked?

The following are useful linking words for referring back when that is necessary.

- [a person] "referred to in subsection (1)", when subsection (1) incidentally directs attention to the person;
- [a person] "mentioned in subsection (2)", when subsection (2) makes provision with respect to the person;
- [a person] "specified in subsection (3)", when subsection (3) expressly designates or lists persons;
- [a person] "described in subsection (4)", when subsection (4) lays down characteristics of a person that are relevant in the section making the back reference.

The following are conventionally used (typically at the beginning of the sentence) to indicate priority between subsections:

- "subject to subsection (2)", when subsection (2) is to take priority over the sentence containing the back reference;
- "despite" (or, in older forms, "notwithstanding") subsection (3)", when subsection (3) is to give way to the subsection using the phrase;
- "without prejudice to subsection (4)", when the sentence containing the phrase is not to diminish the effect of subsection (4);
- "except as provided in subsection (5)" when subsection (5) creates an exception to the sentence containing the phrase;
- "subsection (6) does not apply if [or to]", when the sentence containing the phrase states circumstances in which the effect of subsection (6) is to be diminished.

Some legislative counsel are now using forms of linking sentences within a section that are more in keeping with general usage. The following are sometimes used at the beginning of a subsection to bring out its relationship with the previous subsection:

- "But", when the subsection makes an exception to the preceding subsection;
- "However", when the subsection qualifies the effects of the preceding subsection;
- "Nevertheless", when the subsection operates despite the preceding provisions;
- "In addition" or "Moreover", when the subsection adds a further requirement to those in the preceding provisions;
- "Alternatively", when the subsection may be resorted to rather the preceding one;
- "Instead", when the subsection contains a positive requirement that is to have effect after a negative requirement found in the preceding subsection.

Example 29

Disposal, etc, of public roads.

1. **1.** (1) The Minister may not sell, lease or otherwise dispose of a public road under the State Lands Act until it has been closed under section 12.
2. (2) However, the Minister may grant easements, licences or permits over or in respect of any public road.

Regulations.

2. **2**. (1) The Minister may make regulations prescribing all matters required or permitted by this Act to be prescribed.
3. (2) But the Minister may not make regulations prescribing any fee unless the Minister of Finance is consulted.

We will look at these linking words further in the next part dealing with linking sections. In that part we will consider how to make cross-references and look at an additional linking technique: a labeling definition. This technique is also occasionally used to link sections within a section.

Linking devices are needed within a section only if the relationship between subsections could be misunderstood. In most cases, that relationship can be made clear by the words used in the later subsections and by the order in which the subsections are arranged.

d) Should we use a proviso as a linking device?

From as far back as Coode, legislative counsel have been advised to avoid provisos. Yet they are still used and remain a source of uncertainty as to the intended relationship with the sentence to which they are attached. The legislative use of the proviso is unique to the law - and totally unnecessary. You can achieve the same results with more certainty by following the practices we have just discussed.

How have provisos been used?

Conventionally, the proviso is used in two different ways:

1. Create a particularised exception to the proposition in the sentence to which it is attached.

Example 30

1. 1. Every legal practitioner must pay an annual fee according to the scale set out in the Schedule:

Provided that this section does not apply with respect to a legal practitioner who is not in actual practice.

2. 2. A resolution under this section remains in force for such period not exceeding 6 months as may be specified in it:

Provided that the resolution may be extended from time to time by a further resolution under this section.

2. Elaborate the proposition in the sentence to which it is attached.

Example 31

1. 3. An order under this section is binding on all persons on whom notice of the order is served:

Provided that a person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

The “true proviso” is said to be the first of these - to exclude a particular case from the general operation of a rule. The courts therefore tend to treat the proviso as qualifying the provisions to which it is attached (as an elaboration), and not as an additional enactment. Accordingly, interpretation of the proviso is dictated by the terms of the sentence that it qualifies and the meaning of the principal provision may be affected by the terms of the proviso. An elaborating provision is treated as a legal proposition in its own right.

Neither of these uses is the way that the expression “provided that” is used in common usage, when it expresses a condition (an emphasised form of “if”):

“I will give you first option to buy my car provided that you exercise that option within a month.”

Driedger (pp.93-95) suggests that the legal usage derives from a contraction of enacting words once used in the English statutes “and it is further provided that”. He concludes that the proviso “is an all-purpose conjunction invented by lawyers but not known to or understood by grammarians”. Accordingly, avoid provisos altogether.

e) What alternatives to the proviso should be used?

Provisos link sentences in the same subsection. Once you are clear about the intended relationship, use one of the approaches we have just considered. The order of the sentences and the way you express the particular matter may be enough to show how the qualification fits with the earlier sentence.

- exceptions or qualifications

An exception or a qualification to a previous (more general) proposition can be stated in a few words, making it part of the sentence it qualifies:

- in the case of a true exception, beginning with the expression “except that”;
- in the case of a qualification, in a separate clause at the end of the sentence, beginning with “nevertheless” or “but”;

Example 32

The second example in Example 30 can be redrafted as:

1. 2. (2) A resolution under this section remains in force for such period not exceeding 6 months as may be specified in it; but the resolution may be extended from time to time by a resolution under this section.

- add the qualification to the sentence, as a modifier, if it can be converted easily into that form.

Example 33

The first example in Example 30 can be redrafted as:

1. 1. Every legal practitioner must pay an annual fee according to the scale set out in the Schedule, unless he or she is not in actual practice.

But if the exception is lengthy, place it into a separate subsection immediately after the subsection it qualifies, if necessary beginning with appropriate linking words in one or other of the subsections (or exceptionally both) to indicate their relationship.

Example 34

Possession of narcotic

1. **125**. (1) A person who possesses a narcotic commits an offence.
2. (2) Subsection (1) does not apply to a qualified medical practitioner who possesses the narcotic for medical purposes.

- elaboration

If the additional matter develops or adds to the general proposition in some way, consider the following:

- if you can express the matter shortly, add it at the end of proposition, linking it with appropriate words such as “and” or, if it makes a contrast, “but”.
- if it is rather long, place it in a separate subsection later in the section, with suitable linking words where needed.

Example 35

Example 31 can be redrafted in different ways:

> **3.** (1) Subject to subsection (2), an order under this section is binding on all persons on whom notice of the order is served.
>
> (2) A person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

> **3.** (1) An order under this section is binding on all persons on whom notice of the order is served.
>
> (2) However, a person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

> **3**. An order under this section is binding on all persons on whom notice of the order is served; but any person may appeal to the High Court against the order at any time within one month after being served with a notice of the order.

f) Can we dispense with linking words between sentences?

Linking words should only be included to perform a useful function: connecting sentences that might not otherwise be treated as linked. If it is clear that the sentences are linked, then linking words are not needed. Often the connection is obvious from the fact that the sentences appear in the same section. The continuity of the contents of the sentences that follow each other may well be enough.

Always question whether linking words are needed at all within a section.

Example 36

> (1) The Governor-General may delegate to any Minister any function that is vested in the Governor-General by a written law.
>
> (2) Nothing in subsection (1) authorises the Governor-General to delegate a power to make proclamations.
>
> (3) Notwithstanding subsection (2), a power that is expressed, under a written law, to be signified by proclamation may be delegated; but upon the delegation, the signification must be by notice in the Gazette.

The linking words in subsection (2) are necessary, and some link between subsections (2) and (3) is sensible. But “However,” in subsection (3) instead of the linking words used there would be equally effective and more natural?

7. LINKING SECTIONS.

a) What is different about linking sections?

The contents of a section are bound by their unity of purpose. A careful ordering of the sentences and a narrative style is usually enough to provide continuity among the various provisions of a legislative text. You can also rely on the interpretive approach that prevails in the courts of reading a statute and any subsidiary legislation as a whole. Accordingly, the meaning given to particular provisions is influenced by their statutory surroundings.

In short and uncomplicated legislation you may need little linking or cross-referencing between sections. But more may be needed in lengthy or complicated legislation. You must make sure that a matter referred to in one context is the same matter referred to in another if that is the intention.

A complex statute may impose the same or different obligations on the same or different persons, or regulate a series of similar matters in different ways. Your draft must leave no doubt as to which of the provisions apply to which of the persons or matters. In cases of this kind you may need to refer specifically to the principal provision that identifies a particular person or case intended.

Example 37

1. 1. A person who holds a second-hand dealer's licence issued under section 12 or a metal dealer's licence issued under section 14 must register his business name with the Registrar of Business Names.
2. 2. On conviction of an offence under section 16, the court may cancel a certificate of registration.
3. 3. The registrar must enter in the register details of all information given to him as required by sections 17 to 25 of this Act and by section 14 of the Companies Act.

Linking is required when two different sections are capable of applying to a particular case if certain circumstances occur, for example, if a broad provision applies to a wide range of cases and another narrower one applies to one of those cases. Can both be relied on when those circumstances happen? If not, which is to have priority in the case of such an overlap? Linking provides the answer.

Example 38

The following sections are widely separated in the legislation.

Tenure of Police Commission members.

106. A member of the Police Service Commission ceases to hold office:

- (a) at the end of 3 years beginning on the date of appointment; or

- (b) if circumstances arise that would cause him or her to be disqualified for appointment to that office.

Removal from office.

> **124**. A person may be removed from holding any of the following offices for inability to discharge the functions of the office or for misbehaviour:
>
> - (a) director of a statutory corporation;
> - (b) member of any Service Commission; or
> - (c) member of the Electoral Commission.

Section 106 is not a complete statement of when membership in the PSC ends if it is also intended to be terminated under section 124. This intention can be clarified by adding linking words, such as "subject to section 124", at the beginning of section 106.

b) How can sections be linked?

There are two ways to link sections.

- Labelling definitions

Consider using a labelling definition for a term that appears in several sections. This ensures that each use of the term refers to the same case without saying so each time.

Example 39

In this Act, "gun licence" means a gun licence issued under section 5.

This definition not only permits the shortened defined term to be used; it also removes the need to refer to the section from which the concept is derived.

- Linking words

Legislative counsel generally use linking words as follows:

- "subject to section 12", when section 12 is to take priority in an overlap with the section containing the phrase
- "despite" (or, in older forms, "notwithstanding") section 15", when the section containing the phrase is to have effect even though overlapping with section 15
- "without prejudice to section 20", when both the sentence containing the phrase and section 20 may be relied upon in circumstances when they overlap

It is sufficient to include the linking words in only one or the overlapping provisions. It is not necessary to include "subject to" in one and "despite" in the other.

Some legislative counsel also use “subject to this Act” to indicate that the particular section is not self-contained, but is subordinate to several other sections. This practice may technically serve this purpose, but it provides little guidance and typically states the obvious since the section must be read in its statutory context. Don’t use these words as a way of escaping from one of your principal responsibilities of drafting clearly. As part of the planning of your legislative text and of scrutinising the various drafts, pay particular attention to the question of overlapping provisions to ensure that they do not contradict each other. Be aware of possible contradictions of these kinds so that you can add the specific linking words as necessary.

Linking words are useful

- to draw attention to an earlier or later section which overlaps the matters covered in the present section, especially when they are widely separated in the legislative text;
- in the case of inconsistency in the application of two or more sections, to establish which takes priority;
- to indicate which of two or more sections applies, or whether both or either may apply.

Example 40

> **12**. Subject to section 17, a person who satisfies the Registration Committee that he or she holds a qualification as a medical practitioner in a country listed in the Schedule is entitled to be registered under this Act as a medical practitioner in Utopia.
>
> **17**. A person must not be registered under this Act if
>
> - (a) he or she has been convicted at any time in any place of an offence for which he or she was punished by imprisonment for 2 years or more; or
> - (b) in the opinion of the Registration Committee, he or she is otherwise not of good reputation or character.

Without linking words, the two provisions are contradictory. The linking words draw attention to the existence in section 17 of a qualification to section 12 that confers an apparently unqualified right.

Similar considerations apply rather more strongly when the overlap is with a section in another statute or subsidiary instrument. Bear this possibility in mind when researching the existing law as it applies to the subject matter of the legislative text you are drafting.

c) How should cross-references be drafted?

Make your cross-references as precise as possible, setting out the number of the section or subsection and the citation of the legislation that contains it. Current practices, sometimes supported by Interpretation Acts, enable you to express these references in a compounded form, as shown in Example Box 41.

Example 41

Preferred style:

Subject to section 12(2)(a), ...

Do not use the following:

Subject to paragraph (a) of subsection (2) of section 12 ....

Subject to the provisions of section 12(2)(a) .....

They are cumbersome and harder to understand. Also, do not use the following or similar forms:

“in the foregoing/preceding / following section”;

“as hereinbefore / hereinafter referred to”.

They are archaic and imprecise. They may also become inaccurate if additional sections are added before or after the section in which they are used.

Cross-references to paragraphs give rise to different considerations. Typically, paragraphs contain only one component of a sentence. Most cross-references need to include other parts of the sentence to make the reference complete. It is only if the reference is to an item as described fully in the paragraph that you should refer to the paragraph number alone.

Example 42

Possession of dangerous things in public places prohibited.

> **12.** No person in a public place shall carry or have in his possession:
>
> - (a) a firearm;
> - (b) an article made or adapted for use for causing injury;
> - (c) any noxious fluid.

2. Arrest of persons contravening section 12

> **14.** A police officer may arrest, without a warrant, a person contravening section 12(a).

The cross-reference in section 14 is incomplete. An improved version might read:

> **14**. A police officer may arrest a person who is contravening section 12 in respect of the item in paragraph (a).

But a better version disposes of the paragraph reference altogether:

> **14**. A police officer may arrest a person who is carrying or in possession of a firearm in contravention of section 12.

8. INCORPORATION BY REFERENCE.

a) When can we incorporate provisions from one part of a text to another

In a text of some size, you may find that two classes of cases require to be treated in essentially the same way in one or more of their features, but because, in other respects, the two matters are distinct, they are best dealt with in separate parts of the text. Should the common ground be covered by repeating the same provisions in each case? The alternative is to provide for the common matters in respect of one of the cases and then rely upon a cross-reference to them in the other place. This device of incorporation by reference (or referential legislation) should have a place in your drafting kit.

Example 43

1. **165**. Part V (which relates to the winding-up of companies formed and registered under this Act) applies with respect to the winding-up of an unregistered company.

Several benefits may follow from using the technique in this example:

- since precisely the same rules apply to registered and unregistered companies, both will be dealt with in the same way, securing uniformity of administration;
- lengthy repetition is avoided;
- the length of the legislative text is reduced, which will likely also reduce the time and resources needed to prepare the legislative text and have it enacted as well as the publication costs.

But this device must be used with care. The same provisions can be applied to a second case only if they are to operate in exactly the same way, and if they are capable of operating in the same way in both contexts. If the two legal settings are not, in fact, the same, the provisions may need modification in order to produce an equivalent effect in the second case or to take account of different features of that case.

Before provisions are incorporated by reference, they must be tested in the second context to make sure that they can be applied without any modification. If they cannot, the incorporating provision must specify what modifications are to be made in in applying them. It is rarely sufficient to give a general instruction of the kind in the next example.

Example 44

165. Part V (which relates to the winding-up of companies formed and registered under this Act) applies, *with the necessary adaptations and modifications*, with respect to the winding-up of an unregistered company.

The italicized phrase in this example (which replaces the traditional Latin phrase *mutatis mutandis)* leaves it to the reader to work out the necessary modifications. Disputes about the intended meaning of these phrases often end up in court. They should only be used for changes in formal references (as to names, or titles, or designations), and not for difference of substantive law. If the latter are necessary, provide for them expressly.

If a large number of modifications are needed, it may be better to restate the original rules in their modified form, rather than to ask readers to compare different pages of the legislation and to work out

how specified modifications affect the original provisions. The savings made by the referential incorporation are not justified if they lead to uncertainty or poor communication.

When you use the device, make sure, as with all referential provisions, that the cross-references are precise and complete and incorporate only those provisions that are required.

b) When can we incorporate provisions from other legislation?

In principle, similar justifications can be made for incorporating provisions from existing law into a new piece of legislation. You may receive instructions that a case in your legislation is to be dealt with in the same way as another under existing legislation. In those circumstances, incorporation by reference is the most straightforward way of giving effect to the policy.

There are cases where Government does not wish to reopen for debate a matter that is already well settled by existing legislation. This may occur if the same provisions are repeated in new legislation. Referential legislation helps ensure the implementation of a common policy in the treatment of related matters. It is a particularly valuable way of applying tried and tested legal requirements or procedures to new matters or similar circumstances (for example, procedural rules for tribunals; standard court processes).

Example 45

1. **25.** Sections 5 to 9 of the Employment Act (which relates to the provision of written contracts of service to persons employed in Utopia) apply with respect to contracts of service of persons employed on board ships registered in Utopia.
2. **104**. For the purposes of paying contributions and to receiving pensions under the Pensions Act, a member of the staff of the National Assembly is to be treated as if the member were a public officer within the meaning of that Act.

Both of these provisions extend an existing policy to a new, but similar, category of case.

Referential incorporation is also useful for linking two pieces of legislation that, in some particular respect, are concerned with the same subject matter. This may be achieved by an appropriate definition referring to a concept in another legislative text. But there is no point in incorporating a definition from another text unless it brings with it the sense of the defined term in the context of its application in that other text (as in the next example). If this is not intended, you should include a complete definition using the same terms as the original.

Example 46

1. **2**. In this Act, "registered firearm" has the meaning given to the expression by the Firearms Act.

This usefully ensures that a concept (as it is regulated in the earlier legislation) will operate in the new Bill.

Using referential legislation calls for caution:

- two separate pieces of legislation must be consulted to understand the effects of the incorporation;

- there must be common ground or equivalence between these pieces of legislation, but the underlying policy and circumstances regulated may actually be different in the two cases;
- the more the original provisions need to be modified for the new circumstances, the weaker the case for incorporation;
- the incorporated provisions become part of the new legislation as they stood at the time of incorporation and amendments made subsequently do not take effect automatically unless the incorporating provision otherwise provides;
- this also means that repeal of the original legislation does not affect the incorporated provisions and that, if the original provisions are amended or repealed, the legislation into which they are incorporated must be amended to incorporate the same changes;
- it is often easy to overlook the existence of incorporated provisions once they have been incorporated.

Accordingly, great care is needed in deciding whether incorporation by reference is desirable and feasible and whether the same result can be better achieved by amending the original legislation to extend to the new case. The advantages and disadvantages of incorporation by reference should be considered at the research and planning stage and discussed with the instructing officer, when the advantages and disadvantages can be weighed.

When using incorporation by reference, you should do the following:

- check the terms of the original provisions (including any amendments) as they will operate in the new context, in order to ensure their consistency with both that context and the language of the legislative text;
- if you find inconsistencies, provide express modifications that state how the inappropriate terms in the original are to be treated in the new context;
- include a full citation of all the provisions to be incorporated and the correct citation of the legislation that contains them);
- provide a short note, in parenthesis, after the reference, to guide readers as to the contents of the incorporated provisions (as in Example Box 44);
- if the incorporated provisions rely on definitions in the original legislation, include them among the provisions you incorporate;
- when scrutinising your draft, compare and check the original text and of the incorporating text, especially the incorporating provisions, to ensure that the two can be easily read together and the effects understood and that they are consistent in law and language;
- confirm that the incorporation will achieve the intended aims in using the device.

c) Can provisions be incorporated from the legislation of another jurisdiction?

Many Commonwealth countries still rely upon United Kingdom legislation that has been incorporated as part of their law by general or specific reference. Some incorporating provisions are “ambulatory” they authorise continuing incorporation to take account of changes in the UK legislation. However, this can cause problems since this practice:

- relies upon the law of another country, which does not legislate with other countries in mind;
- is fraught with legal uncertainty as the legislation is rarely completely compatible with local circumstances;
- may be unconstitutional if it is characterized as a delegation of authority to an external body to make local law, which is the prerogative of the Legislature established by the Constitution.

If you believe, after careful research, that a precedent from another jurisdiction suits your needs, use its contents as a precedent for drafting your legislation. In general, it is only in exceptional circumstances that incorporation of external legislation by reference can be justified, especially if it is to have ambulatory effect. However, different considerations may apply in two situations.

The first involves the drafting of legislation intended to facilitate intergovernmental cooperation in matters that concern them jointly, for example international trade or the regulation of private law disputes involving parties from more than one jurisdiction. In these cases, incorporation by reference makes great sense and is usually ambulatory.

The second situation involved dependent territories where consistency with the metropolitan legislation is required for a subject matter that has transnational effect (for example, shipping, communications) and for which the metropolitan country has international responsibility.

Different considerations may also be found for jurisdictions within a federal system. It is generally open to subnational jurisdictions to incorporate federal legislation that applies in federal matters so that it applies to comparable matters within the subnational jurisdiction (or vice versa) as long as it does not breach the division of legislative competence. This secures uniformity or harmonisation. But again incorporation may give rise to constitutional issues if it is characterized as delegating power to legislate.

9. GROUPING SECTIONS.

a) When should we have formal groupings of sections?

Short legislative texts rarely need to be separated into formal divisions. Legislation with a small number of short sections is easy to use. Its coverage and structure are unlikely to be complicated; readers should be able to gain an overview from a quick glance at the section notes.

But as the number and length of sections increase, consider ways of assisting users to find out how the legislation is organised, what range of matters it deals with and where in the legislation they can be found. One way is to provide topic indicators at frequent intervals throughout the legislation. They enable readers to grasp much more quickly the nature of the items that identified by the indicator and the relationship between the principal topics covered by the Legislation. Headings perform this function well. The more headings you can introduce, the more readily that users will see the overall picture.

This means that provisions must be grouped together when they have subject matter in common. The groups can then be placed into Parts or Divisions or other subdivisions to each of which you can add an informative heading. It is a matter of judgment, in each case, whether to divide in this way. Ask yourself whether dividing will contribute to easing access to the content and structure of the legislation. The longer the legislative text, the more likely your answer will be positive. Section 2 looks at how these matters may be worked on when developing a legislative plan.

b) What groupings are conventionally used?

he following is a typical hierarchy of groupings and the names associated with them:

- **Part**: a group of sections, each group comprising a distinctive segment of the legislative scheme, and numbered appropriately.
- **Division (or Chapter)**: A group of sections within a Part, comprising a distinctive component of that Part, and numbered appropriately.
- **Subdivision (sometimes called "fascicule")**: a group of sections within a Division or Chapter, each dealing with one or more of its features; or alternatively in a shorter legislative text a group of sections when more formal divisions are not suitable. These are not numbered.

The headings for each of these groupings are printed in distinctive fonts and may be centred or left justified, depending on the jurisdictional practice.

In terms of numbering, the use of Roman numerals (for example, "IV" or "IX") has given way to more familiar Arabic numerals (for example,"4" or "9").

Example 47

This table shows the way groupings and their headings can be distinguished using numbering and fonts.

Group Designation	**Numbering**	**Font**
PART I	Roman	Capital letters, 14pt, bold
Division/Chapter 1	Arabic	Lower case, 12 pt, bold, italics
[*Unnamed Grouping*]	Arabic	Lower case, 12pt, italics

Activity 6

Look at a substantial Act in your jurisdiction (preferably recently enacted) that has formal groupings (for example, a penal code, companies legislation or an Income Tax Act). Using the entries in Example 47 as a guide, identify the Names, numbering and font attributes associated with each grouping.

First level (for example, a Part)

Second level (for examples, a Division or Chapter)

Third level (un-named grouping)

c) When might groupings be of particular value?

Bills are debated following a formal procedure. The Ministerial introduction and the debates and committee examination can be easier to structure if the distinctive segments of the Bill can be considered separately. Groupings may secure your clients' interests in the facilitating passage of the Bill through the legislative chamber or assembly.

Formal groupings may also be helpful in dealing with drafting problems. When legislation is formally divided into Parts and Divisions, courts assume that this is a deliberate decision by the legislative counsel to treat the various items within them separately and exclusively from others. In consequence, they assume that a section in one division is not intended to be read into another division, though it may appear

to deal with a similar matter. They will do this only if driven to conclude that the section has been misplaced. (Informal divisions are not seen as creating exclusive divisions; they are merely topic indicators.) Dividing into Parts then is a valuable device if you wish to ensure that groups of sections intended to be exclusive of others will be treated in that way.

Example 48

A *Companies Act*, which includes general rules for setting up, operating and winding up companies in the jurisdiction, commonly contains separate parts for other categories of corporate bodies that are to be subject to regulation, for example:

Corporations set up under different legislation

Overseas or external companies

Non-profit companies

You should consider using separate groupings of sections for matters that:

- deal with a particular stage in an administrative scheme;
- regulate the activities of a particular group of persons affected by the scheme;
- create a new legal entity and confer its functions;
- determine the membership and rights and duties of the membership of a new body;
- deal with part of an administrative scheme that is to come into effect at a later stage than the rest of the statute;
- apply to special cases only;
- apply to limited categories of persons or places.

One useful approach is to separate any group of provisions that form an exception to the general application or operation of the legislation.

Example 49

This Part applies with respect only to companies that are registered in a country outside Utopia.

This Part applies with respect to Scotland only.

This section applies for the interpretation of this Part.

This Part comes into force on a date to be fixed by the Minister by notice in the Gazette.

d) When should the decision be made about grouping sections?

Decisions on grouping sections should be carefully considered.

Formal divisions

Whether or not to make formal divisions should be part of the designing of your initial legislative outline (which is considered in the next Section). You are likely to see a need to make them as a result of your analysis, because, for example:

- the legislation will be of some length;
- there are features of the scheme which appear to fall into distinct segments;
- alternatively, the legislation deals with a number of separate subjects that are largely unrelated and should therefore be kept apart.

Informal groupings

Whether or not, or where, to introduce informal groupings generally emerges in the later stages of composing a legislative text, when your systematic ordering of the sections is well advanced. Assigning an informal heading can help break up provisions that covers many pages. It is a useful reminder to you to group together provisions that are concerned with aspects of the Part that are closely related in their substance.

e) What should be borne in mind in grouping sections?

The contents of formal groups are treated as exclusive of others. So take care not to include in one group a provision that properly belongs to another. It may be construed as confined to the context in which it is placed, and not as applying more broadly. However, if a section in one Division or a Part is to have effect in the context of another Part, link them by appropriate cross-referencing.

Example 50

Sections 214 to 221 (which relate to winding up of companies) apply in relation to the winding up of a company registered under this Part.

Alternatively, move the section to another Part that contains general provisions that are to apply to the entire legislative text, unless the section is integrally linked with others in the original Part.

Parts and Divisions are devices for providing a rational and orderly structure for the content of the legislation that is likely to accord with users' expectations and needs. They must be planned with that as a prime objective. Provisions should be grouped, as far as possible, with others with the same subject theme. It is there that the reader will look.

f) How should group headings be expressed?

Give both formal and informal divisions a helpful heading that indicates the gist of the provisions they cover. Remember that they are intended to be topic indicators.

In drafting them you should:

- choose a short set of words (a part or a whole of one line is, typically, sufficient; never more than 2 lines);

- describe the contents by a general expression, yet one that provides an accurate guide (it can never be comprehensive);
- align the heading in accordance with your jurisdictional practice (centred or left justified).

Accuracy is an important consideration. In many jurisdictions headings can be taken account of for the purposes of interpretation (see subsection 13(1) of the model *Interpretation Act* in the Resource Materials).

Activity 7

Can headings be used to assist in the construction of legislation in your jurisdiction? Make a note of any provisions of your *Interpretation Act* on the matter.

If a heading appears not to cover all sections, it is possible that there is insufficient common ground to join them in the same grouping. You should consider whether:

- any section should be placed in a different group;
- the group should be confined to only some of the present group of sections;
- a different heading can be devised that will cover all sections.

Headings tend to be added and altered as the drafting proceeds. Check them all again as the final stage in completing the final draft. Changes in the contents of divisions commonly require some modification to the heading.

Activity 8

Read through the table of contents (called "Analysis") of the Smoke-free Environments Act 1990, No.108 of New Zealand. Note the structure of the Act and the way it uses various divisions and headings for them.

HOW CAN WE DEVELOP GOOD LEGISLATIVE STYLE?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

In earlier modules, we concentrated on legislative syntax - how legislative sentences should be composed consistently with prevailing conventions on grammar and punctuation. In this Section, we deal with legislative style - how legislation should be written so that it expresses its subject matter as effectively as possible.

Though syntax and style are independent concepts, in drafting we cannot treat them separately. How a sentence is composed and structured may significantly affect how well it expresses the subject matter. Legislative counsel make most of their decisions about syntax and style together, as part of the same process.

Section Objectives

By the end of this Section, you should have laid the foundations for developing a personal drafting style within the conventions prevailing in your jurisdiction, and in particular, you should be able to do the following:

- apply a range of stylistic devices in composing legislation that will contribute to its effectiveness and clarity;
- put into effect the main practices that lead to a plain language style of drafting;
- follow a gender-neutral style of drafting.

Essential Questions

This Section is divided into four subsections organised in terms of a series of questions:

1. GENERAL CONSIDERATIONS
    - What do we mean by good legislative style?
    - How do we decide what is good style?
    - How are style standards set for legislative counsel?
    - Why is style important?
    - What style practices get in the way of communication?
    - What is the aim of the plain language style?
2. DEVELOPING GOOD LEGISLATIVE STYLE
    - How can we improve communication?
    - How can we improve clarity?
    - How can we make legislation more readable?
    - How can we make legislation more concise?
    - How can we make legislation more complete?
    - How can we make legislation more consistent?
    - How can we make legislation certain?
3. GENDER-NEUTRAL DRAFTING
    - How can we draft in gender-neutral terms?
4. SOME ADDITIONAL MATTERS OF STYLE
    - Can we split infinitives?
    - Can we end a sentence with a preposition?

- Can we begin a sentence with “And” or “But”?

This section also includes two appendices:

Appendix 1: Simple Words and Expressions Appendix 2: Commonly Confused Words

Studying this Section

This is a long Section that will require several study sessions. Many of the aims of the techniques described are likely to be familiar to you from LGST 551. The Section is designed to identify and prevent poor drafting practices that get in the way of effectively expressed legislation. Some of these you should have already noted. But some of the devices described may be new, and will require careful thought. You will find that easier by reading Subsection 1 to remind yourself of drafting practices that make legislative expression *less* effective.

You are asked to consider a large number of techniques; these are grouped by their contribution to the various objectives that legislation should achieve. This is a little artificial, though it breaks this Section into manageable subsections for the purposes of study. In case you still find difficulty in keeping track of the wide range of devices referred to, an outline chart is set out at the beginning of Subsection 2 to help you keep track of your progress. But we also suggest that you create a *checklist*, as you proceed, of the *particular items* considered under each of the heads. This should be useful for later reference, as well as facilitating your study.

In Subsection 3, we look at gender-neutral drafting to show how it can be put into effect if that is consistent with the practice in your jurisdiction. Gender-neutral drafting is becoming well-established and a good legislative counsel should know how it is done.

1. GENERAL CONSIDERATIONS.

a) What do we mean by good legislative style?

In the context of legislative drafting, style is about the way we express ideas in writing. Style is about making choices whether to express the subject matter in one way or another. As should now be clear to you, the same idea can be conveyed in a variety of ways.

Good style is concerned with the way we can communicate ideas most effectively and efficiently. It involves choosing that mode of expression most suited to the particular drafting task.

In all writing, each of us approaches the task of making style choices in our own way. Good writers develop a distinctive style, often to the point that their readers can recognise who wrote the text from the way in which it is written. Many writers, such as novelists, set and follow their own standards of literary style, which can be very personal. This is true for legislative counsel to some extent. Experienced legislative counsel have their preferred ways of expressing themselves in their drafts, mostly acquired through learning what has proved to be the most effective for them in the past.

Legislative counsel have much less freedom. Their work is constantly judged by those who use their legislative texts. To a considerable extent, legislative counsel must follow standards of style that respond to external expectations. Typically a body of standards has been collectively

developed in their jurisdiction. It is only within those standards that they can exercise some freedom of choice. Consistency in this respect is an important consideration.

b) How do we decide what is good style?

We must never lose sight of what we are here to do. Legislation is a medium for:

- fixing requirements of law in a form that permits people to act with security, and
- communicating those requirements to persons affected by them or concerned in carrying them out.

A *good legislative style* is one that contributes to the fulfilment of those tasks. It furthers the objectives for effective legislation. We are launched once more on the Seven C's of sound drafting (see LGST 551, Module 1, Section 3 - *Why do we draft as we do in parliamentary systems?*).

Activity 1

Review the objectives set out in the Seven C's and how they affect drafting by reading again LGST 551, Module 1, Section 3 (*Why do we draft as we do in parliamentary systems?*).

By those standards a good legislative draft is one that communicates to users, in terms that are:

1. Capable of being complied with;
2. Clear;
3. Comprehensible;
4. Concise;
5. Complete;
6. Consistent
7. Certain.

A number of drafting practices still in use are inconsistent with these objectives. Many of the recent criticisms of drafting relate to questions of style. They are connected with a wider concern about poor intelligibility of legal documents generally, especially those intended to be used directly by the public and others with little knowledge of law.

This Section identifies examples of poor style and shows how it can be avoided. The way to achieve a good style is sometimes identified as using "plain language".

c) How are style standards set for legislative counsel?

Legislative counsel are generally expected to work to the common body of standards, often referred to as the "house-style". This develops in a variety of ways:

- by following the style used in past legislation, in particular in the local statute book;
- through a sharing of experience, particularly between senior and junior legislative counsel in the process of training and working together;
- by following guidelines formulated by senior legislative counsel for the use of the drafting office.

Some jurisdictions produce a style manual and issue a set of guidance notes for this purpose (see the **Bibliography** in the **Resource Materials**). By contrast, in others rapid and frequent changes of legislative counsel have made it difficult to maintain the desired consistency in style. In those jurisdictions in particular, individual legislative counsel set their own standards pragmatically (sometimes by trial and error).

Inexperienced legislative counsel should avoid making style innovations of their own. But many style improvements are being made in countries with a wealth of drafting expertise. You should be aware of them, even if they are not current practice in your jurisdiction. This Section incorporates many of them. Most will prove to be non-controversial. But expect to be challenged about others. In such a case, these materials should provide you with the reasons for following a particular practice (and the knowledge that they are followed without controversy elsewhere). On the other hand, your senior officers have the authority to dictate style requirements; it is your duty to follow the prevailing house-style if you are so directed.

Activity 2

Find out whether in your jurisdiction there is in current use:

1. a drafting style manual;
2. style guidelines;
3. any other written source of guidance on style, which is treated as authoritative.

If these exist, try to obtain a copy and compare their contents with the advice given in this Study Text.

d) Why is style important?

Style is concerned with choices about the words used in legislation and the way that they, and the sentences containing them, should be arranged and related to each other. Style is involved when we ask the following kinds of questions:

- what are the best words to express our requirements?
- what form should a sentence take to communicate its messages most effectively?
- how long or short should sentences and sections be?
- how detailed should provisions be?
- can we compose provisions in language that is in everyday use?
- what features will ensure that the document is as readable and usable as possible?

As has been noted, syntax and style are inter-related. Because choices must be consistent with the conventions of syntax and grammar, it is inevitable that decisions on syntax matters influence style, and the other way round. From working with legislative syntax in LGST 551, Module 1, Section 3 you should already be familiar with a considerable number of issues of style:

- preference should be given to writing in the present tense;
- the active voice is to be preferred to the passive;
- a wider range of auxiliary verbs than “shall” and “may” should be used in the principal predicate of a sentence;
- related words should be kept as close together as possible (for example, subject and its modifier; subject and predicate; verb and its object);
- a sentence should deal with a single idea only;

- adverbial phrases should not be embedded between a verb and its auxiliary;
- a conditional clause is frequently more effective towards the end, rather than at the beginning, of a sentence;
- paragraphing within a sentence makes the component parts of a long sentence much clearer;
- the same expression should be used for the same meaning; a different expression should be used for a different meaning;
- sentences can be shortened by using definitions for terms used in them.

Of course, none of these propositions is a hard-and-fast rule. They are guidelines for making choices. Whether they are adopted or not in any particular case depends upon what you are trying to achieve.

e) What style practices get in the way of communication?

A number of common features of legislation make it difficult for users to understand it easily:

- No statement of the underlying principles

  Concentrating on the rights and obligations of the persons affected, without stating the underlying principle, may obscure the purposes for which they are conferred.

- Long sentences

  Sentences that run to many lines and use too many words are difficult to work with, especially when formatted as a single slab of text.

- Overloaded sentences

  A sentence requires complex structures if it contains not only a statement of a rule but also the circumstances and conditions, and procedures, for its operation, as well as exceptions to it.

- Illogical organisation of the legislative text

  Readers find a document easier to use if it follows a logical sequence. Systematic structure reveals the thinking behind the legislation. Too often, legislation allocates materials that are closely related to widely separated parts of the statute.

- Unusual syntax

  Sentences that use an unnecessarily artificial word-order or that are inconsistent with usual grammatical practice defeat the expectations of the reader.

- Excessive cross-referencing

  Heavy use of cross-references to other statutory provisions (for example, by citing the section reference) makes text difficult both to read and to understand, as they require readers to search out and piece together the two sets of provisions before they can be sure of the total effect of the provisions.

- Superfluous words

  Readers can be held back by text that uses more words than are strictly needed.

- Archaic expressions

  Similarly, users are distracted by old-fashioned terms that are only used by lawyers when there are satisfactory alternatives in common use.

- Legalistic and pretentious expressions

  Although alternative words in common use may be available, lawyers' jargon (including Latin terms) obstructs communication. It unnecessarily separates legal documents from other writings in common use.

- Common words or expressions used in unexpected ways

  Readers may misunderstand a sentence that uses terms in general use in an unusual way (for example, an artificial definition for a common term; provisions that "deem" an expression to cover circumstances that it normally does not).

- Special concepts created solely for the ease of drafting

  An unfamiliar concept introduced to make the drafting easier (for example, because the matter is complex) may obscure the intent of the new rules. Readers have to work out what the concept entails before they can discover how it relates to the provisions in which it is used.

- Complex concepts or details are written out in detail

  It is said that a picture is worth a thousand words. Although pictures are seldom found in legislation, maps are used in legislation dealing with land and diagrams are used in technical legislation to express technical concepts. In addition, numerical information is often better presented in the form of a table.

- Difficult to understand the overall structure of lengthy pieces of legislation

  A long, complex piece of legislation may be well organised, but without navigation aids such as tables of contents, notes and explanatory material, the reader must work much harder to understand and use it.

If we are to develop a good legislative style, we must adopt practices that answer these criticisms.

f) <u>What is the aim of the plain language style?</u>

The essential aim of plain language (also known as *clear* language) is to simplify writing by removing unnecessary obscurity and complexity, and generally to make texts as easy as possible to understand, even those that deal with complicated matters. Plain language drafting of legislative texts is not concerned with producing "simple" provisions (ones that overlook the

complexity of the issues with which they deal). It is concerned with composing provisions, especially those concerned with complex ideas, in ways that enable users to understand them.

In many respects, plain language is a re-assertion of standards that were advocated and practised by the pioneers of common law drafting (see LGST 551, Module 1, Section 3 - *Why do we draft as we do in parliamentary systems?*). Those who are committed to its objectives are determined to retain the features of drafting that contribute to certainty, but to eliminate unnecessary practices that get in the way of easy communication.

2. DEVELOPING GOOD LEGISLATIVE STYLE.

In this subsection, we look at the main ways in which you can improve your drafting in order to achieve the *Seven Cs of Legislative Drafting* discussed in LGST 551, Module 1, Section 3 (*Why do we draft as we do in parliamentary systems?*). These ways are set out under the objective that they principally serve (though many contribute to more than one objective).

But practices already explored in your work on syntax will not be re-examined and others are merely noted in this section, as they are dealt with more fully elsewhere in the Study Text.

The following table outlines how this Subsection discusses how to develop a good legislative style:

Improve compliance through communication	• create a logical structure and sequencing of provisions
	• provide finding aids
	• use a clear layout and format
Improve clarity	• write directly
	• avoid complex and elaborate expressions
	• avoid long sentences, especially if *paragraphing* is not used
	• limit the front-loading of sentences
	• avoid nominalisation
	• avoid embedding

Make legislation more readable	• provide overviews
	• follow standard writing practices: o use the present tense and the active voice o avoid provisos and artificial concepts
	• use standard language: o avoid archaic words o avoid foreign words o avoid legalistic language
	• use formulae, diagrams, etc.
Make legislation more concise	• avoid unnecessary detail
	• omit superfluous words
	• avoid unnecessary reinforcement
Make legislation more complete	• use broad terms with care
Make legislation more consistent	• ensure that a term carries the same meaning throughout
	• provide definitions for key concepts
Make legislation more certain	• use precise words, exactly suited to the case
	• avoid over-vague expressions
	• avoid ambiguity

a) How can we improve communication?

Compliance cannot be achieved without communication, which is made easier if the readers can understand the overall structure of the text, can find their way around it quickly and are not put off by the way it is set out on the page. You can improve communication with **a logical structure, finding aids** and **a clear lay-out and format**.

Create a logical overall structure

A logical structure for legislation is one that:

- groups related provisions together;
- arranges them in an order that makes sense to the reader, by making it easy to find, understand and refer to different aspects of the subject matter.

Related provisions are those that deal with a common subject matter or contain concepts that inter-connect. The user expects to be able to find the requirements on any major feature of the legislative scheme without having to skip around the statute. In the mind of readers sequence implies connection, as suggested by Professor Crabbe, *Legislative Drafting* (1993, Cavendish Publishing, London) at 45.

An order makes sense when it follows a pattern that is familiar or if it has some obviously rational basis. The following are guidelines for settling the sequence of provisions:

- primary (or basic) provisions come before those subsidiary provisions that develop or expand or depend upon them;
- in particular, general propositions come before a statement of exceptions to them;
- provisions of universal or general application come before those that deal only with specific or particular cases;
- provisions that create bodies come before those that govern their activities and the performance of their functions;
- provisions that confer rights, duties, powers or privileges ("rules of substance") come before those that state how things are to be done ("rules of administration or procedure");
- provisions that will be frequently referred to come before those that will not be in regular use;
- permanent provisions come before those that will be in force or have application for only a limited time (for example, during a transitional period);
- provisions affecting a series of related events or actions follow the chronological order in which those events or actions will occur.

These ideas are applied in Module 1, Section 2 (*How should we organise a legislative text?*) and LGST 555 (*Drafting Preliminary, Amending, and Final Provisions*).

Provide finding aids

Typically, legislation is short on editorial devices that make it easier for the reader to travel around the text or to pin down some feature of it that is of immediate interest. In long or complicated legislation particularly, the following aids are valuable:

- explanatory note or memorandum,
- table of contents (or "Arrangement of Sections"),
- headings and section (side / shoulder / marginal) notes,
- reader's guide (see the *Social Security Act 1991*, No. 46 - Commonwealth of Australia),
- road-map clauses, which give directions as to where or how the main provisions of an Act, or a Part in an Act, are placed and arranged (see the *Radiocommunications Act* 1992, No.174 - Commonwealth of Australia).

Here house-styles and local practice determine whether and when to employ these aids. We will see how these ideas can be applied in Module 1, Section 1 (*How should we structure a legislative text?*) and LGST

555 Module 1, Section 1 (*What are preliminary and final provisions and what other explanatory material may be included?*).

Use a clear layout and format

Good layout can make legislation much easier to work with when printed or on a screen. The size and kind of the font, the range of fonts used, spacing between words and lines ("white space"), indents at beginning of lines, and the use of italics or bold type to draw attention, significantly increase the ease with which we can read text.

Activity 3

Compare the layout of *Deer Export Charge Act 1992*, No.31 - Commonwealth of Australia with an Act recently passed in your jurisdiction. This Act has many features that make it easy to read. Note down any that are different from those adopted in relation to your legislation.

Responsibility for these design features and for improving finding aids usually rests with the Drafting Office and the Government Printer. In many countries, changes are difficult to make for financial and other reasons. Yet progressive Drafting Offices are always considering ways to improve local practice within the resources available.

But:

- you must work with the layout and formatting that are current in your jurisdiction;
- keep a note of ideas for improvement of layout as they occur to you, and take the opportunity to draw attention to these when an occasion arises.

One of the greatest obstacles to readability is a lengthy slab of unbroken text. There are ways you can introduce more "white space" by breaking the text up into much smaller units. The following will help create more white space:

- shorter sentences,
- more subsections,
- paragraphing.

b) How can we improve clarity?

To be clear a text must convey precisely what the writer intends without undue effort on the part of the reader. Unnecessary difficulties are created by legislation that uses complicated forms of expression or needlessly elaborate words, or tries to do too much in too short a space. You can improve clarity by:

- writing directly,
- avoid unnecessary or double negatives,
- avoiding complex and elaborate expressions,
- avoiding long sentences,
- limit the front-loading of sentences,
- avoiding nominalisation,
- avoiding embedding.

Writing directly

Legislative counsel are often accused of using roundabout ways of creating rules. Instead of coming directly to the point, the provisions work around the requirements, using more words than are strictly necessary to achieve the objectives. This approach is equivalent to entering a house by going by the side of the house, via the garden gate and through the back door, rather than straight into the front door. Writing directly can lead to economy in the number of words used and a less complicated structure (See the discussion below under the heading *How can we make legislation more concise?*).

Example 1

Were it not for the section note, the objectives of the following section would be difficult to discover without close reading.

Search of persons

> **50.** If any customs officer is informed or has reason to suppose that any person on an aircraft or ship, or any person who has landed from an aircraft or ship, or any person whom the officer may suspect has received any goods from such person, is carrying or has any uncustomed or prohibited goods about his person, such officer may search such person; and if such person on being questioned by any customs officer as to whether he has any goods obtained outside Utopia upon his person, or in his possession, or in his baggage, refuses to answer or denies having the same, and any such goods are discovered to be or to have been upon his person or in his possession, or in his baggage, such goods shall be forfeited.

The precise extent of the powers conferred and the circumstances in which they may be used (though simple enough) are evident only after study. They are lost in a thicket of words, which have been poorly organised. More direct drafting would have revealed a number of substantive defects in the powers conferred by the section.

Accordingly, ask yourself:

- have you adopted the most immediate way to achieve the aims of the provision?
- are any expressions superfluous or replaceable by more straight-forward ones?
- can the provision be better structured to highlight the central elements?

Negatives

You should avoid **unnecessary negatives**. They can cause confusion. Readers are more comfortable with statements made in positive terms. Legislative counsel commonly use the device of “not . . . . unless”, not to prohibit behaviour but to state an essential pre-condition of behaviour. That can often be stated just as well by authorising the behaviour “only if” the condition is met.

Example 2

This section *does not apply* to a company registered outside Utopia *unless* it carries on business in Utopia from a place of business in Utopia.

This section *applies* to a company registered outside Utopia *only if* it carries on business in Utopia from a place of business in Utopia.

But:

- use the usual prohibition when the forbidden behaviour is to be the basis of a criminal offence;
- take care to use "only if" when the aim of the sentence is to lay down an essential pre-condition.

Bear in mind sometimes that a negative sense can be conveyed by choosing words that carry a negative connotation rather than by negativing the verb. In particular, some adjectives and adverbs may take on a negative form by the addition of the prefix "un" or "in", and some verbs imply inaction or omission that is equivalent to negativing a verb describing positive action.

Example 3

Hearsay evidence is not admissible [*inadmissible*] in a criminal proceeding.

A person who does not [*fails to*] register under this section commits an offence.

More serious difficulties may be experienced with double and triple negatives. Readers are frequently confused about what precisely is expected.

Activity 4

How quickly can you determine from the following two sections whether evidence as to family history in a previous statement can be adduced by the defence in a criminal proceeding?

> **17. (1)** Subject to this Act, in a proceeding, evidence of a previous statement is *not admissible* to prove the truth of the statement.
>
> 1. **(2)** Subsection (1) *does not prevent the admission* of the evidence tendered to establish, *not* the truth of a previous statement, but the fact that it was made.
>
> **28. (1)** Section 17(1) *does not apply* in relation to evidence of:
>
> - (a) the existence, nature or extent of a public or general right;
> - (b) family history or a family relationship; or
> - (c) reputation that a man and a woman cohabiting at a particular time were married to each other at that time.
>
> **(2)** In a criminal proceeding, subsection (1) *does not apply* in relation to evidence adduced by the prosecution.

Unfortunately, legislative counsel have to use negatives in cases such as those just illustrated. They are needed to negative the effect of particular rules in particular cases; a provision stated in entirely positive terms may require a great deal of repetition and could go far further than is intended.

Example 4

More positive versions of the sections in **Activity 4** would have to be on the following lines:

> **17.** Subject to this Act, in a proceeding, evidence of a previous statement is *inadmissible* to prove the truth of the statement, but is *admissible* to prove the fact that the statement was made.
>
> **28. (1)** Despite section 17, in a proceeding, evidence of a previous statement *is admissible* to prove the truth of the statement, if it relates to:
>
> - (a) the existence, nature or extent of a public or general right;
> - (b) family history or a family relationship; or
> - (c) reputation that a man and a woman cohabiting at a particular time were married to each other at that time.
>
> **(2)** In a criminal proceeding, subsection (1) *does not apply* in relation to evidence adduced by the prosecution.

But two negatives do not always produce the right legal positive. A rule that requires persons *not* to behave in particular ways when they are subject to a *negative condition* is not the same as a rule that requires people *to* behave in those ways if they are *positively* subject to a condition.

Example 5

A person must not practise as a lawyer if he or she *has not been admitted* as a barrister or a solicitor in Utopia.

A person must practise as a lawyer *if he or she has been admitted* as a barrister or a solicitor in Utopia.

The statements in this example do not mean the same. A positive version of the first sentence (but one that loses the feature of prohibition) would have to read:

A person *is entitled to practise* as a lawyer *if he or she has been admitted* as a barrister or a solicitor in Utopia.

That said, wherever possible:

- prefer the positive to the negative.
- avoid double and triple negatives.

Complex and elaborate expressions

English has a vast vocabulary. It is often possible to find a word that exactly meets the case better than any other word, even though it may not be one that is in everyday use. When a word is precisely right, use it.

Many words, or expressions, are synonyms of each other (they mean the same). Legislative counsel have been inclined to select those that are more formal sounding (which are usually longer), perhaps to give a more authoritative feel to the text. This can take several forms:

- a noun and verb is used instead of a simple verb
- a complicated, or wordy, verb-form is used instead of a simple one
- a descriptive verb is used instead of an action verb
- a long noun is used instead of a simple noun or even an adjective.

As a result, provisions are less direct than they need be.

Example 6

Prefer a simple verb

“begins”, rather than “commences”

“cannot be”, rather than “is incapable of being”

“send”, rather than “despatch” or “forward”

“wishes to”, rather than “is desirous of”

Prefer an action verb

“binds”, rather than “is binding on”

“if [he] does not appear”, rather than “in default of appearance”

Prefer a simple noun or adjective

“end”, rather than “expiration”

“[is] complete”, rather “[has reached] completion”

Another shortcoming, nominalisation (using a verb as an abstract noun instead of a simple verb) is considered later.

In summary:

- use short words in preference to long ones;
- use familiar word forms in preference to those not commonly used;
- use simple verbs and nouns in preference to longer or pretentious sounding ones;
- use action verbs in preference to descriptive statements (which usually require some form of “is”).

Activity 5

In Appendix 1 to this Module you will find a list of simple words and expressions that can be used instead of more elaborate ones in traditional use.

Long sentences

Sentences become complicated if the legislative counsel crams too much information into it. A particular case is the single sentence that states not only what must be done and how, but also when the provision applies, and the exceptions to it. The provisions are so tightly inter-twined that particular aspects cannot be altered without breaking the entire structure.

You can reduce complication in the following ways:

- limit each sentence to one thought;
- if the procedural features of a rule, or the context in which it is operate, or the exceptions to it, are detailed or themselves complex, treat each in separate sentences in the same section;
- highlight the sentence components by *paragraphing*.

How to structure and link sentences is looked at in more detail in Module 1, Section 2 (*How should we organise a legislative text?*).

Long sentences present problems for the user, especially if the text is densely packed. Such sentences make it difficult to discover the grammatical structure (and in particular the principal predicate) and to obtain a quick overview of the matters dealt with there. Introducing white space makes the provision appear less uninviting. This may be achieved in a number of ways:

- dividing separate aspects of a legal proposition into separate sentences set as distinct subsections;
- keeping individual sentences as short as the subject matter permits;
- separating elements of longer sentences by *paragraphing* them.

These features too are examined fully in Module 1, Section 2 (*How should we organise a legislative text?*).

Front-loaded sentences

The idea of "front-loading" was introduced when predicate modifiers was discussed in LGST 551, Module 2, Section 3 (*How do we put together the components of legislative sentences)*. Complex sentences (those that contain both a main clause and one or more subordinate clauses) are easier to understand when the main clause comes *before* the modifying clause. The same is true for a string of adjectives or lengthy clauses or phrases containing a detailed modifier.

Example 7

Where, in any civil proceedings by or against the Crown or in any proceedings in any court in connection with any arbitration to which the Crown is party, any order (including an order for costs) is made by any court in favour of any person against the Crown, the proper officer of the court must issue, at the request of the person, a certificate containing particulars of the order.

The text in Example 7 front-loads in two respects: first, by placing the context clause before the main noun and predicate and secondly, in that clause by placing a prepositional phrase *before* the noun and predicate to which it relates. This requires the information to be carried forward before the nature of that relationship can be discovered.

This can be redrafted without any front-loading:

The proper officer of the court must issue, at the request of a person, a certificate containing particulars of an order (including an order for costs) made by the court in favour of the person against the Crown in civil proceedings by or against the Crown or in proceedings in connection with an arbitration to which the Crown is party.

Front-loading requires us to hold information in our memory as we move forward in the sentence to find out the later components to which it is linked. This may be an additional obstacle to prompt understanding if the subject-matter itself is complicated or unfamiliar to the typical reader. For that reason, legislative counsel try to limit the use of front-loading, by moving modifying features to later in the sentence, often as its final provisions. It is worth remembering then that rear-loading contribute to clarity, and may sometimes simplify the draft.

Example 8

During the taking in any application under this Act of any evidence which in the opinion, of the magistrate, is of an intimate or indecent character, the magistrate may, if he thinks it necessary in the interests of the administration of justice or of public decency, direct that all persons, not being members or officers of the court or parties to the case, or their solicitors and counsel or other persons directly concerned in the case, be excluded from the court during the taking of the evidence.

In addition to front-loading, this sentence breaks up natural phrases by other interpolated phrases (sometimes called “embedding” and discussed below). A much more understandable draft reads as follows:

A magistrate hearing an application under this Act may direct that all persons be excluded from the court who are not members or officers of the court or parties to the case, or their solicitors and counsel, or directly concerned in the case, during the taking of any evidence that, in the opinion, of the magistrate, is of an intimate or indecent character, if he or she thinks it necessary in the interests of the administration of justice or of public decency.

However, it can be helpful to begin a sentence with a context clause or a modifying phrase, for example,

- to accommodate other modifications later in the sentence;
- to highlight or contrast the context in which the provision is to take effect;
- to make an effective link with a preceding provision.

Example 9

Ease of expression:

> **(3)** *Immediately after receiving the certificate*, the Registrar must register the name by which the child was baptized without any erasure of the original entry.

Highlighting a case:

> **9.** *In the case of an illegitimate person whose birth has been duly registered,* the Registrar may authorise the re-registration of the birth at the joint request of the mother and the person acknowledging himself to be the father.

Linking:

> **16.-(1)** The occupier of a dwelling in which a child is born must report the birth to the Registrar within 28 days after the birth, in default of notice by a parent under section 8.
>
> .....
>
> **(5)** *If the birth occurs on board a vessel in a port or harbour in Utopia or on the waters of Utopia,* the master of the vessel is under the same duty to report the birth, and is liable to the same penalties, as the occupier of a dwelling.

Nominalisation

Nominalisation is the practice of using a phrase containing an abstract noun instead of a simple verb, for example, "make an application" *rather than* "apply". It is an over-used feature of bureaucratic writing, and very tempting.

Consider the following sentence:

Although it may give a more formal and authoritative sound to sentences, it is often causes a loss of directness and obstructs ease of understanding.

This can be restated more clearly as:

Although it may make sentences sound more formal and authoritative, they are often less direct and easy to understand.

Example 10

The following are typical examples of nominalisation and ways to avoid it:

enter into an agreement [to do]:	agree [to do]
bring [institute] an appeal:	appeal
make a claim:	claim
reach a conclusion:	conclude
give consideration to:	consider

cause a disturbance:	disturb
give notice:	notify
make provision for:	provide for
is in possession of:	possess
make a recommendation:	recommend

But sometimes we need to nominalise, for example because the noun itself is to have legal significance elsewhere or because in later provisions we need to refer back in precise terms to the same action.

Example 11

> **8. (1)** The mother or father of a child must *give notice* to the Registrar of Births of the birth of the child within 28 days after the birth.
>
> **(2)** *The notice* must contain the following particulars.....
>
> **11.** If no *notice is given* under section 8 within 28 days after the birth of a child, the Registrar of Births may register the birth at the instance of a person present at the birth who *makes a sworn declaration* of the particulars required to be known concerning that birth.

Embedding

Embedding is the practice of inserting clauses or phrases between parts of speech that are typically linked closely. It conflicts with expectations about sentence structure that derive from standard patterns of expression

Example 12

> **14.** The Registrar *may*, at any time after the expiration of 12 months from the date of the birth of a child, at the instance of a person present at the birth or a person interested on behalf of the child, who makes a statutory declaration, to the best of his knowledge and belief, of the particulars required to be known concerning the birth, *register the birth* of the child according to the particulars of the declaration.

Phrases are embedded between the verb and its auxiliary and between a noun and its modifying prepositional phrase.

Embedding may occur when clauses or phrases are inserted between, for example,

- the subject noun and the verb
- the verb and its auxiliary
- the verb and its object
- a noun and a prepositional phrase that modifies it
- a clause and its adverbial modifier.

Embedding makes sentences more difficult to read. Standard patterns of expression are to be preferred.

Example 13

> **(3)** The Registrar upon receipt of the certificate must, without any erasure of the original entry, register forthwith the name by which the child was baptized.

This re-draft follows standard patterns more closely:

> **(3)** Immediately after receiving the certificate, the Registrar must register the name by which the child was baptized without any erasure of the original entry.

However, embedding may be unavoidable in tightly structured sentences that contain a series of modifying words or phrases. It can also help to prevent ambiguity, that is, by linking a modifier next to the expression it modifies.

Example 14

> **(2)** The Registrar must require the officiating minister of religion to transmit a copy of the notice to the Registration Office, *as soon as practicable*.

The uncertainty as to which of the verbs the adverbial phrase modifies can be resolved with certainty by embedding the phrase.

> **(2)** The Registrar must, *as soon as practicable*, require the officiating minister of religion to transmit a copy of the notice to the Registration Office.

> **(2)** The Registrar must require the officiating minister of religion to transmit, *as soon as practicable*, a copy of the notice to the Registration Office.

c) <u>How can we make legislation more readable?</u>

Readers find text easier to understand if they have a general idea of what the text will be about before they start reading. They are also helped if the text is written without using unusual forms or language. So make your drafts more readable by:

- providing overviews,
- following standard writing practices,
- using standard language,
- using formulas, diagrams and similar modes of communicating information.

Overviews

It is easier for readers to understand the relationship between provisions and the detailed requirements of a series of rules if they have a mental framework for what they are about to read. As one legislative counsel has put it, reading legislation without an overview, “it is like doing a jigsaw puzzle when you don’t have the picture on the box”. You can help create a picture through purpose clauses, content guides, headings and section notes.

- Purpose clauses

  Legislation does not typically state its aims or the principles underlying its provisions. But they will have been well understood by legislative counsel, whose task is to give effect to them by a comprehensive set of provisions. Some indication of the reasons for the new legislation and the nature of the changes may be sometimes derived from a preamble or long title, but the provisions of the legislation give little explicit guidance in this respect to those responsible for its implementation. This may lead to unnecessary controversy, and problems of interpretation, about what particular provisions are intended to do.

An purpose (or objects) clause states the purposes that the legislation Bill is designed to achieve. These clauses can also provide a particularly valuable introduction to a part of a legislative text, by setting out quite specifically the aims of the provisions in that part. They can also be used for a single complex section, for example, stating the purposes for which a discretion in the section can be exercised. They may be called in aid if a problem of interpretation arises. We look at them more fully in LGST 555 Module 1, Section 5 (*When and how do we draft purpose clauses?*).

Activity 6

Look once more at the *Radiocommunications Act 1992*, No.174 - Commonwealth of Australia, in particular s.155 (*Object of Part 4.1*).

- Content guides

  Readers can be helped finding their way around legislation by providing a table that gathers together the section notes and headings at the start of the instrument. This gives an immediate picture of its organisation and general indications as to its content and coverage. Many jurisdictions confine this practice to sizable legislation; though it can be useful even in short instruments.

  We see how these contents guides (or "road-maps") can be used in LGST 555, Module 1, Section 1 (*What are preliminary and final provisions and what other explanatory material may be included?*).

Activity 7

Look again at the *Radiocommunications Act 1992*, No.174 - Commonwealth of Australia, in particular s.45 (*Outline of Chapter 3*), s.154 (*Outline to Chapter 4*) and s.156 (*Outline of Part 4.1*). These sections help users understand the structure and aims of a group of very technical sections.

- Headings and section notes

  Short indicators of the subject matter in a text can give the gist of the topic about to be examined. When carefully devised, they supply help in understanding what is about to be covered in a section or a group of sections. These include:

  - **headings** giving guidance as to the contents of Parts or other divisions;
  - **section (side / shoulder / marginal) notes** describing the gist of individual sections or subsections to which they are attached.

We see how these can best be used in Module 1, Section 2 (*How should we organise a legislative text?*).

Standard writing practices

Readers find text easier to manage if they meet familiar ways of presenting information. We have already seen the value in following:

- standard conventions on syntax and grammar;
- the house-style on the way particular types of sentence should be drafted.

Here are some additional suggestions.

- Use the present tense and the active voice

  We have already seen the advantages of expressing verbs to indicate that the provisions are always speaking. This accords with the reader's expectation and is in line with much of modern communication, both oral and written.

  Similarly, the benefits of drafting in the active voice contribute to understanding. Not only does this identify the actor before the action, so that we see quickly to whom the provision is directed, but it reminds the legislative counsel of the importance of identifying in the text the person who is to perform the action.

  Review these considerations, if necessary, from LGST 551, Module 2, Section 3.

- Avoid provisos

  Provisos have been much used in the past for two purposes:

  - to create a particular exception or qualification to a general proposition, to which it is attached:
  - to expand, or elaborate upon, the general proposition to which it is attached

Example 15

exception

1. **5.** A person must keep only in a warehouse or licensed building:
   - (a) dangerous petroleum in a quantity exceeding 100 litres;
   - (b) ordinary petroleum in a quantity exceeding 250 litres:

Provided that the Inspector may authorise a fit and proper person in writing to keep ordinary petroleum in a quantity that does not exceed 2500 litres in a store, shop or other building approved by the inspector.

expansion

1. **12.** A licensee who contravenes a condition of a licence issued under this Act commits an offence and is liable to a fine of $5000, and may have the licence forfeited:

Provided that in proceedings under this section, the quantity contained in a licensed machine is to be excluded from the computation of the quantity of petroleum that the licensee is authorised to have and use upon his or her premises.

As discussed in Module 1, Section 2 (*How should we structure a legislative text?*), provisos have long been a source of confusion and unnecessary. The same results can be achieved by using conventional forms.

Example 16

> **5. (1)** A person must keep only in a warehouse or licensed building:
>
> - (a) dangerous petroleum in a quantity exceeding 100 litres;
> - (b) ordinary petroleum in a quantity exceeding 250 litres.
>
> **(2)** *Despite subsection (1)*, the Inspector may authorise a fit and proper person in writing to keep ordinary petroleum in a quantity that does not exceed 2500 litres in a store, shop or other building approved by the inspector.
>
> **12.** (1) A licensee who contravenes a condition of a licence issued under this Act commits an offence and is liable to a fine of $5000, and may have the licence forfeited.
>
> **(2)** In any proceedings under this section, the quantity contained in a licensed machine is to be excluded from the computation of the quantity of petroleum that the licensee is authorised to have and use upon his or her premises.

- Avoid artificial concepts

  Legislative counsel sometimes devise concepts (for example, in the form of a definition) with the objective of shortening or simplifying the text. It allows an expression to be used throughout the legislation to refer to an (often important) element of the legislative scheme. But if the definition takes an artificial form, this device may operate at the expense of understanding. The reader has to discover and then remember a meaning that the legislative counsel has given to the idea that may not be conveyed by the expression used. A particular practice is to add the word "relevant" to a common word and then assign a special meaning to the phrase.

Example 17

> **(1)** The Minister may provide, by regulations, for participation in *a relevant scheme*, on such terms as the Minister thinks fit, of persons who are either:
>
> - (a) employees of the Board or of a joint subsidiary; or
> - (b) members of the Board or directors of a joint subsidiary.
>
> **(2)** In subsection (1), "a relevant scheme" means a pension scheme maintained under section 24 of the Civil Aviation Act 1967.

Note: the italicised phrase can be replaced either by "a pension scheme maintained under section 24 of the Civil Aviation Act 1967" or by "a pension scheme" (which then becomes the term that is defined). We look at definitions in LGST 555, Module 1, Section 4 (*How do we draft interpretation provisions?*).

Standard language

Lawyers generally have the reputation of unnecessarily using words that are not in common use, in particular, archaic words, Latin or other foreign expressions and legalisms. If your legislative text is to be intelligible to as wide a group as possible, wherever practicable, choose words in general use.

- Avoid archaic words

  Legal documents still contain too many expressions that date back to earlier times. They are particularly common as linking words. Modern writing has equivalents that are in common use or treats them as superfluous. Here are examples of archaic words used to make links with other parts of a statute that can readily be replaced by more up-to-date expressions.

Archaic	***Modern***
Aforesaid	the, that
afore-mentioned, above-mentioned	mentioned in [*specify where*]
herein, hereunder, hereinafter, hereinbefore	in, by, under [*this Act*], in [*specify where*]
Hereby	*omit*
Notwithstanding	despite
preceding/succeeding [*section*]	*specify* [*the section*]
pursuant to, in pursuance of, by virtue of	under
with reference to	about
the said	the
the same	that
save	except
therein, thereunder, thereof, thereat	in it, under it, of it, there
whatsoever	*omit*
whenever, wheresoever, whosoever	when, where, who
whereas	as, since
apparel	clothes

[is] desirous	wishes
forbear	refrain
forthwith	at once, as soon as practicable
the like [*sum*]	the same [*sum*]
monies	money
otherwise than	except
situate	situated
suffer [*a personto*]	permit, allow [*a person to*]
utilise	use

Its time to practice what you have learned. ……

Avoid Latin and other foreign expressions

Lawyers are inclined to use Latin expressions, even when there are satisfactory English alternatives. This gives the unfortunate impression that the text is intended only for lawyers.

Even so, certain technical terms in Latin (mainly as names of writs) have been accepted into standard legal use. They include *caveat*, *certiorari*, *fieri facias*, *habeas corpus*, *in rem*, *in personam*, *mandamus*, *prima facie*, *subpoena*. These are terms of art that describe things created by the legal system. Legislation reforming the legal system often replaces them with English terms, but until that happens, legislation must generally continue to use them.

If a Latin phrase is not a term of art for a legal concept, the trend is to use English language alternatives. Those that have been used in the past in legislation include the following.

Latin	***English***
ab initio	from the start
ad valorem	according/in proportion to value
bona fide	in good faith, genuine
de novo	anew, again
ejusdem generis	of the same kind/class
inter alia	among other things/matters
gratis/ex gratia	free, without payment

mutatis mutandis	with the necessary modifications/ changes
pari passu	with equal treatment
per annum	a year, each year, annually
proprio motu	on [*his* or *her*] own initiative
ex abundanti cautela	from an excess of caution, for removing doubt, being doubly cautious

- Avoid legalisms

  Lawyers are also prone to use expressions that are part of their jargon though not technical legal terms. The equivalent words in common use are intelligible to both lawyers and non-lawyers.

Legalism	***Standard***
action	civil proceeding
cesser	ending
chattel	goods, movable
demise	bequeath/transfer/rent (*whichever is the case*)
instrument	document (*unless this term is defined in the Interpretation Act*)
purchaser	buyer
seised of	possessing
vendor	seller

  "Deem" is used to create a legal fiction - to provide that the legislation is to be applied as if some fact were different from what it is in reality.

Example 18

For the purposes of this section, an unmarried woman *is deemed to be* a married woman if she has living with her a child of hers who is under the age of 5.

"Deem" has also been used for a variety of other purposes, including

- to change the meaning of terms, for example by "deeming" a word to mean something,

- to alter the application of legislative provisions, for example by providing that they apply in ways that they would not otherwise apply,
- to confer discretion, for example by authorizing a public official to do something that they "deem" necessary,
- to create a presumption, for example by providing that something is "deemed" to have happened.

"Deem" presents two sorts of drafting problems:

- it is a legal expression that does not have any clear meaning in ordinary discourse,
- its use often results in leaving important details of the legislation to be worked out by the reader and, if not used carefully, it can lead to undesired results.

"Deem" should be used only when it is necessary to create a legal fiction. It should not be used for definitions or application provisions or for the creation of presumptions or discretionary powers. But take care when creating a legal fiction. The effect is to apply legal rules to a case to which they would not otherwise apply. But what about those rules that ordinarily apply? Are these replaced or do both sets of rules apply?

Make clear in creating a legal fiction the extent to which the "deemed" rules replace those which ordinarily apply.

Example 19

A notice under this section *is to be treated* as unreasonably delayed if it is not sent within 14 days.

Is this the only type of "unreasonable delay" that can be considered? Or can other cases be put forward that otherwise fall within that term? Almost certainly the second is intended. A better draft reads:

A notice that is not sent under this section within 14 days is to be treated as unreasonably delayed.

A final word of warning: English has a number of words that sound very much the same, but have rather different meanings. A reader can be badly misled if you use an incorrect word. Some of the words that are commonly confused are set out in **Appendix 2**.

Activity 8

Quickly read through **Appendix 2**. Are there any words there, especially ones which you regularly use, which you tend to confuse?

Refer to this Appendix in the future if you have any doubts about a listed word.

Formulas, diagrams and other graphical aids

Readers find visual representations of certain kinds of information easier to understand than words of description. These kinds of aid are not common in legislation, perhaps because of limited facilities of the Government Printer in the past. But they can make complicated legislation much clearer. The following devices may be useful:

- Formulas to show how, for example, tax or benefit calculations are to be made.

Example 20

Section 1 contains a complicated rule by which a grant for farm land is to be calculated. Section 2 states the same rule as a formula.

> **1.(1)** The level of grant is to be calculated by determining sixty per cent of the average income of the applicant that is attributable to the use of the relevant land in the previous five tax years, less:
>
> - (a) the average of so much of the income tax attributable to the relevant land over that period; and
> - (b) the average cost of the seed and fertiliser used for the purpose of production on the relevant land over that period.
>
> **(2)** The income tax attributable to the relevant land is to be that proportion of the total income tax payable in respect of the farm as is equivalent to the proportion that the relevant land has to the total area of the land comprised in the farm.
>
> **1.** The level of grant is to be calculated in accordance with the following formula:

where:

"I"	= income attributable to the use of the relevant land over the previous 5 tax years;
"t"	= income tax assessed as payable in respect of the farm over the previous 5 tax years;
"rla"	= area of the relevant land;
"tla"	= total land area of the farm;
"cs"	= total cost of seed used for the purpose of production on the relevant land over the previous 5 tax years;
"cf"	= total cost of fertiliser used for the purpose of production on the relevant land over the previous 5 tax years.

- Diagrams to show how a legislative scheme is intended to work, for example in the form of flow charts;
- Maps to indicate boundaries (for example, for constituencies).

Activity 9

1. Examine how diagrams are used in the *Radiocommunications Act 1992*, No.174 - Commonwealth of Australia and how a map is used in *Royal Botanic Gardens Act 1991*, No.87 - Victoria, sections 2, 3 and 10 and Schedules 1-3.
2. By a quick look at your local statute book, find out whether either of these techniques are in current use in your jurisdiction.

These techniques are needed only for legislation dealing with complicated matters and long legislative text.

d) How can we make legislation more concise?

Long-winded provisions take two forms in legislation:

- compressing too many words into a single sentence;
- putting in a sentence words than are not needed.

Good style avoids long sentences, using instead linked short sentences, each dealing with distinct items of information. This is looked at in more detail in Module 2, Section 1 (*How should we structure a legislative text?*). Legislative counsel are tempted to use too many words for two reasons:

- the need to make absolutely sure that the intended meaning is not in doubt, and especially that particular cases are covered by the rule;
- a belief that more elaborately phrased expressions appear more authoritative.

Circumlocution, as this is sometimes termed, leads readers away from understanding. Good style in this respect requires that:

- you express yourself in a **direct way with the minimum words necessary**;
- when **one word will do**, you do not use more.

In particular, avoid:

- unnecessary detail
- superfluous words
- unnecessary reinforcement.

Unnecessary detail

Excessive detail was a common feature of 19th century legislation. Its influence is still seen in many collections of legislation.

Example 21

Any person who, by cruelly beating, ill-treating, over-driving, abusing, over-loading or torturing any animal, does any damage or injury to such animal or thereby causes any damage or injury to be done to any person or to any property shall, on conviction of such an offence, pay to the owner of such animal (if the offender is not the owner thereof) or to the person who sustains the damage or injury such sum of money by way of compensation, not exceeding the sum of fifty dollars, as is ascertained and determined by the magistrate by whom such person is convicted.

There are 3 main ways to reduce excessive detail:

- replace a string of words by a single expression that is then **defined** either in the interpretation section or in the section where it is used, if it is used only there (definitions are looked at in LGST 555, Module 1, Section 4 - *How do we draft interpretation provisions?*).

- if the sentence repeats matter contained in an earlier section, a **cross-reference** may allow you to use fewer words, as well as to link the two sets of provisions (referential provisions are looked at in Module 1, Section 1 - *How should we structure a legislative text?*).
- replace detailed provisions, particularly strings of words, by a single expression that uses general terms.

Example 22

This Act applies to premises where food for human consumption is sold to the public.

The general description of kinds of premises removes a need to itemise the many cases that are covered (from restaurants to supermarkets), similarly the description of the food. Yet both impose clearly understood limits.

Such broad "indeterminate" expressions as these catch the essence of the cases, instead of setting the cases out individually. It is easy to overlook particular cases or to fail to foresee new ones. This kind of expression prevents that. It puts the onus on users to decide whether their particular cases satisfy the description. If there is any dispute in a marginal case, the courts ultimately will decide. We look at other features of broad terms below.

But when using generalising expressions:

- make sure that the description is wide enough to cover all intended cases, but not too wide as to catch unintended ones.
- give clear guidance to users as to its coverage; if you use *too generalised* terms, you lose precision and make recourse to the courts a necessity.

Its time to practice what you have learned. ……

Superfluous words

Always keep looking to use the minimum number of words for the purpose. Superfluous words occur because the legislative counsel is following outdated practices or lack confidence in his or her language skills.

There are a number of ways to avoid superfluous words.

- Avoid unnecessary internal references

  References to other provisions in the same legislative text or the same legislative provision (for example, section or subsection) can be made without additional words stating that the reference is to the one *in the legislative text* or *in the same legislative provision.* The omission of such words may be authorised by the Interpretation Act, but authority is not legally necessary.

  Use expressions identifying an instrument (for example, an Act) or provision only when referring to *some other instrument* or *provision* than the one in which the expression is used (for example, "of section 12 of the Animals Act").

Example 23

Subsection (1) *of this section* has effect without prejudice to *the provisions of* section 12 of this Act.

This can be expressed much more succinctly as:

Subsection (1) *does not affect* section 12.

Activity 10

Note any provision in your local Interpretation Act that authorises the omission of expressions referring to the same instrument or legislative unit.

- Avoid duplicating words

  Lawyers have a habit of using phrases made up of two words that mean much the same. The explanation is found from English legal history. Early writings used both Latin/French and Anglo-Saxon; so expressions came to be used that contained equivalent words that had their roots in the two language sources. Today, one or the other is usually enough. Those in most common legislative use are:

aid and abet	null and void
fit and proper	terms and conditions
just and reasonable	null and of no effect.

  At the same time, give thought to whether twin terms differ in meaning. In that case, use the term that is more general in effect.

- Avoid false subjects

  A clause contains a false subject if it begins with such a phrase as “there is” or “there are”. Not only does this use unneeded words (because often the false subject must be followed by a relative clause), but it obscures the true subject of the clause.

Example 24

If *there is* a person *who* makes frivolous complaints, persistently and without reasonable grounds, about judicial officers, the Commission may declare the person to be a vexatious complainant.

The highlighted words can be omitted. However, a better draft reads:

The Commission may declare as person to be a vexatious complainant who makes frivolous complaints about judicial officers persistently and without reasonable grounds.

A number of expressions can be found in legislation with this shortcoming. You can omit or replace all by more direct terms.

It is declared that	*omit*
It is lawful/unlawful	*state the subject and use* "may"/"may not"
It shall be the duty of	*state the subject and use* "shall"/"must"

- Use numerals instead of words

  Older legislation used words rather than numerals to express numbers, presumably in the interests of certainty. In fact, numerals are more prominent and easier to register than words. They are also much shorter. Today most legislative counsel use them in the body of their sentences for the following purposes (as well as for section numbering):

  - units of measurement;
  - dates (for the day and the year) and times;
  - sums of money (including fines);
  - length of imprisonment;
  - ages;
  - percentages and mathematical formulae;
  - statistical data in tables and Schedules;
  - fractions or decimals (for example, "4¼"; "4.25").

On the other hand, numerals should not be used if they could be a source of confusion, as in the following cases:

- when the numerical reference is used as a modifier: for example, third party;
- for ordinal numbers (except in dates): for example, first, tenth;
- for the month in a date: for example, "1 January 1995" (*not* 1.1.1995)
- when the number begins a section or subsection: for example, (2) Two directors....;
- when two types of numbers come close together: for example, 100 two-heeled vehicles....;
- when fractions are used to describe proportions of for example, membership: for example, two-thirds of the members;
- when "one" is used not as a numerical quantity: for example, transfer from one to another.

Unnecessary reinforcement

Legislation cannot express emphasis in the same way as other writings. Some legislative counsel try to overcome this by using extra words to add a stress. We can mention two forms:

- Using a phrase when a word will do

  Lawyer's English is full of expressions that use a number of words to say something simple. In these cases, you can usually substitute a word for the expression without loss of effect.

Phrase	**Word**
act in contravention	contravene

at the particular time	then
by means of	by
by reason of [the fact that]	because
during such time as	while
if and when	if
in connection with	about / for
in relation to / in respect of	to / of / for
in the event of / that	if
notwithstanding anything to the contrary	despite
prior to	before
shall have / has the power	may
sufficient number of	enough

- Including words of emphasis

  Similarly, some legislative counsel add words to give emphasis. They are often superfluous, as the section should make clear the extent of the application without the need for emphasis. They may also cause a problem of interpretation as to their function.

  Here are some examples:

  - absolutely
  - fully
  - completely
  - never
  - excessively
  - utterly
  - extremely
  - very

The following should also be used with care:

already now: both express a point of time but is it calculated as at the time of enactment or the time of use or some other time? If you need to stress a particular time, it is usually better to indicate it specifically (for example, “at the date this Act comes into force”).

any all each every: Some legislative counsel use these systematically before a noun to reinforce its universal application. They can be used, but sparingly, to *emphasise* that universality. For almost all cases, a simple indefinite article (“a”) is enough.

Use “each” or “every” only if you have a good reason to point up that a rule applies to *all* members of a class.

Example 25

> **1.(1)** *Any* person who keeps *any* place for the purpose of fighting or baiting *any* animal (whether of a domestic or wild nature) commits an offence and is liable to a fine of $500 for *each* day that the person keeps the place for such a purpose.
>
> **(2)** *Every* person who receives money for the admission of *any* other person to *any* place kept for *any* of the purposes specified in subsection (1) is to be regarded as a person who keeps that place.

In subsection (1) “any” is not called for. A simple article produces the same effect in each case. In particular, in the third use, emphasis comes from the bracketed words. On the other hand, “each” does provide some needed stress.

In subsection (2), “every” is not required to show that all those meeting the description come within the rule. The first use of “any”, with “other” can be replaced by “another”.

The second use is superfluous; the third is necessary to singularise the case.

1. **2.** The owner must pay *all* reasonable expenses incurred by the Sheriff for *all* necessary food and water supplied to *any* animal impounded under this section; all such expenses are recoverable by summary proceedings.

There is no need to use “all” in any of these cases. No emphasis is required; “the” is enough. (“such” too is superfluous, and “any” can be replaced by “a”).

e) <u>How can we make legislation more complete?</u>

ompleteness is concerned with content rather more than style. Legislative counsel have an overriding duty to ensure that their drafts cover the ground and meet the policy objectives. You must pursue style considerations consistently with that duty. In striving, for example, for plain language, do not leave out any essential matter. Omitting superfluous words is one thing; trying to produce simplicity by over-generalising or by leaving out words that are legally important creates problems rather than solving them.

By merely stating what a person must *not* do in a certain situation you may not make clear exactly what that person is required *positively to do*. If you intend that a particular way of doing something must be followed, do not leave that to be implied. Completeness then may require you to use express provisions if different ones could be implied.

The use of broad terms may affect the completeness of the legislation. Legislative counsel regularly employ words or expressions that are variously termed “broad”, “vague”, “indeterminate”, “general”, “fuzzy” or “open-ended”. These terms do not cover exact cases or circumstances or state precise details; they require the user to read in details by reference to the purpose and the context in which the terms are used. They are often used when a provision has to cover a range of circumstances too numerous to be listed. The effect is to pass to those who apply the legislation the responsibility of deciding whether particular cases fall within the term. In using the term, the legislature leaves this aspect of its application to courts and administrators.

Example 26

The following are examples of broad terms:

- accident,
- cruelty,
- food for human consumption,
- immoral purposes,
- in the execution of his duty,
- in the vicinity [neighbourhood] of the National Assembly,
- second-hand goods,
- unnecessary noise.

You can use indeterminate terms *deliberately* to pass the task of applying the rule to circumstances to others, including, in the case of dispute, the courts. This technique is particularly useful for setting general standards for conduct that can be adapted by the users to a wide range of unpredictable circumstances when it is not possible to offer more precise requirements. The best known of these perhaps is "reasonable", which leaves it to the judges in the last analysis to decide whether the conduct in a particular case is acceptable for the purposes of the legislation. As Thornton points out (*Legislative Drafting*, 4th ed., at.69), this can result in "more humane laws and greater justice".

Example 27

Other broad terms used for this purpose include:

- as [the court] thinks fit/proper,
- as [the Board} believes appropriate/ expedient,
- as [the Minister] considers just/equitable,
- as soon as possible,
- fair,
- if the judge is satisfied,
- just/justified,
- sufficient,
- necessary,
- suitable.

But by choosing an expression of this kind, the onus is on the user to determine whether particular circumstances fit the statutory standard, with recourse to the courts if there is disagreement. As a consequence, use these terms only after deciding:

- that the users should be given that degree of discretion;
- whether to include limitations or specific statutory guidance as to the criteria that should be applied in exercising the discretion.

In any case, make sure that the statutory context in which the standard is to operate states clearly its function and the ambit and purpose of its application. Indeterminate terms are a valuable tool for legislative counsel since they preclude the need to provide unnecessary detail and allow legislation to be adapted to circumstances as they arise. However, they can introduce an element of undesirable vagueness. As we will see below in the discussion of how we can make legislation certain, this is a problem if precision is required.

Example 28

Thornton (*Legislative Drafting*, 4th ed., at 70) offers an example of an indeterminate term that gives insufficient guidance to the user as to how it is to be applied:

1. If a minor wishing to marry:
    - (a) has no parent or lawful guardian residing in Utopia who is capable of consenting to the marriage; or
    - (b) satisfies the Registrar that after diligent inquiry he or she cannot trace any such parent or guardian,

   the Registrar may give consent to the marriage writing *if on inquiry the marriage appears to the Registrar to be proper*, and that consent is as effectual as if the parent or guardian had consented.

The section gives no guidance, either expressly or from its context, as to the standard of propriety the Registrar must apply. Is the Registrar able to refuse on moral grounds? Is the Registrar to attempt to take the place of a parent who legally is able to refuse consent merely because he or she disapproves of the particular marriage? Or is the Registrar only to be concerned with whether the law on capacity to marry has been met?

f) <u>How can we make legislation more consistent?</u>

Consistency, like completeness, gives rise to problems of content more often that to issues of style. New legislation must fit with the existing body of law, so no substantive conflicts occur. This is a major consideration in the research and planning of legislation. However, good style calls for consistency in the wording and terminology.

In particular, this means:

- using the same expression to express the same meaning
- using definitions for key concepts

- Use the same expression to express the same meaning

  In many forms of writing, writers are encouraged to make elegant variations, i.e. to look for different words and different ways of expressing the same idea, in order to retain the interest of the reader. In drafting legislation, avoid this practice in the interests of consistency. Readers need to know when the same person, object or circumstance is intended.

As a matter of routine:

- use the same term or expression when it is necessary to convey the same meaning;
- use the same expression for the same concept;
- do not use the same expression for a *different concept*; use a *different expression*.

Example 29

In *Bell v Day* (1886) 2QLJ 180, a statute gave local authorities power to make bye-laws to "licence" certain activities and to "regulate" others. The court held that the latter term could not be interpreted to authorise licensing. The use of different expressions was aimed to produce different legal results.

Your freedom to choose terms or expressions may be limited by the use to which those may have been put in other laws. Although, strictly, terms used in one piece of legislation are treated as distinct from those used in other legislation, many have distinctive legal connotations ("terms of art"), in particular because they refer to legal concepts. Those terms are presumed to be used consistently from one legislative text to another.

When the context requires a term with a settled and distinctive legal meaning, choose that term. If the context might cause a term to be treated as a legal term when that is not appropriate, choose a different term.

Example 30

"sells or hires or offers for sale or hire",

In *Fisher v Bell* [1960] 3 All E R 731, this phrase, although used here in a criminal statute, was construed in the same way as in the law of contract. "Offer" does not include mere "invitations to treat", which are made when goods are put on display for sale. In consequence, legislative counsel are obliged to use additional terms:

"sells or hires or offers, exposes or displays for sale or hire".

- Use definitions for key concepts

  A definition establishes the meaning that must be applied whenever the defined expression is used in the instrument. In that way it guarantees consistency of usage. In particular, it can be used to reduce the possibility of ambiguity, as you can indicate the scope of the expression precisely. It is then a useful device for stipulating the content of key concepts that you used in your draft. It is particularly valuable for technical or specialist concepts. By choosing an appropriate term for the defined term, you can describe the concept in a shorthand manner, in the confident knowledge that its definition will provide the precision needed.

Example 31

1. **19.** In this Act, "wireless telegraphy" means the emitting or receiving, over paths that are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy of a frequency not exceeding 3 million megacycles a second, being energy that either:
    - (a) serves for conveying messages, sound or visual images (whether the messages, sound or visual images are actually received by any person or not), or for actuating or controlling machinery or apparatus; or
    - (b) is used in connection with the determination of position, bearing, or distance, or for gaining information as to the presence, absence, position or motion of any object or of any objects of any class.

This kind of definition is likely to be relied upon, and incorporated by reference, for the purposes of other legislation in which the concept is required.

As we will see (LGST 555, Module 1, Section 4 - *How do we draft interpretation provisions?*), definitions may also be used in other ways, for example to provide labels for lengthy expressions in order to avoid unnecessary repetition. Acronyms can be used in a similar way.

- Use acronyms

  Be ready to use an acronym (the initial capital letters of the words in an expression) instead of repeating the entire expression. Most readers are familiar with the practice. You can use it for in preference to:

  - the full expression when it is commonly referred to by an acronym; or
  - a formal expression in the particular draft that can be converted into an acronym.

  But always put the acronym in **capital letters** and **define** it.

Example 32

In this Act:

"CFCs" means chlorofluorocarbons";

"UEPA" means the Utopian Environmental Protection Agency.

g) How can we make legislation certain?

Although certainty may be an objective, legislation can never be made absolutely certain. Not only is it impossible to foresee and provide for all the circumstances that may arise in connection with the subject-matter of the legislation, but language itself is inherently imprecise and can give rise to legitimate difference of opinion as to the intended meaning. Most words have fuzzy edges: the central core of meaning is well understood but the limits are less exact. It is the task of legislative counsel to reduce or at least control these factors both by the choice of terms and the careful formulation of the context in which they are used.

Considerations of style must accommodate or give way to the search for as much certainty as can reasonably be looked for in the particular matter. Precision in the choice of words and their context to settle as clear-cut provisions as possible is an overriding factor.

In particular, strive to:

- use the **precise word or expression** required in the context;
- avoid **over-vague expressions**;
- avoid **ambiguity**.

Precise words or expressions

Precision in the choice of words or expressions must not be sacrificed. Your aim remains that of regulating as exactly as possible the particular matter in hand. This calls for a careful and considered choice that covers the foreseeable circumstances that fall within the ambit of the provision. So make sure that the words and expressions you use:

- are not narrower or wider in effect than the provision requires;
- do not introduce imprecision or ambiguity as to their meaning or application in the context in which they are used.

Words do not have an independent existence; they acquire their meaning from the context in which they are used. It is not enough to find a suitable term. In choosing the most appropriate word or expression from the wide range available, be prepared to consider whether alternative terms might work better when used in a particular sentence.

The exact term may be dictated by the subject matter of the legislation. In dealing with **technical matters** (including technical legal topics), use the terms that are appropriate to the subject, even if those are specialist and not in common use.

- Technical terms

  Specialist legislation needs the correct specialist terminology. Except when dealing with legal matters, for this you generally have to rely upon your instructions and advice from those with technical knowledge. You should not attempt to find alternatives in more common use, as this will not convey the precision intended.

  Technical terms are needed not only in scientific or technological legislation (for example, radio-communications and the measurement of radioactivity or water quality); they may also be required for most specialist fields which have developed their own terminology (for example, banking, insurance, as well as the law).

  In these cases:

  - do not use a term that is capable of carrying technical connotations in the legislation if that is not your intention;
  - make sure (by definitions, for example) that it is obvious to the reader that a particular word is used in a technical manner.
- Legal terms

  Certain broad terms are typically found in connection with legal concepts. Some are notoriously troublesome as they have come to be overlaid with judicial constructions that differ according to the subject matter in respect of which they are used. They have shifting elements as a result of legal decisions as to their meaning in different contexts.

Example 33

Among the many broad legal terms are “fraud; “intentional”; “negligent”; “possession”; “public interest”; “public policy”; “recklessly”. If you use one of them,

- take care to find out whether it has been used in a similar context and whether the courts have consistently maintained a meaning that is appropriate for the present case.
- if not, look for a different term or make the intended meaning of the term clear by additional words.

Vagueness

We have seen that broad terms, carefully used, are a valuable device for legislative counsel. However, as we have seen, many terms have fuzzy edges. Used without care they can introduce an unwelcome element of imprecision (they are too vague). Although it may be convenient to use them in a legislative text, particularly because they are in common use, they may lack the precision the legislation requires unless qualified in a more precise way by the context or other surrounding words.

Activity 11

Consider the range of possible meanings that can be given to the following words:

"building"; "child"; "day"; "family"; "goods"; "mother"; "vehicle".

These words are commonly used in legislation. But as Bennion (*Statute Law* at 240) points out, they often have a solid core of meaning about which there is no doubt, but surrounding that core is an area of uncertainty.

Example 34

Bennion gives the example of "vehicle". That term obviously includes cars, buses, motor cycles, and lorries / trucks. But does it extend also to a horse-drawn cart, an army tank or a pedal bicycle? Even less certain, does it extend to trains, derelict cars or wheel-chairs used by the disabled? The precise coverage may differ from one piece of legislation to another, depending on its purpose.

Sound drafting requires you to use phrases whose uncertainty is as small as possible. Otherwise they may introduce too great a vagueness as to their application. This you can do, for example:

- by the process of modification
- through definitions
- by making clear the statutory context in which the expression is used.

This involves an exercise of judgment in selecting and satisfactorily modifying the term. Try to keep the detail to a minimum.

Bennion also points out that terms may not retain a constant meaning but may change its meaning with the passage of time or according to the different cases to which they apply.

Example 35

Expressions such as "consent" or "accident" are unlikely to change their essential meaning, although they apply to a great range of circumstances.

But terms such as “cruelty”, “disorderly house”, “fit for human habitation”, “moral”, are likely to change meaning as standards and values, or circumstances to which they are applied, change.

In using particular terms, make yourself aware of the way judges tend to interpret particular terms. But past judicial decisions on words with shifting meanings may not provide sound guidance as to the way in which they may be construed in future legislation. At the same time, deliberate use of terms of this kind may permit the courts and others who use the legislation to take account of changing circumstances.

In cases of this kind, if you need to avoid unwanted results consider whether to stipulate how you are using a term, for example, by a definition, rather than merely relying upon past interpretation of the term in a different statutory context. (Definitions are dealt with in detail in LGST 555, Module 1, Section 4 - *How do we draft interpretation provisions?*).

Some words are too open-ended for legislative use, since they involve sliding standards or require individual assessments, on which a wide variety of different, and legitimate, views are possible. These **relative terms** implicitly require comparisons to be made with variable circumstances or conditions. They often lack the degree of objective guidance that we look for in legislative provisions. If you use them, you introduce a vagueness that a court cannot cure since the terms are inherently imprecise.

Example 36

Relative terms include:		
average	high	regular
cold	hot	several
excessive	large	slow
fast	low	small
few	many	usual
frequent	noisy	

As a result, in choosing terms:

- make sure that you do not introduce unacceptable vagueness either in the words themselves or from the context in which they are used.
- consider whether reliance on the following interpretation practices provide the required element of certainty:
    - the expression is to be construed in the light of words used in association with them (“their colour may be derived from their context”; this is known as the “associated words” or *noscitur a sociis* interpretive assumption).
    - in an expression containing a series of specific words followed by a broad word, the broad word may be construed as restricted to matters of a similar character (this is known as the “limited class” or *ejusdem generis* interpretive assumption).

Example 37

***Associated words*:**

In the expression "riotous, violent or indecent behaviour in a church", the term "indecent" does not carry sexual overtones but refers to behaviour that creates a disturbance in a sacred place.

Limited class:

a police officer may arrest without a warrant a person whom the officer finds in possession of a firearm, knife, bludgeon or *other offensive weapon*.

The italicised phrase will be construed to cover only articles that have been made or adapted for causing injury. It does not extend to a piece of broken glass that is used in a fight.

We look at these interpretive assumptions in Module 4, Section 1 (*How do we work with interpretive approaches and rules?*).

Ambiguity

Words or expressions that are capable of two or more meanings introduce serious uncertainty. In considering syntax, we saw a number of ways in which sentence construction can produce ambiguity (*syntactic* ambiguity). It may also arise from a word itself (*semantic* ambiguity) or from the context in which a word is used (*contextual* ambiguity).

Example 38

No person shall damage plants in a public park.

The sentence in this example has ambiguities of all three kinds:

- **Syntactic ambiguity** arises from the ambiguously placed modifier "in the public park". Does it apply to the plants or to the act of damaging?
- **Semantic ambiguity** arises from "plant". Is this limited to items that have been put in the ground (for example, flowers) or does it apply to items that have grown there without human intervention (for example, trees)?
- **Contextual ambiguity** arises from "plants in a public park". Does this apply to items carried into the park or only to those growing there?

Check that you have not opened the way to more than one intended construction:

- by the term you select;
- in using the term in the context created by surrounding words;
- in the place it occupies in the syntax of the sentence.

3. <u>GENDER-NEUTRAL DRAFTING.</u>

   Interpretation legislation invariably includes provisions that say:

words importing the masculine gender include the female gender.

In reliance on this kind of provision, the long-standing practice is to draft using the masculine gender.

Example 39

The Minister may delegate, by notice signed by *him* or on *his* behalf, to another person the performance of any function vested in *him* by this Act.

A number of jurisdictions have adopted a policy of gender-neutral drafting. The principal drafting challenge comes from personal pronouns used in the singular. These are limited to "he", "she" and "it", (in the possessive, "his", "hers" and "its"). In ordinary usage, their use is determined by whether the pronoun or adjective refers to a male person, to a female person, or to a thing. But drafting is typically concerned with classes of persons that include males, females and artificial persons, who are referred to in the *singular*. Standard pronouns are inadequate to deal with all three categories simultaneously.

English has evolved or adopted many words that are intended to point up gender differences, for example, "actor" and "actress"; "author" and "authoress"; "waiter" and "waitress"; even "executor" and "executrix". Interestingly, the terms that relate to females only appear to be dying out, and a gender-neutral term is becoming standard usage.

a) How can we draft in gender-neutral terms?

terms unless the substance calls for the distinction to be made. The following are ways in which this can be achieved:

- use gender-neutral terms
- repeat the noun instead of using a pronoun
- use "he or she" (or "him or her", "his or hers")
- use plural, instead of singular, pronouns
- omit offending possessive pronouns
- use a passive form
- restructure the sentence.

- Use gender-neutral terms

Many terms that have a male connotation can be replaced by gender-neutral terms. The dictionary or a thesaurus usually offers a perfectly satisfactory alternative. Here are some examples:

Preferred term	***Replaced term***
fisher	fisherman
head/head-teacher	headmaster/headmistress
human beings, or humanity	mankind
husbands and wives	men and their wives
legislative counsel or drafter	draftsman

lessor	landlord
police officer	policeman
postal worker	postman
reasonable person	reasonable man
sailor	seaman
chairperson or chair	chairman
juror	juryman
athlete	sportsman

- Repeat nouns to avoid gender-specific pronouns

  Rather than use “he” to refer to a person of either sex, consider repeating the noun to which the pronoun referred.

- Use “he or she” to avoid gender-specific pronouns

Example 40

The Minister may delegate, by notice signed by, or on behalf of, *the Minister* [rather than *him*], to another person the performance of any functions vested in *the Minister* [rather than *him*] by this Act.

A tenant may renew a lease if *he or she* gives the lessor notice and if *he or she* is not in arrears of rent.

The repetition of a noun may make for a clearer expression of the rule. On the other hand, if references are needed in the same sentence, repetition of the noun can lead to a proposition that is both inelegant and difficult to read. A mix of repeated nouns and combined pronouns is usually the appropriate solution for lengthy cases.

- Use plural, instead of singular, pronouns

  Legislative sentences are typically written in the singular. Some jurisdictions, however, have begun to use plural pronouns (“they”, “their” “them”) to refer to singular indefinite persons (for example, “a person”), though not to specified or identified persons.

  Alternatively, a sentence can sometimes be written in the plural, for example, where the rule provides for a group of persons, all of whom are in the same position and are intended to receive the same treatment.

Example 41

1. **(2)** A person who purchases alcohol for *their* own use or consumption is exempt from the levy under subsection (1).

Directors are entitled to receive bonus shares proportionate to *their* shareholdings.

Trustees are entitled to receive remuneration in respect of the performance of *their* duties.

- Omit or replace possessives

  A reference back to a noun may be obvious even without a possessive “his” or “hers”. Alternatively (and perhaps better), consider substituting “the” for “his”. But make sure that this does not create ambiguity as to whether a link with the relevant noun has been achieved.

Example 42

1. The Registrar must enter in the register, in relation to every registered dentist:
   - (a) the date of [*his*] registration; and
   - (b) particulars of the qualifications in respect of which [*his*] registration was granted.

But this will not always work:

1. The inspector must send a copy of *his* or *her* report with *its* recommendations.

Omission of the first possessive would remove the required emphasis on the inspector’s responsibility, but an impersonal possessive in the second case does away with the need to repeat the double personal possessive.

- Use a passive form

  Repetition of a pronoun can sometimes be avoided by turning the sentence around so that the particular noun is no longer the subject of the sentence. But a passive form creates a risk that the person upon whom the right, duty or power is conferred may be left unidentified. Avoiding those risks remains your overriding consideration.

- Restructure the sentence

  A different sentence structure can usually be adopted if you have the objective of avoiding gender-specific language in mind when starting composing the sentence.

Example 43

1. When a lessor has prepared a statement of the grounds of complaint, *he* must send it to the lessee...

can be replaced by:

A statement of the grounds of complaint *prepared by the lessor must be sent* to the lessee [by the lessor]...

2. Where a person receives notice under this Act, he shall send a reply to the Minister ...

can be replaced by:

A person receiving notice under this Act *shall send* a reply to the Minister ...

3. The Minister must consider the report....and *he* must lay it before Parliament.

can be replaced by:

After considering the report....the Minister must lay it before Parliament.

Unless directed to do so, don't adopt a rigid policy to avoid gender-specific language at all costs. Doing so may diminish the quality of the draft, especially if it then reads in an artificial and strained way. This contradicts other objectives. Some changes in style that gender-neutral drafting requires are to be encouraged, but not if they lead to ambiguity or to less well expressed propositions.

4. SOME ADDITIONAL MATTERS OF STYLE.

Three style features are frequently criticised in any writing:

- splitting infinitives
- finishing a sentence with a preposition
- beginning a sentence with "and" or "but".

These are no longer as frowned upon as in the past. Today, all can be found in even quite formal documents. But should these be avoided in legislation?

a) Can we split infinitives?

Most split infinitives (for example, "to easily avoid") can and should be avoided, since they serve no purpose. Just as some legislative counsel make a habit of putting an adverb between an auxiliary and a verb, so some writers make a habit of breaking up an infinitive in this way. But it often sounds awkward. In most cases, we can write without a split, by placing the adverb before or after the infinitive, instead of inside it - and that is the usual drafting style.

- make it your practice to *avoid splitting an infinitive*, unless necessary to make the provision read less awkwardly;
- do not hesitate to use a split infinitive if that is the surest way to *avoid ambiguity*, as for example, as with an ambiguous adverb.

Example 44

The following may be cases in which a split infinitive has value:

1. 1. A person commits an offence. who encourages another person *to* ill-treat, abuse, torture or *cruelly treat* an animal.

The split is not apparent here; any other position for "cruelly" would be even more awkward.

1. 2. The trustee shall require the tenant *to promptly pay* the rent.

The split removes any doubt as to which verb "promptly" modifies; any other position leaves a doubt or reads awkwardly.

b) Can we end a sentence with a preposition?

Most writers end sentences with prepositions when they need to. But in drafting formal legislative sentences, you are not likely to find any such need. Readers usually take particular notice of beginnings and ends of sentences. Finishing with a preposition creates a very weak sentence. Good writing practice is to *avoid finishing* your sentence *with a preposition*.

c) Can we begin a sentence with "And" or "But"?

n the past, legislative counsel have used neither word at the beginning of sentences. As each sentence is treated a separate legal proposition, linking them with these conjunctions, suggests that the propositions are not separate. For that reason, legislative counsel do not use "*and*" to begin a sentence, as that implies a second element of the same proposition, the first of which is contained in the previous sentence.

But some legislative counsel are happy to use "But" in this way. At the beginning of a *sub*section that contains a qualification or exception, it indicates that the subsection qualifies the contents of the subsection immediately before it. So it performs two valuable functions:

- it links two connected, but distinct, propositions;
- it indicates in a very direct way that the sentence contains a modification to what has just gone.

Consider using "But" to begin a *subsection* that introduces a modification to the subsection that immediately precedes it. But take care when amending provisions that use this device. The addition of a new subsection (1A) in **Example 45** might introduce doubts as to what subsection (2) now qualifies.

Example 45

> **(1)** A resolution under section 4 remains in force for the period specified in the resolution (which cannot to be more than 6 months).
>
> **(2)** *But* a resolution may be extended on one occasion by a further resolution under section 4.

HOW DO WE WORK WITH INTERPRETIVE APPROACHES AND RULES?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

Legislative counsel must have a sound understanding of how legislation is interpreted and applied, particularly by courts. This understanding is required to anticipate and avoid uncertainty as to meaning or application - the very situation that you will be setting out to prevent. If we understand how legislation is likely to be interpreted and applied, we can be forearmed when drafting legislative texts. You will be better equipped to draft legislation that meets these expectations if you understand how judges and other legal interpreters approach the interpretation and application of legislation and how they are likely to treat particular linguistic practices and expressions.

Section Objectives

By the end of this Section, you should be able to take into account interpretive approaches and unwritten rules of legislative interpretation applied by common law judges, including the important linguistic assumptions and presumptions of intent they rely on.

This Section assumes that you already have a basic knowledge of the ways in which legislation is interpreted and applied and that you are familiar with the approaches judges tend to follow when a question of interpretation arises before them. If you need to refresh your memory, read one of the basic texts on the subject listed in the **Bibliography**.

Essential Questions

In this Section, we consider interpretive approaches and rules from the standpoint of the legislative counsel (who draft the legislation to be interpreted), rather than the more common standpoint of someone faced with a problem as to the meaning or application of legislation in particular circumstances. Although these two standpoints have much in common, there are some subtle differences that will be discussed.

This Section is divided into five subsections organised in terms of the following questions:

1. GENERAL CONSIDERATIONS
    - What do we mean by “interpretive approaches and rules”?
    - How should legislative counsel look at interpretive approaches and rules?
    - How should legislative counsel take account of interpretive approaches and rules?
    - What questions of interpretation arise most commonly?
2. JUDICIAL APPROACHES TO INTERPRETATION
    - How do judicial approaches affect drafting?
    - How can we anticipate judicial approaches?
3. INTERPRETIVE ASSUMPTIONS AND PRESUMPTIONS
    - What are the principal linguistic assumptions?
    - What are the principal presumptions of legislative intent?
4. AIDS TO INTERPRETATION
    - What intrinsic aids may be used?
    - What extrinsic aids may be used?
5. CONCLUSION

Studying this Section

The principal aim of this Section is to enable you to develop your knowledge of legislative interpretation and adapt it to legislative drafting. This Section is designed to encourage you to look for the relevance of the interpretive approaches and rules to the composition of legislation. Throughout this Section you should ask yourself when and how the particular matter under discussion might affect the drafting of legislation. The examples, activities and exercises should all be approached in that way.

1. GENERAL CONSIDERATIONS.

Although lawyers tend to talk about "rules of interpretation", in practice the process of legislative interpretation is not rule-governed. Judges and other legal interpreters do not give meaning to provisions by applying a prescribed requirement to a particular case. The process is more sophisticated and complex than that. The so-called "rules" comprise a range of guidelines that indicate considerations legal interpreters should have in mind or can call in aid when applying a legislative provision to a particular case. A decision as to the meaning of a provision is matter of judgment by which legal interpreters make what they consider to be the best choice of possible meanings. These choices depend on factors that legal interpreters should take into account; relying on their experience and good sense, they determine what weight to give to those factors.

It should also be noted that while judges have the last word on the meaning and application of legislation, they are not the only ones called on to make decisions about these matters. Administrative tribunals and government officials do the same on a far more frequent basis. And the vast majority of their decisions are not reviewed by courts. Although the interpretive approaches and rules considered in this Section are ultimately formulated and approved by the courts, the courts are not the only ones to use them.

a) What do we mean by "interpretive approaches and rules"?

As a lawyer

Legislative counsel have to interpret and apply legislation much as other lawyers do. For example, to work out how a legislative text is to link with existing law, you may have to arrive at the legal meaning of an existing provision. This involves three somewhat distinct activities:

- *comprehension*: construing the legislation to understand what it says, in particular what it states grammatically;
- *interpretation*: resolving doubts about meaning; overcoming ambiguities, obscurities, inconsistencies or other forms of uncertainty;
- *application*: deciding whether particular cases fall within the terms of the legislation with the consequence that specified legal results are produced;

Much of the time, the task of understanding and applying legislation is straight-forward. But in fact all three of these activities are involved, including interpretation although it may sometimes be done subconsciously.

Lawyers typically study how to interpret and apply legislation because they need to advise on the legal effect of enactments that are not straight-forward. To do that they must able to predict how judges and

other legal interpreters are likely to decide what the legislation means. For this, they should be conversant with:

- the interpretation legislation of their jurisdiction, which sometimes contains relevant provisions;
- the approaches and various guides to legislative intent that judges may use and continue to develop.

As legislative counsel

Our interest in interpretation as legislative counsel has a different emphasis. Our main concern in drafting is to create a body of legal provisions to achieve a given policy, not to determine how a particular provision should be applied in a particular case. Legislative counsel try to prevent complicated questions of interpretation arising by communicating the legislative intention as certainly and conclusively as they can. They rely on the basic interpretive approaches and rules for that purpose. However, they do not apply them in a particularized way to resolve ambiguity or obscurity in specific cases. Their focus is more general.

Questions of interpretation will always arise. In the end, the judges or other legal interpreters may be asked to decide whether or not there is uncertainty in meaning and how it should be resolved. For that reason, legislative counsel must write in the ways that take into consideration judicial approaches to legislative language and generally help judges, other legal interpreters and indeed anyone else affected by the legislation to reach conclusions that are consistent with the legislative scheme.

As a legislative counsel, your function is to draft legislation in ways that:

- facilitate its application by those affected by the legislation to the cases it is intended to cover;
- prevent uncertainty as to the legal meaning of the legislation.

You can fulfil this function by:

- using your imagination to work out the cases the legislation must cover and devising provisions that deal with those cases with the required degree of precision;
- drafting provisions that are clear, unambiguous and consistent;
- taking account of the interpretive approaches and rules whenever they are relevant.

b) How should legislative counsel look at interpretive approaches and rules?

To communicate legislative intentions, we need to take into account:

- *judicial approaches*: how judges are likely to go about the task of reading legislation;
- *common questions for judicial interpretation*: the cases that commonly give rise to questions of interpretation;
- *interpretive assumptions and presumptions*: the assumptions and presumptions the judges make about the context for drafting legislation;
- *aids to interpretation*: the aids that judges may call on in ascertaining the meaning of legislation;
- *interpretation legislation*: the requirements of the Interpretation (or General Clauses) Act in your jurisdiction, which invariably contains many provisions of special concern to legislative counsel (interpretation legislation is dealt with in Section 2 of this Module).

c) How should legislative counsel take account of interpretive approaches and rules?

We can see the relationship between drafting and interpretation more clearly if we consider the kinds of case that commonly give rise to questions of interpretation. Professor W A Wilson has produced a helpful analysis of these: "Questions of Interpretation" [1987] **Statute Law Review** 142-162. Wilson suggests from his analysis of case-law that two principal types of questions typically face the courts, though these arise for several different but regularly occurring reasons.

1. Propositional questions

   This type of question occurs when construing an enactment to find out exactly what it provides, and before any attempt is made to apply it to particular facts. At this stage, there may be difficulties in discovering precisely what legal results are intended to follow on which factual situations. This may be because of

   - uncertainty as to whether the legislation has been validly made;
   - ambiguities in syntax and expression;
   - imprecise linking, or conflicts, between provisions;
   - other words that could be substituted for, added to or subtracted from those actually used;
   - vagueness about the legal effects of provisions.

2. Semantic questions

   The second main type of question arises when the legal propositions derived from reading the legislation are actually applied to a particular set of facts. Doubt may exist whether the legislation extends to those facts because it contains, for example:

   - expressions the natural meaning of which is unclear because they are too general, ambiguous or obscure when they come to be applied;
   - expressions the natural meaning of which is clear, but that appear too wide or too narrow when looked at in all the circumstances;
   - uncertainty as to whether the facts described in the legislation exist in the particular case.

It will be evident that sound drafting techniques can reduce the likelihood of at least some of these questions arising for judicial consideration.

d) What questions of interpretation arise most commonly?

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2. JUDICIAL APPROACHES TO INTERPRETATION.

a) How do judicial approaches affect drafting?

Drafting and interpretation have always been linked

- judges have developed their approaches to interpretation on the basis of the way legislation has been drafted;
- legislative counsel are influenced by judicial practice on interpretation.

The Report of the English and Scottish Law Commissions, ***Interpretation of Statutes*** (1969), para.5, makes an important point -

If defects in drafting complicate the rules of interpretation, it is also true that unsatisfactory rules of interpretation may lead the draftsman to an over-refinement in drafting at the cost of the general intelligibility of the law.

The links are most clearly seen in many of the judicial assumptions about linguistic expression (see below). These put great weight on the way particular words or expressions are used and are part of a tradition of *literalism* that has been a feature of common law interpretation. Judges have tended not to look beyond the precise words used. The detail and particularity of common law legislation are partly the result, and partly the cause, of this tradition.

There is now a steady trend away from literalism to a broader, more *purposive*, approach. This gives greater opportunity for words to be given meanings that reflect the underlying policy. Judges today are readier than in the past to consider approaches that support purposive interpretation.

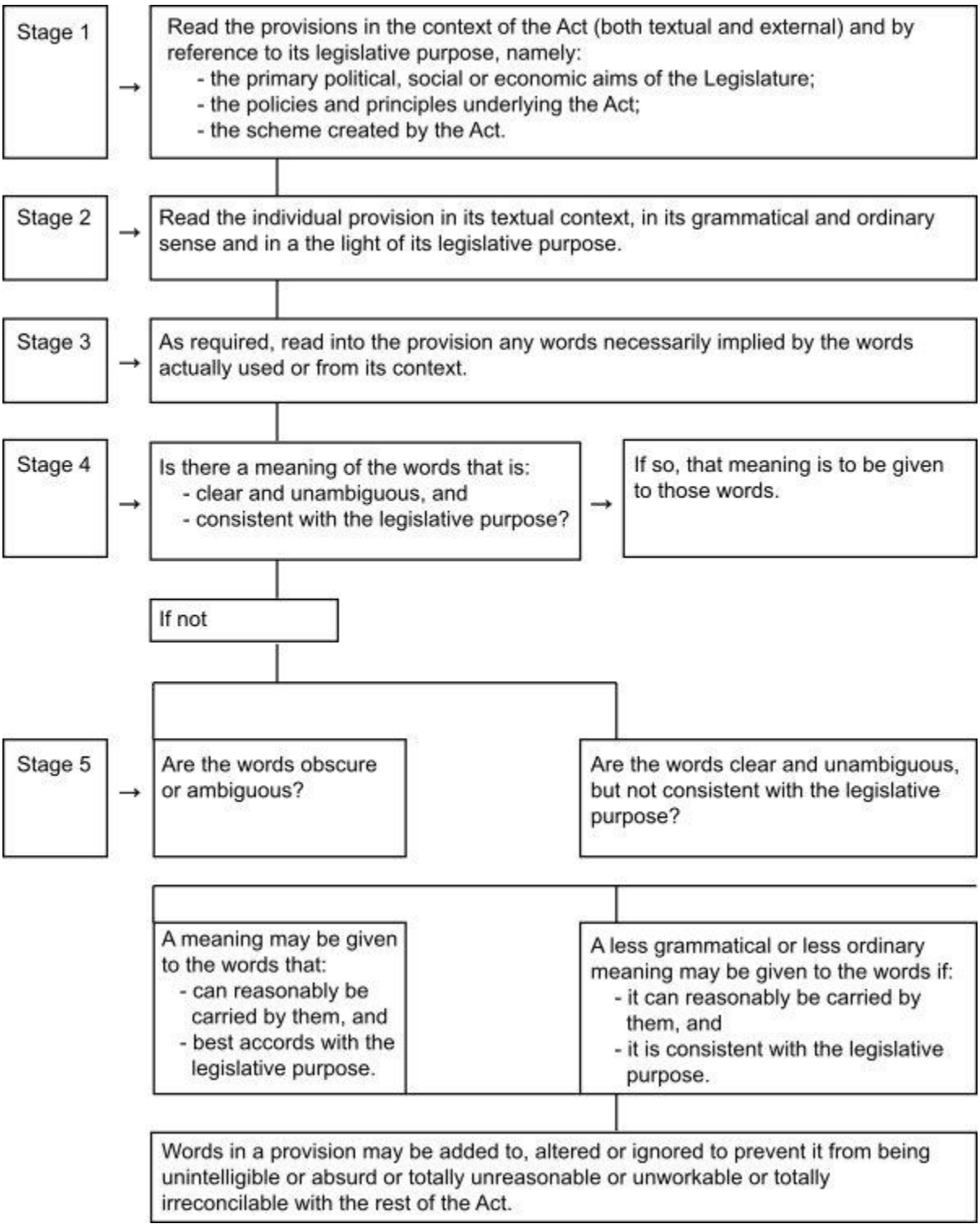
In the past, literalist interpretation may have encouraged legislative counsel to try to cover all foreseeable circumstances by providing a mass of detailed provisions. Today, legislative counsel are developing

techniques to support the trend towards purposive interpretation, for example, by including purpose clauses (see LGST 555, Module1, Section 5 - *When and how do we draft purpose clauses?*), and by discarding practices that lead to detailed, over-long sentences and dense and obscure text. Greater reliance on a plain language style makes it easier to construe statutes without giving rise to any increase in uncertainty. (This is discussed in LGST 551, Module 2 - *Writing Legislative Sentences*.)

b) How can we anticipate judicial approaches?

The basic judicial approach to interpretation is outlined in the following flow-chart. It reflects the contemporary trend for purposive interpretation that favours the adoption of meanings consistent with or that advance the underlying legislative purpose over undue reliance on the legislative text. Ruth Sullivan in ***Sullivan on the Construction of Statutes*** (6th ed, 2014) usefully suggests that an interpreter should start with the assumption that the Legislature intends the text to carry its ordinary or plain meaning: the meaning that would be understood by a competent reader when reading words in the provision in which they appear. However, that meaning should then be tested in the larger context of the instrument as a whole, against the purpose of the provision and that of the instrument as a whole, its place in the legislative scheme, its consequences and by reference to relevant extrinsic aids.

The following flow chart indicates the steps that to be taken to give meaning to legislative provisions.



3. <u>INTERPRETIVE ASSUMPTIONS AND PRESUMPTIONS.</u>

Legislation is a form of communication between the Legislature and legal interpreters, notably judges. They assume that it has been prepared on sound drafting principles by legislative counsel who have full

knowledge of the interpretation approaches the courts use. For that reason, you need to be aware of those approaches in order to:

- take advantage of them where appropriate; and
- avoid creating circumstances where judges will have to have recourse to them to settle unclear meaning.

These approaches include:

- assumptions about linguistic expression that indicate how certain uses of language in legislation are to be interpreted (*linguistic assumptions*).
- presumptions of legislative intent that state the premises on which the Legislature is presumed to have legislated (*interpretive presumptions*).

a) What are the principal linguistic assumptions?

These assumptions (often referred to as interpretive *canons*) have been developed to deal with legislative language that is a source of uncertainty, especially when looked at in a literal way. They are guides to meaning based on rules of logic, grammar, syntax and punctuation. They are also traditionally expressed as Latin maxims, which are noted here for reference rather than because you will need to use them regularly.

Legislative counsel anticipate these assumptions by adopting sound legislative writing practices of the kind you are studying in these Materials. These practices reflect the underlying judicial expectations about how language will be used. They are relevant to all legislative texts and should be followed routinely by legislative counsel quite apart from their value in reducing the possibility of uncertainty arising.

Legislative texts as a whole

- A legislative text is to be read as a whole so that the provision in question is interpreted in its full textual context.

  Words and expressions must not be construed separately; they take their colour from their context. Good drafting proceeds on this premise.

- Each word should be given meaning.

  Accordingly, the legislative counsel select each word and expression because it has a linguistic function to perform. Omit the superfluous or unnecessary.

- The same words should be given the same meaning throughout the legislative text and different words concerned with the same matter should be given different meanings.

  This is another premise on which sound drafting rests. It places the onus on consistency in the choice and use of terms. For example, when drafting amending legislation, adopt the same terminology as the original used, even though you might not choose the expressions if you were preparing a new piece of legislation.

Example 1

Road traffic legislation should use a standard term such as "motor vehicle" when the rules affect all types of motorised transport. Different terms (often defined), such as "motorcycle", "motor car", "tractor", though referring to classes of motor vehicles, should be used for more specialised rules.

- Cognate expressions (different parts of speech of an expression) are presumed to have the same meaning throughout the legislation in which they appear.

  Consistency of this kind is at the heart of sound drafting and is routinely followed by legislative counsel. This rule is often confirmed by interpretation legislation (see the **model Interpretation Act, section 22**).

Example 2

If an Act uses the term "sell" in a way that indicates that it extends also to "barter" (because there is a definition to that effect), a reference in the Act to "sale" will be construed as covering bartering.

- If a general provision and a specific provision in a legislative text cover the same situation and conflict with each other, the specific overrides the general.

  This assumption can be expressed either positively or negatively:

  - the specific overrides the general (*generalibus specialia derogant*),
  - the general does not override the specific (*generalia specialibus non derogant*).

  This assumption is less self-evident than the others. But it requires that particular attention be paid to the relationship between provisions that touch on the same matter. That relationship has to be thought through when the legislation is planned and it should be made quite clear in the drafting.

  Overlapping provisions are common and often all of them can be given effect. However, if the overlap leads to conflict or if one provision is intended to be exhaustive, use appropriate words to eliminate doubt as to which overlapping provision has priority. It is good practice when two provisions cover essentially the same ground to indicate whether both or only the specific provision can be relied on. But you can rely on this assumption if the two propositions, when read together, clearly convey the intention that the specific is an exception to the general.

Example 3

Consider the following overlapping section that provide different arrest powers:

25. A person in a prohibited place may be arrested only on the production of a warrant.

30. A police officer may arrest a person found in the act of committing an offence under this Act in a prohibited place, without a warrant.

Section 25 is a general provision; section 30 is more specific. The overlap can be removed by specifying that section 25 is subject to section 30:

25.*Subject to section 30*, a person employed in a prohibited place may be arrested only on the production of a warrant.

This assumption is examined in more detail in LGST 555, Module 2, Section 2 - *How should we repeal and amend legislation?*

- Legislation is always speaking.

  It is assumed that legislation applies on an ongoing basis in the present. Its application is not limited to circumstances existing when it was enacted. This assumption encourages legislative counsel to use the present tense for verbs. It is often restated in interpretation legislation (see the model *Interpretation Act*, section 20).

Ordinary and Technical Meaning

- Words in legislation are to be given their ordinary meaning.

  It is assumed that legislation uses language in its ordinary sense as opposed to some special or technical sense. If there is more than one ordinary meaning, the one that is appropriate to the context is to be adopted.

  When you are using a word in a sense that is not common, make sure the intended sense is clear, either from a context that indicates that special or technical sense or by stipulating the intended meaning, for example in a definition.

  This assumption has also been used to support applying the current meaning of a word as opposed to some meaning it might have had when the legislation was enacted. However, there is some controversy about this and case law is not uniform, particularly as between different jurisdictions. You should verify the position on this question in your own jurisdiction.

- An expression that has a technical meaning should be given its specialised meaning when used in a technical context.

  Use the correct technical language when preparing legislation on a subject that has its own specialist vocabulary.

Example 4

The Gas Acts in the United Kingdom use the term “carbonization” without defining the term. This is a technical term which is used to cover the process of converting coal to coke.

- An expression that has a technical legal meaning in relation to a particular branch of law should be given that meaning when used in that context.

Example 5

In legislation dealing with commercial transactions, expressions such as “bill of exchange”, “cheque” and “promissory note” will be given the technical legal meanings they normally have under a Bills of Exchange Act).

However, technical legal terms are often difficult for many readers to understand and it may be possible to convey the intended meaning through more generic or common language.

Example 5A

The expression "body corporate" is a traditional legal expression that has been largely supplanted by the more common word "corporation" (see the Canadian Legislative Drafting Guide *Legistics* - http://canada.justice.gc.ca/eng/dept-min/pub/legis/n1.html).

- An expression that has both an ordinary and a technical meaning should be given the technical meaning only when it is used in the relevant technical context.

  Select technical expressions when (but only when) they are needed and make that evident by the context in which you put them to work.

Example 6

A requirement in an Act that a person wishing to become an advocate must pass a "*course* in Latin" is unlikely to be treated as having a technical meaning, although in universities a "course" has to fulfil certain basic criteria. The legislative requirement may be met if the applicant has completed a short programme of quite elementary study, although that would not be treated as a "course" in internal university practice.

Linguistic context

- An expression containing broad (indeterminate) words that is linked to words of a more specific nature is to be construed as limited to matters of the same specific character (**limited class** or *ejusdem generis* assumption).

  Legislative counsel commonly use a series of terms followed by a general phrase intended as a catch-all. Courts construe the catch-all phrase as restricted to cases that share common characteristics with the specific terms to which it is linked. The key is to find a common denominator from the listed terms. This assumption is less likely to be invoked when the phrase is linked to a single term rather than a series of terms.

Example 7

In an Act dealing with the slaughter of animals for food for human consumption, the expression "cows, goats, sheep and *other animals*" will be construed as extending to other types of domesticated animals that may be a source of meat for human food in that jurisdiction. It does not extend to cats or dogs, as these are not commonly eaten, or to poultry, as these do not have the same physical characteristics as those listed, or to wild animals that are hunted for their meat. But in places where horse flesh is used for human food, it may be construed to cover horses.

- An intention to exclude the limited class assumption requires clear words to indicate that the general words are not intended to be limited to matters of a similar kind.

You can put questions of this kind beyond doubt in the legislation, for example by stating explicitly whether or not general words are limited by the characteristics of other terms with which they are linked. In any case, this helps readers, as it avoids recourse to the assumption.

Example 8

The italicised words make clear whether the broad term is to take the characteristics of the specific words or not.

cows, goats, sheep and other *similar* animals;

bottles, tins, cartons, packages, paper, glass, food, or *other* refuse or rubbish, *whether of a similar kind or not.*

- The meaning of an expression may be derived from its context, especially from **associated words** (*noscitur a sociis*).

  This assumption is especially useful to give precision to broad terms (terms which, by themselves, are general or indeterminate). The meaning can be confined by the context in which the term is used; it takes the characteristics suggested by the neighbouring words.

Example 9

A section prohibiting an activity in a "house, office, room or *place*" does not extend to a public lane. The context in which "place" is used indicates that it is confined to *enclosed* places.

Do not depend on the context to provide characteristics that are not expressly stated (for example, by leaving out a modifier to make text more readable), on the grounds that they will be supplied by the neighbouring words.

When a qualifying word is legally necessary, attach the appropriate adjective that indicates the required characteristic directly. Otherwise, it may be unclear whether the term is intended to be modified in this way.

Example 10

…streets, lanes, roads or other *public* thoroughfares or passages…,

In this phrase it is not completely clear whether the adjective "public" modifying "thoroughfare" also modifies "passages". If it does, it is as well to repeat it before that word.

- An express statement of one thing may impliedly exclude other things.
  - *expressum facit cessare tacitum*,
  - *expressio unius est exclusio alterius*.

This assumption requires careful attention to the effects that your choice of words may have. Unstated matters may be construed as outside the text, unless you indicate otherwise.

This assumption can apply in a number of ways:

- specifying that something can be done in a particular way.

Example 11

A provision stating that an instrument in writing is to be used to effect a transaction affecting immovable property excludes the possibility of carrying out the transaction orally.

- specifying a particular case excludes similar cases that are not specified

Example 12

If a definition of "diplomatic premises" includes, as one specified case, "*the residence of the head of the mission*", the term is likely to be construed as showing an intention to exclude residences of other members of the mission, which are not mentioned.

- specifying the classes of persons to which provisions apply excludes other classes not referred to

Example 13

If an Act on child care includes a reference to the mother of a child, this may be construed as excluding the father.

- specifying certain exceptions excludes other exceptions that could have been made.

Example 14

Road Traffic legislation allowing ambulances, fire service and police vehicles to disregard speed limits in emergencies may be construed as indicating that other traffic restrictions (for example, traffic lights) cannot be ignored.

- specifying particular remedies or penalties excludes others that might have been applicable.

Example 15

If an Act specifies a particular form of remedy for non-compliance with its provisions, this will generally be taken to be the sole mechanism for enforcement.

However, you should not rely unduly on the implied exclusion assumption. Judges do not apply it consistently. Try to ensure that all the cases that should be included are covered by the words you use. Unfortunately, when a court does not apply the assumption, it necessarily includes some item that is not mentioned. If this possibility is foreseen, it may be possible to exclude expressly cases that are *not* to be included. But this may encourage the courts to look for such a device and, if they do not find it, to assume that was a deliberate technique to allow an item to be included. This is a dilemma of which legislative counsel must be aware. The best that can be done is:

- carefully work out what cases are to be covered, and which not, by individual provisions; and
- include appropriate words that in the context go as far as possible to put that intention beyond doubt.

b) What are the principal presumptions of legislative intent?

Common law courts presume that the Legislature intends to legislate on the basis of certain principles of legal policy or values. Some of the presumptions may also be expressed as rights and freedoms in constitutional provisions. In those cases, legislation that does not comply with those principles may be invalid, as opposed to being interpreted narrowly.

The constitution of your jurisdiction may also contain a statement of Principles of State Policy, which are to guide the making of legislation and to which the courts are expected to have recourse in its interpretation (these matters are examined in Section 3 of this Module - *How do we work under the Constitution?*). However, the presumptions may still be used by the courts to interpret legislation to reach the same conclusion as would be achieved by a direct constitutional challenge.

The important presumptions for our purposes concern

- general principles of legislative policy
- specific principles of legislative intent.

General presumptions of legislative policy

Judges invoke these presumptions when they find uncertainty in the ordinary meaning of the legislation. They are examples of a general presumption that effect is not to be given to changes in the law that are unclear. They are devices by which the courts enforce common law norms that reflect the values we usually describe under the notion of the Rule of Law. The courts assume that legislation will give the clearest indication of any intention to impinge on individual rights. In most parliamentary jurisdictions, some of the presumptions now take second place to constitutional safeguards, which offer legal remedies when rights are interfered with (Human Rights are considered in Section 4 of this Module - *How do we work with fundamental freedoms provisions?*).

The list of presumptions continues to evolve, but the principal ones include:

1. persons are not penalised except under clear law;
2. the jurisdiction of courts is maintained;
3. individual liberties are not curtailed;
4. law does not operate retroactively when imposing burdens or interfering with vested or property rights (for further detail on this see LGST 555, Module 1, Section 6 - *When and how do we draft application provisions?*);
5. in taxing legislation, the taxpayer is to be given the benefit of a doubt;
6. domestic law conforms to international law.

Without clear indications to the contrary, judges generally construe legislation consistently with these principles on the assumption that, if the legislation was intended to deviate from them, it could have been made to that effect and the Legislature can address the issue directly. If you are instructed to deviate from these principles, the constitutionality of your draft must be a prime consideration. But when you are drafting a deviation, use express language that indicates the precise application and extent of the deviating provisions. Otherwise, the courts may well give a restrictive meaning to them by reference to these principles.

Activity 1

List the references to the provisions of your Constitution that provide enforceable safeguards with respect to any of the matters covered by the listed presumptions of legislative intent.

Specific presumptions of legislative intent

Judges have also identified specific principles that they presume the Legislature intends to follow. You may recognise them in the form of Latin maxims. Unless your draft makes it plain that these principles are displaced, the courts may read them in to resolve some perceived uncertainty in meaning or application. Again, use the clear language to exclude or qualify their application.

- No one should judge his own cause (*nemo debet esse judex in propria causa*).
- Hear the other side (*audi alteram partem*).

  These two principles (often referred to as "rules of natural justice") are features of a wider principle of procedural fairness, which the courts continue to develop and will imply if they conclude that the procedural safeguards for persons affected by administrative decision-making are inadequate.

- All things are presumed to be correctly and solemnly done (*omnia praesumuntur rite et solemniter esse acta*).

  This presumption of correctness or "regularity" usually applies to administrative acts or formal law-making processes. An important application of the presumption is that legislation is in conformity with the Constitution. This puts the burden of establishing that legislation is invalid for this reason on the person so alleging.

- The law does not concern itself with trifling matters (*de minimis non curat lex*).

  Trivial breaches of a legislative requirement are usually treated as outside the statute. Interpretation legislation usually provides that deviations from prescribed forms are to be disregarded if they are not material (see the model Interpretation Act, section 44). But if you foresee an obvious or frequently occurring case, it may be better to state expressly that it is not subject to the legislation.

Example 16

In many jurisdictions penal legislation authorises magistrates to dismiss a complaint of assault or battery preferred by or on behalf of an aggrieved party on the grounds that the assault or battery was "so trifling as not to merit any punishment". This states expressly what a magistrate might have concluded as a result of applying this principle.

- A person acting through another does the act himself or herself (*qui facit per alium facit per se*).

  This presumption of agency generally means that a legislative reference to a person will be taken to include that person's duly authorised agent, without the need to make express provision. But express extension is sometimes needed to put the matter beyond doubt. Conversely, you may

need express provisions if a person is *not* to be permitted to act through an agent, but is to be personally responsible.

Example 17

If an Act requires a landlord to serve a notice on a tenant, it is generally unnecessary to authorise service to be made also by the landlord's lawyer or by some other person charged with the task by the landlord.

4. AIDS TO INTERPRETATION.

Judges may have recourse to two kinds of aids when faced with problems of interpretation:

- *intrinsic* aids: aids derived from the form or technical apparatus contained in the legislation itself, for example, titles, section notes, headings, punctuation;
- *extrinsic* aids: documentation external to the legislation, for example related legislation, official reports and legislative debates.

a) What intrinsic aids may be used?

The courts and other legal interpreters may find help in resolving ambiguity or uncertainty from the form of the legislation itself. From time to time, they may call in aid:

- the long title
- the short title
- any preamble
- any purpose clause
- section notes (side, marginal or shoulder notes)
- headings to parts or other divisions
- schedules and tables
- punctuation
- any explanatory notes incorporated into the legislative text.

Whether, and when, these may be resorted to is partly dictated by judicial rulings and partly by the Interpretation Act. (The model Interpretation Act, sections 12-14, which deals with these matters is considered in Section 2 of this Module). Accordingly, check the relevant provisions in the interpretation legislation of your jurisdiction.

While you should be aware of interpretive approaches on these matters, they are generally of lesser significance at the drafting stage for resolving interpretive problems. However, they do have considerable value as aids to reading and finding. Legislative counsel should adopt sound drafting practices with respect to these legislative features for that reason. These practices are considered from that standpoint in Module 1, Section 1 - *How should we structure a legislative text?*

b) What extrinsic aids may be used?

Practice varies from one jurisdiction to another as to the extent to which courts refer to other types of material to help in solving problems of interpretation. These include materials produced

- before the legislation is enacted;
- during the legislative process; or
- after the legislation has been enacted.

Pre-enactment materials

In working out the contents of a Bill, you may have to consult a wide range of materials in order to inform yourself about such matters as:

- the legal context (including international law) in which the legislation is to operate;
- the problems the Bill is to deal with;
- work already done on the matter by commissions and committees;
- the policy and mechanisms for dealing with those problems.

You may need and should seek access to this material to solve your immediate drafting problems. In one sense, it is irrelevant to your work how far the courts are prepared to look at such material for purposes of interpretation. If courts do refer to any of them, it is usually because there is some obscurity as to the legislative policy or as to the meaning of expressions. Those are shortcomings that you should be trying in any case to prevent.

In theory, the more the courts are prepared to refer to these kinds of materials, the more legislative counsel may feel free to write in broad principles (what is known as *principled drafting*), leaving it to the courts to develop them by reference to the underlying policy to be found in external documents. There are few signs yet that the common law courts are ready to go this far. Typically, courts use extrinsic materials in a much more limited way, to clarify technical words or general words of indeterminate meaning.

Legislative counsel's concern should be to make sure that:

- all the relevant materials have been identified and consulted during the research on the legislative scheme; and
- the legislative text properly reflects the agreed policy and places it in its full legal context.

Courts and other legal interpreters may be prepared to consult the following kinds of pre-enactment materials. Most are materials that legislative counsel should have considered when drafting.

- **legislation demonstrating the legislative evolution**, showing by means of successive versions of the enactment how the legislation on the matter has evolved to date, and so an aid to establishing the purpose of the new enactment (the significance of the change - whether formal or substantive, whether to clarify, correct or to alter the earlier legislation);
- **other legislation relating the same subject matter** as indicating some of the context of the new enactment;
- **other legislation using similar terms for dealing with the same subject matter** (*in pari materia*)to assist in the meaning of expressions used in both;
- **judicial decisions on the subject matter**, especially those on legislative provisions that are being re-enacted, as an indication of the intended meaning of expressions;

- **dictionaries and other literary sources** to suggest ordinary meanings of particular expressions.
- **the practice of specialists** as an aid to the meaning of technical expressions;
- **reports of commissions and committees, or documents published by Government showing proposed policy** *("white papers")* to ascertain the mischief with which legislation is concerned and the context in which it is enacted;
- **treaties implemented by legislation, and their preparatory documentation** (*travaux préparatoires*) as an aid to resolving ambiguity and obscurity in the legislation.
- **explanatory memoranda published with the legislation** to ascertain the legislative purposes for which the legislation has been enacted. (Some legislative counsel are responsible for preparing the explanatory memoranda - see LGST 555, Module 1, Section 1 *What are preliminary and final provisions and what other explanatory material may be included?*).

Activity 2

List any provisions in your Interpretation legislation which contain rules on extrinsic aids, of the kind in section 15 of the model Interpretation Act**.**

Legislative and post-enactment materials

In a number of countries, courts are now prepared to look more readily at what is said about provisions of a Bill when it was being considered by the Legislature. This may affect the work of Ministry instructing officials during the Parliamentary stages, as they must watch that Ministerial statements do not put a contradictory gloss on the actual terms used in the Bill. However, in drafting the legislation itself, follow the advice of Francis Bennion ([1993] *Statute Law Review*, at p.162) to carry on undeterred by the possibility that the courts may have recourse to such material.

Courts may also look at official sources published after the legislative process is finished. Typically, this again should have little significance for the legislative counsel. Obviously, these materials do not exist when you are drafting the Bill, and as a legislative counsel you have little opportunity to influence their contents.

The legislative and post-enactment materials most commonly called in aid are:

- Legislative debates

  Although you retain a responsibility for protecting, as far as possible, the integrity of a Bill when it is passing through the Legislature, there will be limited opportunity for you to influence what matters will be the focus of debate or the content of Ministerial explanations.

- Official statements or circulars

  It is rarely the legislative counsel's responsibility to prepare Government circulars or publications made after the Bill has been enacted.

- Subsidiary legislation

  The fact that courts may refer to subsidiary legislation made under the parent Act as an aid to its interpretation is rarely your concern when drafting either. But this may be a consideration for you if you are instructed to prepare both the parent Act and its subsidiary legislation as a single

legislative exercise. It points up the importance of your providing a coherent and logical design for the entire legislative scheme.

5. CONCLUSION.

The courts and other interpreters will always be faced by problems of interpretation, not least because of unforeseeable events, subsequent developments or unpredictable combinations of circumstances. Practising lawyers inevitably look for arguments about the meaning and application of legislation that are favourable to their clients, and then try to persuade the courts to decide in their favour. Legislative counsel may draw comfort from Reed Dickerson **(*The Fundamentals of Legislative Drafting,* 2nd ed, 1986, para.3.9)**:

For the draftsman, many interpretive approaches and rules are irrelevant. These are the rules by which courts resolve inconsistencies and contradictions or supply omissions that cannot be dealt with by applying the ordinary principles of meaning. They are irrelevant because the draftsman who tries to write a healthy instrument does not and should not pay attention to the principles the court will apply if he fails. He simply does his best, leaving it to the courts to accomplish what he did not.

At the same time, remember that sound drafting practices are grounded in conventions that reflect the basic interpretive approaches and rules. These can never be discounted. Your approach should be:

1. to be aware of the ways in which drafting techniques have been conditioned by the basic interpretive approaches and rules, and to employ these techniques routinely in all your drafting work;
2. to recognise those occasions when your draft needs to be written in a way that removes or reduces the likelihood of a problem of interpretation arising;
3. to write in ways that take account of likely judicial approaches to the task of interpreting your legislation, especially when you anticipate difficulties in establishing a precise meaning.

HOW DO WE WORK WITH INTERPRETATION ACTS?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

Interpretation Acts are of paramount importance in drafting. They apply generally to the interpretation of statutes and subsidiary legislation in a particular jurisdiction. Although the usual title is *Interpretation Act*, in some jurisdictions they are called the *General Clauses Act* or they are part of more general legislation dealing with the enactment and operation of legislation, for example the *Legislation Act* of the Canadian Province of Ontario. Throughout these Materials refer to them as, "Interpretation Acts".

Most features on Interpretation Acts have been devised by legislative counsel. Their overall purpose is to bring greater predictability to the interpretation of legislation. If legislation is drafted in accordance with an Interpretation Act, it will be given effect as intended. An Interpretation Act typically offers useful definitions and rules about the form, application and presentation of enactments, many of which enable you to produce a legislative text that is easier both to draft and to use.

You need to know the Interpretation Act thoroughly and have it at hand when you are drafting. In particular, you must be fully aware of all that it offers to legislative counsel.

Section Objectives

By the end of this Section, you should be able to do the following:

- apply the drafting practices authorised by the Interpretation Act in your jurisdiction; and
- work with its provisions as to the form, application and presentation of legislation.

Essential Questions

This Section is divided into three subsections organised in terms of the following questions:

1. IMPORTANCE OF INTERPRETATION ACTS
    - Why are Interpretation Acts important to legislative counsel?
    - How are the benefits of Interpretation Acts to be obtained?
    - How well do users of legislation know Interpretation Acts?
2. APPLICATION OF INTERPRETATION ACTS
    - What provisions do Interpretation Acts apply to?
    - How can the application of an Interpretation Act be excluded?
3. USING INTERPRETATION ACTS TO FACILITATE DRAFTING
    - Form and application provisions
    - Commencement provisions
    - Standardised definitions
    - Standardised rules for a common legislative style
    - Resolution of interpretive uncertainties
    - Implied rules of substantive law.

Studying this Section

In studying this Section, you will need to refer constantly to the Interpretation Act in force in your jurisdiction. Make sure that you have the same available before you start work on this Section.

The aim of this Section is to make you familiar with the entire contents of the Interpretation Act in your jurisdiction and to allow you to work most effectively with it when you are drafting legislation. To do this we propose that you compare your Act with the model *Interpretation Act*, which has been drafted to draw attention to the rules most commonly found in this type of legislation. Commentary in this Section is directed to this model. By comparing the individual provisions of the legislation in your jurisdiction with the model in the light of the commentary, and by undertaking the activities and exercises, you will be able to develop a clear picture of how these matters affect drafting in your jurisdiction. The Appendix to this Section contains a table of Interpretation Act provisions for you to complete as you work through this Section.

This Section warrants your closest attention. It probably includes many features that are new to you, especially what individual provisions enable legislative counsel to do. Concentrate on finding out what is in your jurisdiction's legislation, and so what it permits you to do.

Various provisions of Interpretation Acts are referred to throughout these Materials. You will need to refer to the legislation on many occasions when working with them. Keep it handy whenever you are studying, and particularly when drafting. Constant recourse to it will increase your facility in using it. Study of this Section is designed to ensure that you are thoroughly at home with Interpretation Acts and that you are fully aware of its potential in drafting.

1. IMPORTANCE OF INTERPRETATION ACTS.

Activity 1

Obtain a copy of the *Interpretation Act* currently in force in your jurisdiction. As you study this Section and the model *Interpretation Act*, fill in the table in the Appendix to this Section.

a) Why are Interpretation Acts important to legislative counsel?

An Interpretation Act contains rules of law about matters that are central to drafting, for example, the form, language, syntax, application and operation of legislation, as well as its construction and interpretation. These rules deal mainly with frequently occurring matters in ways that are likely to accord with the expectations of those who use legislation. As a result, the Act enables legislative counsel to adopt particular drafting practices backed by the rules of law contained in the Act.

The Act allows legislation to be written without using many of the words, phrases or expressions that in the past, under the literalist tradition, would have been regarded as necessary. Many of its provisions reflect the general approach to interpretation considered in Section 1 of this Module and contain nothing unexpected. Nonetheless the Act provides the security of a statutory basis for their use.

Users of legislation are generally familiar with or can benefit from the drafting practices that the Act recognizes.

Example 1

The model *Interpretation Act*, section 23(2) (the singular includes the plural) supports the practice of writing rules with the subject or an object expressed in the singular. Users find no problems in reading the rules as covering both singular and plural subjects and objects, without needing to look up section 23(2).

An Interpretation Act is not the exclusive source of law on interpretation. Other provisions of general application and case law (some of which can contain parallel or even contradictory matter) may be relevant to interpretation.

The origins of these Acts are found in legislation first introduced in the United Kingdom in 1850 and developed in the *Interpretation Act, 1889*.Many jurisdictions now have much fuller legislation than that in force in the United Kingdom (*Interpretation Act, 1978*) and there is a growing variety of provisions. But there is still much common ground. The model *Interpretation Act* contains provisions in more general use.

If you take all the opportunities offered by an Interpretation Act, you will:

- contribute towards a common legislative form;
- achieve greater standardisation in legislative expression and language;
- achieve greater consistency between instruments;
- reduce repetition in legislation by using expressions that are defined in the Act;
- shorten and simplifying legislation;
- prevent doubts of interpretation arising when you use particular provisions or expressions.

b) How are the benefits of Interpretation Acts obtained?

To take full advantage of an Interpretation Act, you should first:

- have an up-to-date version of the Act at hand;
- be fully conversant with its provisions;
- know exactly when the provisions will or might apply to draft legislative text.

Secondly, remember that the provisions of the Act apply automatically by operation of law when the circumstances they refer to arise. You should be aware of what those circumstances are and when they arise in the course of drafting *and either*:

- take the relevant rule fully into account and ensure that its requirements are precisely followed; *or*
- if those requirements are not appropriate, make sure the rule cannot apply by drafting a contrary provision.

c) How well do users of legislation know Interpretation Acts?

Many users of legislation are far less familiar with the Interpretation Act than you will be. Some will never have heard of it. For example, a rule governing the quorum of a statutory body (see the model *Interpretation Act*, s. 49) will be read into legislation, but its applicability in a particular piece of legislation may be overlooked, even by lawyers, because it is found in another Act. If a provision of the Act does not accord with the general expectations of users and is of particular importance, you should consider whether to indicate expressly that the provision applies. You can do this in two principal ways:

1. State specifically that the section of the Act applies for the purposes of the draft.

   Example 2

   The model *Interpretation Act*, s. 47 confers on the body that appoints an office holder a wide range of additional powers over the officer (for example, disciplinary powers). The section itself requires that its provisions must be *declared* to apply by the legislation conferring the power.

2. Repeat the provision in your draft

   Some provisions of Interpretation Acts are not well-known. If they are critical to the legislation you are drafting, it may be useful to incorporate them textually into your draft.

   Example 3

   In some jurisdictions (for example the Commonwealth of Australia), Acts always state when they come into force, even though the Interpretation Act provides for their commencement.

2. APPLICATION OF INTERPRETATION ACTS.

Interpretation Acts typically say what classes of legislation they apply to and the extent of their application. They are generally expressed to have effect "unless the contrary intention appears" or "unless the context otherwise requires", making clear that their provisions must give way if they conflict with provisions in other legislation.

a) What provisions do Interpretation Acts apply to?

The application of an Interpretation Act is generally limited to legislation (Acts and subsidiary legislation).Typically, those terms are themselves defined in the Act.

When a new Interpretation Act has introduced major innovations, the new provisions may apply only in relation to legislation made *after* the Act takes effect. Unexpected results may follow if it were made to apply to pre-existing legislation that has not been prepared relying on it. This restriction applies only to those innovations that affect the construction or meaning of words or their application. Others that affect the form of legislation can usually be applied to existing legislation (for example, when it is republished).

Activity 2

Read the model *Interpretation Act*, ss. 2 and 3 and the definitions of the expressions used in those sections (for example, "enactment" (ss. 25(1)); "subsidiary legislation" (ss. 25(1) and (2)).Summarise the equivalent provisions of your Act. In doing so, indicate:

- what kinds of legal texts are not subject to your Act;
- whether any provisions of your Act apply only to texts enacted or made *after* the Act came into force.

b) How can the application of an Interpretation Act be excluded?

An Interpretation Act does not typically apply to legislation if a contrary intention is expressed or can be implied in that legislation. You should make it clear if a provision of the Act, which would otherwise apply, is not to do so. To do this

- work out whether the application of the Act will lead to a legal result that is contrary to the one you require;
- if such a result appears likely, make it clear that the relevant provision of the Act is not to apply.

A contrary intention can be made clear in a number of different ways:

1. Use express words that deal with the case in the way you require and displace the application of the Act.

   Example 4

   The Interpretation Act often contains a definition of "public place" (see the model *Interpretation Act*, s. 29). If this is unsuitable (for example, because the legislation is not to apply exactly as envisaged in that definition), provide a definition that is suitable (perhaps adapted from that in the section) for your draft.

2. Ensure that the substantive provisions are drafted so as to indicate that a different result must have been intended.

   Example 5

   The model *Interpretation Act*, para. 50(d**)** states that the exercise of the powers of a board are not affected by the participation in a meeting of a person not entitled to be present. A provision that certain board decisions, of a confidential nature, are to be taken by a committee of specified members of the board would almost certainly displace the section.

3. Deal with the matter among provisions that require a different result (the context displaces the application of the Interpretation Act).

   Example 6

   A provision drafted in the plural is usually treated as applying also to singular cases (see model *Interpretation*
   Act, ss. 23(2)).This will not be the case if related provisions indicate that only a plural condition is contemplated. The context then indicates an intention to exclude the Interpretation Act provision.

4. Satisfy yourself that the context of your draft makes the provision of the Interpretation Act wholly inapplicable or cannot sensibly support its application.

   Example 7

   The model *Interpretation Act*, s. 29 defines "person" so as to include a corporation. That definition can have no application to a provision that provides social welfare benefits to persons

in need. However, note that corporations act through their officers and employees and in that sense are capable of doing things that can only be done by natural persons. If the intent is to impose liability for these things only on natural persons, then "individual" rather than "person" should be used.

If you are in any doubt whether the Act might be relied on when it should not be, include words that remove that doubt.

3. USING INTERPRETATION ACTS TO FACILITATE DRAFTING.

An Interpretation Act facilitates drafting by:

- providing for the form and application of legislation;
- creating general rules for the commencement of legislation;
- prescribing standardised definitions;
- supporting a common legislative style;
- resolving uncertainties in interpretation;
- specifying rules of substantive law to be implied into legislation.

a) Form and application provisions.

An Interpretation Act usually contains rules describing or for referring to legislative texts and generally on the form of written law (model *Interpretation Act*, ss. 4 and 25).

- **References to legislative instruments:** standard terms are provided that legislative counsel should use when referring to different types of legislative instruments and the methods of making them law.

Activity 3

Note the terms used in your jurisdiction to refer to:

- all forms of legislation ("**written law**")
- primary legislation: ("**Act**")
- secondary legislation: ("**subsidiary legislation**")
- the types of secondary legislation ("**regulation, rule, order, bye-law**", etc)
- the process of legislating ("**enactment**"; "**making"**)

- **Citation and words of enactment**: provisions for citing legislation and the correct enacting words that must appear in Bills.

Activity 4

Note for your jurisdiction:

- the methods of citing legislation(model *Interpretation Act*, s. 5);
- the words of enactment(model *Interpretation Act*, ss. 6 and 10 and Schedule 1).

- **Other provisions as to form or application**
    - ***Acts to be public Acts*:** Public Acts need not be proved before the courts. Under this provision, an Act is not to be treated as merely local or personal and, accordingly, need not be proved (model *Interpretation Act*, s. 7).
    - ***Territorial application of written law*:** If legislation is to apply to part only of a jurisdiction or outside it, this section requires you to make clear provision to that effect.(model *Interpretation Act*, s. 8; this is considered in more detail in LGST 555, Module 1, Section 6 - *When and how do we draft application provisions?*).
    - ***Binding the State*:** When legislation is to impose burdens upon the State, the Government or State institutions, this section requires express provision to that effect.(see model *Interpretation Act*, s. 9 and Module 5, Section 6 -*When and how do we draft application provisions?*).
    - ***Intrinsic aids*:** These sections set out the status of various features found in legislation as aids to interpretation (model *Interpretation Act*, ss. 12 to 14); these are also considered in Section 1 of this Module).

Activity 5

Read the provisions mentioned above of the model *Interpretation Act* on form and application. Note in the table in the Appendix to the Section whether the Interpretation Act in your jurisdiction contains provisions on these matters.

b) Commencement provisions.

Interpretation Acts typically contain standard provisions about the dates and time on which enacted legislation is to be considered as coming into force (model *Interpretation Act*, ss. 17-19).These affect decisions about whether to include a commencement provision in legislation. These provisions generally take effect automatically if there is no other provision (see model *Interpretation Act*, s. 18). A commencement provision is needed when these standardised rules do not provide the intended result.

Interpretation Acts also contain general rules for taking preparatory steps in order to make legislation fully effective on the date it comes into force (model *Interpretation Act*, s. 19). It is not necessary to repeat them if they will produced the intended result.

c) Standardised definitions.

Interpretation Acts assign standard meanings to expressions that are frequently used in legislation (model *Interpretation Act*, sections 25-29). Unless you make different provision, these expressions carry the meanings assigned by the Act in any legislation in which you use them. Consequently, you need not define these expressions if the standard definition will do. If they are not, you must provide an alternate definition to achieve the intended meaning.

It is usual to find four main kinds of definitions in Interpretation Acts.

- **Official authorities, officers or public bodies or institutions**

Example 8

The following are examples of these expressions for which the model *Interpretation Act* (ss. 26 and 27) provides definitions:

"Attorney-General"; "court of summary jurisdiction"; "*Gazette*"; "Government"; "Judge"; "Supreme Court".

- **Expressions that have no fixed meaning, but are to be given a settled one for legislative purposes**

Example 9

The following are examples of these expressions for which the model *Interpretation Act* (ss. 27 and 29) provides definitions:

"financial year"; "public holiday"; "statutory declaration".

- **Expressions that have a usual meaning, but are to carry a different meaning (usually an extended one) when used in legislation**

Example 10

The following are examples of these expressions for which the model *Interpretation Act*, s. 29 provides definitions:

"oath"; "person"; "sell"; "swear"; "will"; "word".

- **Give precision to commonly used expressions that are indeterminate or capable of more than one meaning**

Example 11

The following are examples of expressions for which the model *Interpretation Act*, s. 29 provides definitions:

"document"; "publication"; "public place"; "writing".

- **Convenient short-hand expressions**

Example 12

Use the expression "prescribed" (model *Interpretation Act*, s. 25(1)) in an Act to indicate that the matter that it describes is to be regulated or explained by subsidiary legislation made under the Act. It can be used as an adjective or a verb.

A person holding the prescribed qualifications ....

The Minister may prescribe the qualifications that must be held by members of the Board.

Activity 6

1. Familiarise yourself with the four kinds of definition by examining how the model *Interpretation Act* deals with the terms set out in Examples 8 to 11.

2. Read through the standard definitions in the Interpretation Act in your jurisdiction giving thought as to which of the four kinds each falls.

d) Standardised rules for a common legislative style.

The Act contains a series of standard rules for construing written laws. A common legislative style is more likely to develop when these are taken into account. Three examples found in the model Interpretation Act are discussed below.

- **References to internal divisions** (model *Interpretation Act*, ss. 16(3)-(5):

  These provisions are particularly valuable as they enable you:

  - to refer to individual sections or schedules without adding "**of this Act**" or "**of this regulation**";
  - to refer to a subsection of a section without adding "**of this section**";
  - to refer to a paragraph in a subsection without "**of this subsection**".

- Application of subsidiary legislation (model Interpretation Act, ss. 40(4)):

  A general power to make subsidiary legislation is treated as including a number of ancillary powers. You need only provide expressly with respect to these if you must deal with the matter in a different way.

  This power should be read with the model *Interpretation Act*, s. 45, which authorises the power to be used as often as it is needed. If you intended the power to be used, for example, only once or in the same way for everyone subject to the parent Act, you will have to say so.

- Cumulative penalties (model Interpretation Act, ss. 54(2)):

  You can authorise a court to impose several penalties together or in the alternative merely by stating those penalties linked by the word "**and**":

  "… or "liable to a fine of $500 **and** to imprisonment for 2 months."

  There is no need to restate the cumulative position (for example, by adding, "**or to both such fine and imprisonment**").

Now let us take a look at other provisions of this kind and work out how you can take full advantage of them.

e) Resolution of interpretive uncertainties.

Some sections of Interpretation Acts are intended to remove doubts about the ways in which particular kinds of provisions should be interpreted. They provide standard rules, which apply unless there is a different provision. They relate to:

- time;
- the effects of repeals;

- powers and duties;
- miscellaneous matters.

- **Time**

  These rules are similar in most Interpretation Acts (see model *Interpretation Act*, ss. 30-33).They enable you to write, for example, time provisions, in ways that leave no uncertainty about when the time begins or ends.

Example 13

The model *Interpretation Act*, ss. 32(2) and (3) indicates how a period of time that has a fixed opening and closing dates can best be drafted.

Applications may be made in the period beginning on 1 April and ending on 31 May.

1 April and 31 May are both included in the period.

- **Effects of repeal**

  Here too the rules follow standard lines. They set out standard ways in which transitional matters are to be dealt with when legislation is replaced or repealed (see model *Interpretation Act*, ss. 35-39). These provisions are discussed in LGST 555, Module 1, Section 4 - *How do we draft interpretation provisions?*

Example 14

The model *Interpretation Act*, ss. 39(2), deals with the consequences of the repeal of an enactment that creates an offence. Under this subsection, prosecutions for offences under an Act that were committed before its repeal can be started and completed, and the penalty applied, afterward despite the repeal of the Act. You need not provide for that case in transitional provisions.

- **Powers and duties**

  As a result of provisions such as those in model Interpretation Act, Part 9, you need not state that:

  - a function may be performed whenever the circumstances envisaged arise (s. 45);
  - a power-bearer has, in addition to the specified power, all other necessary powers to enable that power to be carried out (s. 46);
  - the person appointing an officer is the authority that has the power to dismiss and discipline the officer and to make acting appointments (s. 47);
  - those acting in, or temporarily appointed to, an office may perform all the functions of that office (s. 48), including any powers delegated to the office-holder (ss. 51(3));
  - delegated powers may be delegated subject to conditions or exceptions specified by the delegating authority, and the delegation is subject to safeguards (s. 51).

- **Miscellaneous**

When you are requiring a prescribed form to be used, you need not add words stating that a form that is substantially the same (for example, "in the form prescribed *or to like effect*") may be also used. This deviation in forms is generally permitted by the Interpretation Act (see model *Interpretation Act*, s. 44).

f) Implied rules of substantive law.

Interpretation Acts sometime contain rules of substantive law that apply by implication. These must be read into legislation if the circumstances they describe arise. Our earlier words of caution about a possible lack of awareness of other users have particular relevance to these provisions.

The most important of these rules are set out in the following provisions of the model *Interpretation Act*:

- **Majority and quorum of statutory bodies** (s. 49)

  This section permits statutory bodies to reach decisions by a majority of the persons who comprise it, and establishes standard rules for determining what constitutes quorum for the body. However, it is good practice to include provisions on these matters in the legislation initially creating the body, where most users will look for them.

- **Statutory bodies not affected by vacancies** (s. 50)

  This section reverses some unfortunate common law rules under which technical irregularities vitiated the decisions of corporate bodies. It is sensible to include a section on these matters too in legislation initially establishing such a body. This is particularly the case if the matter is not dealt with in your Interpretation Act.

- **Double jeopardy** (s. 52)

  If you are drafting an offence provision that overlaps with the terms of an existing offence, this section ensures that the same act or omission cannot be punished under both provisions. It is a re-statement of the common law. Today many Constitutions also contain rules that prevent a person being prosecuted twice in these circumstances.

Activity 7

Verify the references to any provisions dealing with double jeopardy in your Constitution.

- **Punishment of corporate officers** (ss. 53(2))

  A provision of this kind is often included in legislation dealing with activities that are particularly likely to give rise to offences by corporate bodies. This section creates a general rule that applies to all legislation.

- **Fining as alternative to imprisonment** (ss. 53(3)-(4))

  As corporate bodies cannot be sent to prison, this section provides specified levels of fine for those bodies if convicted of an offence when the legislation creating the offence does itself not

provide for fining. So long as the scale is adequate, you need not make further provision for this purpose when drafting offence provisions.

- **Forfeitures and fines** (ss. 55)

  This section provides for the standard ways in which fines and forfeitures are to be paid. It is only where you wish to make alternative provision (for example, exceptionally, for the penalty to be paid to an informer or a victim), that these matters need specific attention.

- **Service of documents** (s. 56)

  This section contains standard rules for serving documents and for determining when service is taken to have occurred. These are usually adequate for normal purposes. If different arrangements are called for, include express provisions in your draft.

Example 15

If relying on these provisions, it is usually enough to state:

the defendant must *deliver* [*serve*] the notice *to* [*on*] the plaintiff; or

the plaintiff must *send the document* by post to the defendant not later than.....

- **Membership of the Commonwealth** (s. 57 and Schedule 2)

  This contains general provisions for establishing which countries are “Commonwealth countries” (see also the definition in s. 27).You can use that term to refer to all the member states, without having to include, for example, a list of the countries in the Commonwealth in your draft. In the past, such lists have proved unreliable as the membership changed.

HOW DO WE WORK WITH THE CONSTITUTION?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

It has been said that legislative counsel need not be specialists in any branch of law. However, this is not usually the case for constitutional law. Since much legislation deals with public law matters, legislative counsel have to be familiar with the principles of public law and have a sound working knowledge of administrative law. But overriding even this, you need to be thoroughly conversant with the Constitution of your jurisdiction and its associated legislation and with the ways in which the courts have interpreted and apply their provisions. Be prepared to work out the constitutional implications of legislative proposals and look out for any that may not be constitutional.

In this Section, we concentrate on drafting constraints that arise from the Constitution and constitutional law. We are not concerned with drafting constitutional instruments. That is a specialist area of drafting that arises relatively infrequently and is generally undertaken by legislative counsel with considerable experience. At the beginning of a drafting career, your first priority is to establish how constitutional instruments influence drafting practices and choices and the ways in which the Constitution can set limits within which you must work.

Section Objectives

In this Section, the objectives are to enable you to work within the constraints imposed by your Constitution and to take full account of its requirements so that the legislation is not vulnerable to legal challenge.

Essential Questions

This Section is divided into two subsections organised in terms of the following questions:

1. THE CONSTITUTION AND LEGISLATIVE COUNSEL
    - What is legislative counsel's responsibility?
    - How should we deal with instructions that appear inconsistent with the Constitution?
    - What constitutional instruments are we likely to need?
    - What constitutional principles are important for drafting?
        - supremacy of the Constitution;
        - restrictions on constitutional amendment;
        - separation of powers;
        - the rule of law;
        - limitation of legislative authority;
        - delegation of legislative power;
        - principles of state policy;
        - protection of fundamental rights and freedoms.
2. PARTICULAR CONSTITUTIONAL CONSTRAINTS
    - What are the main constraints on legislative functions and procedures?
    - What are the main constraints on judicial functions and procedures?
    - What are the main constraints on executive functions and procedures?

- What are the main constraints on public service functions and official appointments?
- What are the main constraints with respect to financial matters?

Studying this Section

This Section is written on the assumption that you are already familiar with your Constitution and have a good understanding of the constitutional law of your jurisdiction. But if you come across concepts or aspects of constitutional law in this Section with which you are not familiar, consult a standard textbook on the matter. If you are already thoroughly conversant with this area of law, you may be able to work through this Section quite quickly.

Throughout this Section, the activities require you to confirm or find out about features of constitutional law as they relate to your jurisdiction. This may require a little research and certainly a close examination of your Constitution. But time spent on this will stand you in good stead in the future, even though the information may not be required for the immediate purposes of these Materials.

You will also be invited to search out other legislation that supplements the Constitution. So, this Section provides an opportunity for you collect documents that, as a legislative counsel, you should always have at hand.

Make sure that you have a completely up-to-date copy of the Constitution for your personal use. You will need to refer to it frequently during this Section and Section 4.

1. THE CONSTITUTION AND LEGISLATIVE COUNSEL.

Legislation that is inconsistent with the Constitution or that fails to take constitutional requirements into account is open to both legal and political challenge. Even if it survives such a challenge, its status will have been the subject of controversy and expense, and almost certainly of delays in putting it into effect. Legislative counsel have a professional responsibility to reduce the possibility of this happening, whether the fault lies in the policy or the form of the legislation or in the procedures followed in the making.

How that may be done varies considerably from one jurisdiction to another depending on organization structures. Most often, legislative counsel work within or in close cooperation with the department responsible for providing legal advice to the Government, typically the Attorney General's department. Constitutional concerns, like other legal concerns, are addressed within that context, ultimately by the Attorney General with Government ministers if necessary. Some jurisdictions have also recognized this role in statutory provisions for the examination of draft bills and regulations and reports of inconsistency (see for example, the *Department of Justice Act* (Canada), section. 4.1 and the *New Zealand Bill of Rights Act*, 1990, section 7).

Policy matters

Constitutions typically impose restrictions on legislating for a wide range of matters (especially through a Bill of Rights). In planning legislation, these restrictions must be respected. For that purpose:

- look for any constitutional issues to which a legislative proposal can give rise and consider their implications for your draft;

- consider whether your draft is not open to constitutional challenge either in the courts or the legislature;
- if you find constitutional problems in the present form of the proposals, make your clients aware of them so that they have ample opportunity to consider the implications and whether the proposal should be modified to avoid the problems.

The instructing Ministry may pick these matters up in the course of developing the proposals. In that case, they may be expected to seek the advice of the Attorney-General (as principal legal adviser to Government). This is often done through departmental legal advisers or specialist constitutional law units in the AG's department. Departmental legal counsel and constitutional specialists may also consult with legislative counsel.

But an instructing Ministry cannot necessarily be relied upon to spot constitutional problems. In many countries, no legal officers are assigned to the Bill team; policy officials without legal expertise may overlook, or treat as unimportant, features of the proposals that are of crucial significance to the constitutional lawyer. Some issues only become apparent as the legislative requirements are worked out at the drafting stage. For these reasons, legislative counsel have a responsibility:

- to evaluate the drafting instructions from the constitutional standpoint (and not rely upon the client);
- to draw early attention of the client to any features of the proposals or scheme that appear to give rise to constitutional difficulty, with a view to their re-consideration after obtaining appropriate legal advice;
- to draft legislation so that it complies with the Constitution;
- to draw attention of the client (and therefore of the Minister steering the legislation through the Legislature) when constitutional requirements demand a particular choice of words.

Formal matters

Whether or not the contents give rise to constitutional questions, the form of legislation, its language and the methods it uses must also accord with the Constitution and constitutional law. Legislative counsel also have a responsibility:

- to ensure that the formal features of legislation follow any requirements that the Constitution either explicitly or implicitly prescribes (for example, enacting words);
- to adopt the terminology used in the Constitution when dealing with the same matters in the legislation;
- when the legislation is concerned with activities that involve entities or authorities created or regulated by the Constitution, to ensure that the draft is consistent with the way the Constitution deals with those bodies.

Procedural matters

Constitutional requirements typically prescribe the procedures to be followed in enacting different kinds of legislation. These requirements can affect the form of the legislation (for example, legislation amending the Constitution may require special enacting words). In these matters, you are expected:

- to be conversant with the various legislative procedures;
- to provide advice as to what they entail and how they should be applied;
- to take them into account in as far as they affect the form of legislation you are drafting.

a) What is legislative counsel's responsibility?

Legislation that is inconsistent with the Constitution or that fails to take constitutional requirements into account is open to both legal and political challenge. Even if it survives such a challenge, its status will have been the subject of controversy and expense, and almost certainly of delays in putting it into effect. Legislative counsel have a professional responsibility to reduce the possibility of this happening, whether the fault lies in the policy or the form of the legislation or in the procedures followed in the making.

How that may be done varies considerably from one jurisdiction to another depending on organization structures. Most often, legislative counsel work within or in close cooperation with the department responsible for providing legal advice to the Government, typically the Attorney General's department. Constitutional concerns, like other legal concerns, are addressed within that context, ultimately by the Attorney General with Government ministers if necessary. Some jurisdictions have also recognized this role in statutory provisions for the examination of draft bills and regulations and reports of inconsistency (see for example, the *Department of Justice Act* (Canada), section. 4.1 and the *New Zealand Bill of Rights Act*, 1990, section 7).

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- to provide advice as to what they entail and how they should be applied;
- to take them into account in as far as they affect the form of legislation you are drafting.

b) <u>How should we deal with instructions that appear inconsistent with the Constitution?</u>

Governments in their determination to carry through their priorities may become impatient with the restrictions that the Constitution appears to impose. They may decide to push ahead with a legislative proposal that is constitutionally questionable, or more rarely, that is evidently inconsistent with the Constitution. If legislative counsel receive instructions of that kind, what should they do?

Legislative counsel in the employ of a government are public officers, all of whom have a duty to uphold the Constitution. In addition, as members of the legal profession, they have professional duties to uphold the law. At the same time, a public officer appointed to serve the government of the day is expected to carry out duties as directed by Government. General Orders (which regulate the activities of public officers) sometimes contain rules for dealing with cases of doubt about the legality of an instruction. For example, they may permit the officer to state the objection in writing to a superior officer. But in the last analysis, legislative counsel who are public officers have the choice between carrying out instructions given by the authorised superior officer or the responsible Minister, or resigning from the service. A comparable choice faces legislative counsel in private practice who are retained by the government to draft legislation: they can either carry out the instructions or discontinue providing their services.

However, legislative counsel are in a special position in cases of this kind. More than any other public officers or legal counsel, they should have an understanding of both the specific and the broader constitutional implications of enacting a piece of legislation that is constitutionally questionable. In a controversy of this kind, the expertise of legislative counsel needs to be asserted to the full before a final decision is taken by Government to proceed with the legislation. The possible consequences of a

constitutional review by the courts, the likelihood of reversal by the court or of a successful defence, and the attendant costs and delay, must be made known.

Providing this advice is an aspect of the professional responsibility of legislative counsel to safeguard the statute book. And they do not assume it alone. Serious issues of constitutional challenge should be raised with their managers or other senior legal officers, including the First or Chief Legislative Counsel. A written account and analysis of the issues should be prepared by legislative counsel, departmental legal counsel or specialist constitutional counsel, as appropriate.

Faced with constitutional objections, the Government has a number of options:

- drop the proposal altogether;
- proceed with the proposal and take the risk that the challenger will be unable to rebut the presumption of constitutionality that the courts apply;
- seek an amendment of the Constitution to accommodate the legislative proposal;
- if the Constitution permits, ask Parliament to enact the legislation by a special procedures (for example, with a special majority), in which case the legislation becomes a valid exception to the Constitution;
- modify the proposal to a form that permits the legislation to be drafted consistently with the Constitution.

It is rare for Governments to disregard strong legal objections by their legal advisors, including legislative counsel, especially if they are coupled with positive and constructive proposals that enable the Government to carry through its policies without contradicting the Constitution. It is here that your expertise can be valuable. Can you suggest modifications to the proposal to achieve all or most of the policy objectives while reducing the likelihood of any legal challenge to the minimum?

To discharge this responsibility you need considerable ingenuity and drafting skill, in particular:

- a thorough understanding of how your courts are likely to interpret the relevant parts of the Constitution;
- familiarity with the relevant case law both from your jurisdiction and from others with similar constitutional requirements;
- access to legislative precedents, from any source, on similar legislation that has resisted constitutional challenge.

c) What constitutional instruments are you likely to need?

In many countries, a single instrument, formally described as “The Constitution”, contains the basic and supreme law. In other countries, it is comprised of a series of instruments, typically made over time as the country and its public institutions develop.

The Constitution is concerned with the distribution of State power, executive, legislative and judicial, the establishment of the major institutions of the State that are to exercise that power and the relations between them. It sets limits, safeguards and, typically, guarantees as to the way that power can be used, including fundamental standards governing the relationship between the individual and the State. It is also the supreme law of the country and prevails over all other laws in cases of conflict.

The ways in which Constitutions distribute and regulate State power are by no means the same. And they are by no means the sole source of authority on such matters. Typically, the Constitution itself requires the enactment of legislation that supplements its provisions. Since this legislation puts much flesh on the bones of the Constitution, it is of considerable importance in constitutional terms, although it does not have the superior legal status of the Constitution.

You should be familiar with the contents of the following kinds of instruments in your jurisdiction, and should keep those marked with an asterisk (*) to hand, as you are likely to have consult them regularly:

1. the Constitution* and all the current amendments*
    - if the Constitution was made in an Order-in-Council in the United Kingdom:
        - the Act (usually the Independence Act) under which the Order-in-Council was made;
        - the Order-in-Council (which typically contains transitional provisions, some of which may still have relevance);
2. citizenship legislation;
3. the Act regulating membership, privileges and powers, parliamentary bodies;
4. rules of procedure or standing orders of parliamentary bodies*;
5. election legislation ("*Elections Act*" / "*Representation of the People Act*");
6. Acts establishing the courts and defining their levels and jurisdiction;
7. legislation providing for the management and control of public finances* ("*Financial Administration and Audit Act*");
8. legislation regulating the public service* ("*Civil Establishment Act*" / "*Public Service Act*");
9. legislation establishing the local government system and defining the jurisdiction of local government councils;
10. legislation on constitutional and judicial review (including "*Crown Proceedings Act*");
11. legislation governing law enforcement officials (police) and their powers.

This is by no means a comprehensive list. Other legislation affects authorities established by the Constitution, though little of it has general constitutional significance. Examples are Acts which govern remuneration, allowances and pensions of the Head of State, Ministers, Parliamentarians, Judges and public officers or regulate the armed forces or statutory corporations.

Activity 1

For each of the instruments noted above, note the short title and citation of the principal instrument on the specified matter that is currently in force in your jurisdiction. Also take the opportunity to familiarise yourself with their contents and obtain copies of those marked with an asterisk (*) for your jurisdictional materials folder or binder.

In addition, a growing trend is to legislate "quasi-constitutional" law that complements the Constitution and its related legislation, for example, on human rights issues, access to government information and official languages. Again, these are areas of law with which legislative counsel should expect to become familiar.

d) What constitutional principles are important for drafting?

Almost all countries have a written Constitution, but the way that state power is distributed and constrained is treated differently. Many still exhibit the influence of the parliamentary model; others have drawn on different precedents.

However, there are some constitutional doctrines that typically apply to these written Constitutions. Legislative counsel should be familiar with them. We will not examine these in detail since this is not a constitutional text. For the present purposes, it should be enough to draw your attention to their implications for drafting legislation.

These doctrines are:

1. supremacy of the Constitution;
2. separation of powers;
3. the rule of law;
4. restricted powers of constitutional amendment;
5. limitation of legislative authority;
6. delegation of legislative power;
7. principles of state policy;
8. protection of fundamental rights and freedoms.

1. Supremacy of the Constitution

Constitutions typically contain a statement that the Constitution is supreme law.

Example 1

This version brings out the essential characteristics of the doctrine:

1. (1) This Constitution is the supreme law of [Utopia] and, subject to subsection (2), any act (whether legislative, executive or judicial) that is inconsistent with it is, to the extent of the inconsistency, void.

(2) All other laws are to be interpreted and applied subject to this Constitution, and as far as practicable, in such a way as to conform to it.

As the example states, inconsistent legislation is void - the definitive decision to that effect will be made by the court charged with the function of constitutional review. However, the courts generally adopt a presumption of constitutionality. This places the burden of establishing a breach of the Constitution on those asserting it. Further, wherever possible, courts seek an interpretation to legislation that is consistent with the Constitution so that the legislation can be given some legal effect. They assume that a Parliament or Legislature does not intend to enact legislation that contravenes the requirements of the Constitution. If they can, courts try to save legislation by severing void provisions; but this is possible only if removal of those provisions does not alter the essentials of the scheme as enacted.

You should never rely upon the courts saving legislation by these means. It is not their function to correct legislation that is unconstitutional. Your responsibilities then, when dealing with any matter that is affected by the terms of the Constitution, are:

- to respect the distribution of legislative authority and any procedural requirements as to its exercise prescribed by the Constitution;
- to ensure that any constitutional requirements governing actions taken by public authorities are respected (and, if necessary, reflected) in any legislative provisions dealing with actions of that kind;
- to check that what your draft authorises does not offend against restrictions on the exercise of state power contained in the Constitution;

- to follow the terminology of the Constitution when your draft deals with authorities or topics that the Constitution addresses (typically, many of the terms used there are supported by definitions in the Interpretation Act that expressly link the terms with the Constitution).

It is worth remembering that Constitutions often create bodies that are not strictly concerned with the executive, legislative or judicial power to perform specific functions, sometimes exercising autonomous authority (for example, an Ombudsman or an independent Auditor General).

Example 2

Many Constitutions contain a provision on the following lines to ensure the independence of public prosecutors:

In the exercise of the functions conferred upon the Director of Public Prosecutions by this section [*which regulates the institution, continuance and discontinuance of prosecutions*], the Director of Public Prosecutions is not subject to the direction or control of any person or authority.

In drafting legislation on criminal process, such a provision requires that you take care not to give powers to another person (for example, the Attorney-General) which cut across the specified functions of the DPP, nor to permit another person to have the final say on the exercise of the powers in question. On the other hand, the provision does not prevent a requirement that the DPP *consult* with the Attorney-General on particular matters before reaching a final decision.

Activity 2

Find and re-read the provision in your Constitution on supremacy of the Constitution.

2. Restrictions on Constitutional Amendment

Constitutions typically contain a comprehensive statement as to the circumstances and procedures for their amendment. In addition, some Constitutions require any statute that makes a Constitutional amendment to make that fact clear on its face. Strict compliance is essential; a law that contradicts any of the requirements is void and will be struck down on a constitutional review.

Amendment can take a variety of forms (as some Constitutions state explicitly):

- repeal of existing provisions (with or without their re-enactment or replacement);
- modification of existing provisions or addition of new ones;
- suspension of the operation of existing provisions (or where legally suspended, ending the suspension);
- making provisions that are inconsistent with the existing provisions.

The last of these is particularly important when drafting legislation. Under some Constitutions, a statute can escape the constraints of the Constitution if it is enacted by a prescribed procedure (for example, a special majority of votes). The Constitution itself is not changed; the legislation constitutes a valid exception to its requirements. This device has particular relevance in relation to the fundamental rights. Typically, Constitutions prescribe the extent to which protected rights and freedoms may be restricted. Legislation within those specified restrictions is permitted by the Constitution (and so does not constitute

an amendment). But a similar result may be achieved by enacting inconsistent legislation by a special process.

Example 3

Some Constitutions contain provisions such as the following:

47. (1) A Bill for an Act of Parliament that alters any of the following provisions [the principal provisions are then listed]..... must not be passed in Parliament unless the final vote on the Bill is supported by not less than two-thirds of all the members of Parliament.

(2) In this section:

(a)references to altering this Constitution or any its provisions include references:

(i) to repealing it, with or without re-enactment, or replacing it with a different provision;

(ii) to *modifying* it (whether by omitting, amending or *overriding* any of its provisions or inserting additional provisions in it or *otherwise*); and

(iii) suspending its operation for any period or terminating any such suspension.

Activity 3

1. Check whether your Constitution allows inconsistent legislation to be made through special procedures.
2. Also check whether your Constitution permits this device to be used in respect of the fundamental rights and freedoms.

To safeguard against this practice, some Constitutions treat certain rights or freedoms as sacrosanct; they are so essential to the structure of the Constitution that they may not be amended by any process.

Example 4

The Constitution of Namibia states:

131. No repeal or amendment of any of the provisions of Chapter 3 of this Constitution, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms created and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Even if the Constitution does not contain such a prohibition, it may be open to your courts to call in aid the “basic structure” doctrine, evolved in the constitutional courts of some countries. This states that some provisions of the Constitution are so basic to its integrity that any alteration of them would damage its essential structure; for that reason the Legislature cannot amend them, even by following the amendment procedure. This doctrine has been applied to invalidate legislation which purported to restrict the courts’ capacity to carry out the constitutional review of legislation and could apply, for example, to a statute that diminishes the independence of the judiciary, alters the basic distribution of powers or interferes with the

system of human rights protection. The doctrine has been particularly advanced in India: see *Minerva Mills Ltd. v Union of India* (1981) 1 SCR 206; *Sambamuthy v State of Andrha Pradesh* AIR 1987 SC 663.

Not all Commonwealth courts have accepted the application of this doctrine with respect to their Constitutions (see for example *Teo Soh Lung v Minister for Home Affairs* [1990] LRC Const 490 (Malaysia)). It is argued that the amendment power in the Constitution is cast in such broad terms that there is no restriction as to its scope. But as a legislative counsel, you must be aware of the growing potential of this argument, particularly in relation to the Bill of Rights provisions.

Activity 4

If the information is readily available, note whether your courts have considered, applied or rejected the "basic structure" doctrine, when dealing with a challenge to the validity of a constitutional amendment.

The same procedure may not be needed for all amendments. Some provisions of the Constitution may be "entrenched" (their amendment requires a special and demanding form of legislative procedure), but not all (since some provisions are merely technical). Some may be subject to an even more demanding procedure than others; a non-parliamentary procedure may be an additional requirement (for example, a referendum).

Example 5

7. (1) An Act of Parliament may alter this Constitution.

(2) A Bill for an Act of Parliament to alter this Constitution must state that it is a Bill to alter the Constitution.

(3) A Bill for an Act to alter this Constitution is not passed by Parliament unless it is supported at its final reading in Parliament by the votes of two-thirds of the total membership of Parliament.

(4) In every Bill under this section presented to the President for assent, the words of enactment are to be as follows:

"Enacted by the Parliament of Utopia in accordance with section 7 of the Constitution of Utopia".

Make yourself familiar with the mechanisms for constitutional amendment in your jurisdiction. As Example 5 shows, three features are particularly relevant to your work:

- the sections stating which provisions are entrenched and the special procedures for amending them;
- any requirement that an amending statute must state that purpose if it is to have constitutional validity;
- any requirement that special enacting words must be used.

Activity 5

1. Remind yourself of the provisions of the Constitution that provide for its amendment by noting their basic features.

2. Check whether your Constitution requires such an amending Act to state that fact; note the reference.
3. Check whether special enacting words are required for such Bills; note the reference.

When drafting a Bill that amends constitutional provisions (and particularly one that amends by making inconsistent provisions), draw attention to that fact by:

- making sure the client Ministry is aware of any special procedure that must be followed;
- including words in your draft to indicate that its purpose is to amend the Constitution (for example, in the long title or an objects clause or, if appropriate, by express words altering the text of the Constitution);
- using the correct enacting words if particular ones are required.

3. Separation of powers

Many constitutions allocate the three basic powers of the State - legislative, executive and judicial - among the major institutions established by the Constitution. If the Constitution makes no direct reference to which bodies are to perform these functions, courts still treat the doctrine of separation of powers as underlying it. The division of powers is a deliberate device to secure checks and balances between state authorities and to allow for specialisation of functions.

Few Constitutions provide for an absolute separation. Governments typically enjoy a limited delegated power to legislate; parliamentary bodies often contain members who make up the Government. But a high degree of separation is standard in democratic systems; particular emphasis is given to the independence of the judicial function as an essential safeguard for the Constitution itself.

Legislative power rests with the Parliament or Legislature; executive power with the designated governmental authorities; judicial power with the courts. Particular categories of power may be assigned by the Constitution to other autonomous bodies created by the Constitution (for example, the Director of Public Prosecution (DPP), the Ombudsman, the Public Service Commission).

Legislative counsel must pay full regard to these divisions of responsibility; legislation that breaches the principle is likely to be struck down by the courts. You should ensure that legislation does not vest an authority with a function that falls within the responsibility of another, unless the Constitution directly or indirectly permits.

There is a growing body of case law on the separation of powers, which legislative counsel should know. The following are examples of cases where the courts have used this doctrine in coming to a conclusion of unconstitutionality:

- allocation to the Executive of a discretion to decide the severity of punishment or to fix the penalty for persons convicted of criminal offences (a judicial function - *Hinds v R* [1976] 1 All ER 353 (Jamaica));
- determination by the Legislature itself of the penalties to be imposed on specific individuals, rather than prescribing them in respect of classes of persons committing particular classes of offence (again an interference with the judicial power - *Liyanage v R* [1966] 1 All ER 650 (Sri Lanka));
- conferring power on the Executive to nominate the judges who are to exercise the judicial power in a particular case (*R v Liyanage* (1962) 64 CNLR 313 (Sri Lanka));

- reversal by the Legislature of judicial decisions determining the rights of particular individuals or of their acquittal in a criminal case (*Mahboob v Government of Mauritius* [1983] 9 CLB 81);
- establishing a new tribunal, not provided for by the Constitution, to exercise judicial functions (for example, involving the determination of individual rights, imposing penalties, enjoining bodies for breaches of law, ordering and enforcing compliance by contempt powers) (*AG of Australia v R & Boilermakers Society of Australia* [1957] 2 All ER 45; *Brandy v Human Rights and Equal Opportunities Commission* [1995] 2 LRC 9 (Australia); *Re Residential Tenancies Act* [1981] 1 SCR 714 (Canada));
- ousting the power of the courts to review legislative or executive action for breaches of the Constitution or negativing court decisions on infringements of the Constitution by declaring invalid infringements of the Constitution to be valid (*Minerva Mills*, above; *Kenilorea v AG* [1986] 12 CLB 55 (Solomon Islands));
- requiring a court to participate in making a preventive detention order when no breach of the criminal law needed to be established (*Kable v DPP* (1996) 138 ALR 577 (Australia))

However, the separation of powers cannot be used to set aside other provisions of the Constitution: see Newfoundland (Treasury Board) v. N.A.P.E. - 2004 SCC 66 at para 104:

While the separation of powers is a defining feature of our constitutional order …, the separation of powers cannot be invoked to undermine the operation of a specific written provision of the Constitution like s. 1 of the *Charter*. Section 1 itself expresses an important aspect of the separation of powers by defining, within its terms, limits on legislative sovereignty.

As these examples show, a major cause of challenge is interference with the judicial power. In drafting legislation, then, you should check on the constitutionality of any draft provision that confers authority on a body, other than a court, the power:

- to make a conclusive ruling as to the existence or the limits of the legal rights of individuals;
- to give a binding decision as to a person's rights that involves interpretation or application of the law;
- to decide and impose penalties or to make binding orders on persons following a finding that they are in breach of legal requirements.

4. Rule of Law

Three principles that typically underlie Commonwealth Constitutions can be brought under this head:

- authorities seeking to interfere with the activities of persons in the community can only do so if they derive their power from existing law;
- those powers should not confer an unfettered discretion on the authority to do whatever it wishes; the powers should be proportionate to the achievement of the objectives for which they are needed;
- the existence, and proper exercise of those powers, and due compliance with statutory duties, should be open to judicial review, which, in particular, should be able to invalidate the action on the grounds of procedural unfairness.

These principles provide the public with a reasonable opportunity to challenge the limits of government action; they encourage executive bodies to carry out their functions with proper regard to the requirements of sound and fair administration.

Since most State authority derives from statute law, legislative counsel are well placed to assist in putting these principles into effect. When instructed to prepare legislation concerned with the powers of public bodies, in consultation with your instructing officer provide positive answers to the following questions:

- are the proposed powers sufficient to achieve the objectives of the legislation?
- do they extend only so far as is necessary for that purpose?
- are the purposes for which the powers are given evident either from their terms or from the overall statutory context?
- is the body that is to exercise the powers identified without ambiguity?
- are the circumstances in which the powers may be used made apparent?
- are the procedures to be followed in exercising the powers sufficiently provided for?
- in so far as the powers interfere with existing rights or legitimate expectations as to their exercise, should requirements of notice of the proposed exercise and of fair hearing be dealt with expressly, or are they to be left to be implied from the common law?

5. Limitation of Legislative Authority

Legislatures are generally treated as having the supreme legislative authority to make laws for their jurisdiction on whatever matters are required. Typically this is stated in the Constitution to be a power to make laws for the peace, order and good government of the State. But this supremacy is subject to any restrictions imposed on the legislative power by the Constitution. In addition to those relating to constitutional amendment, the following matters may also be entrenched, so that Parliament may legislate on them only if the specified Constitutional constraints are observed (for example, following a special procedure):

- legislation affecting the fundamental rights and freedoms;
- legislation affecting the rights of particular sections of the community (for example, rights of the indigenous people or language rights);
- the core elements of the electoral systems as contained in electoral legislation.

Example 6

(3) In so far as it alters Chapter 2 (*Fundamental Rights and Freedoms*), an Act under this section does not come into operation unless:

(a) the provisions contained in the Act effecting the alteration have, in accordance with any law in that behalf, been submitted to a referendum in which all persons who are registered as electors for the purposes of a general election are entitled to vote; and

(b) those provisions have been supported by the votes of not less than two-thirds of all the persons entitled to vote in the referendum.

Other examples are found in Examples 3, 4 and 5.

Activity 6

Note with the references matters in respect of which your Constitution prohibits the use of the legislative power or imposes restrictions on the circumstances or way in which it may be exercised.

Federal Legislatures

In federal States, the Constitution divides the responsibility for enacting legislation between two levels: a federal parliament and state or provincial legislatures, though each is treated as having full power to legislate on the matters exclusively allocated to them. The principal method of allocation is through lists of legislative powers in the Constitution. Typically these assign certain matters exclusively to one level or the other; the other matters are shared concurrently (with federal legislation taking priority). It is usual also to state which level has the power to legislate on matters not covered in the lists ("residual matters"). The body of the Constitution may also contain specific provisions allocating responsibility for specified matters to one level or the other.

Example 7

(1) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purposes of implementing a treaty.

(2) A bill for an Act of the National Assembly passed pursuant to subsection (1) shall not be presented to the President for assent, and shall not take effect as law, unless it is ratified by a majority of all the Houses of Assembly in the Federation.

Legislative counsel in a federal system have a particular responsibility for verifying that a legislative proposal falls within the power of the parliament or legislature for which they are drafting. The scope of the listed items is not always obvious given the sparse wording that is typically used. To discharge this responsibility, you should:

- make yourself fully familiar with the Legislative lists and the other Constitutional allocations of specific legislative powers:
- have a good understanding of how the courts of your jurisdiction interpret those powers;
- check that any legislative proposal is within the competence of the enacting parliament or legislature;
- if there is any uncertainty about that matter, seek advice from constitutional law specialists.

Activity 7

If your jurisdiction is in a federal system:

1. Note with references how legislative powers are divided (for example, which level is given exclusive powers or the residual power);
2. Note with references any *specific* legislative powers that are assigned to the parliament or legislature of your jurisdiction by particular sections of the Constitution.

Exceptional powers

Constitutions may confer legislative powers on bodies other than parliamentary ones (for example, the Head of State) for use in exceptional circumstances (for example, during emergencies or when the parliamentary bodies are not in session). Such powers are strictly limited and typically require confirmation by the Legislature within a prescribed time.

Example 8

89. (1) The President may, except when the National Assembly is in session, make and promulgate an Ordinance if satisfied that circumstances exist which render it necessary to take immediate action.

(2) An Ordinance promulgated under this Article has the same force and effect as an Act of the National Assembly, but every such Ordinance shall:

(a) be laid before the National Assembly; and

(b)stand repealed at the end of 4 months after its promulgation or, if before the end of that period the National Assembly passes a resolution disapproving it, upon the passing of the resolution.

(3) Without prejudice to subsection (2), an Ordinance laid before the National Assembly is to be treated as a Bill introduced in the National Assembly.

In some countries where the parliamentary system has been suspended, a body such as a Military Council may arrogate the full Legislative power to itself by its own decree. In those cases, the constitutional restrictions on its exercise are usually removed or loosened.

Activity 8

Note with references, any legislative powers that have been conferred by the Constitution on bodies other than the Parliament or Legislature it creates.

6. Delegation of Legislative Power

Legislatures are recognised as having the capacity to delegate power to make legislation on specific matters to other bodies. Typically, they are bodies with the policy-making and executive powers for those matters (for example, Ministers) or responsible for the administration of particular geographic areas (for example, local or municipal government councils). A general authority to delegate may be conferred by the Constitution, though this is rare.

Example 9

Acts of Parliament may provide:

(a) for the delegation to any person or authority other than Parliament of power to make subsidiary laws; and

(b) for the control of the use of any power delegated under paragraph (a), whether:

(i) by means of a requirement of approval; or

(ii) by means of a power to disallow, or in some other prescribed way.

Activity 9

Note any provision of your Constitution that authorises the parliament or legislature to delegate a power to legislate.

Even in the absence of an express provision, the practice is too well established to be challenged as inconsistent with the Constitution. But in both cases, what is authorised is *delegation*, not *an abrogation*, of power. Delegation is revocable and imports the continuing responsibility for and oversight of the delegated power by the delegating parliament or legislation. Abrogation severs responsibility and oversight and effectively amends the Constitution authority conferred on parliament or the legislature. It occurs if responsibility for law-making for a general class of matters is handed over to another body, giving it a free hand to determine the policy it legislates, without being subject to restrictions imposed by the Legislature. The wider the delegation, the greater the risk that it could amount to abrogation. So for example, transfer to the Executive of the legislative power to impose taxes and duties without limits or guidelines may be successfully challenged as unconstitutional (*Astaphan & Co. v Comptroller of Customs* [1996] 3 CHRLD 442 - Dominica).

Example 10

A statutory provision on the following lines is so wide that it might be regarded as an abrogation of legislative power in favour of the Minister:

(1) The Minister may make regulations with respect to the maintenance and securing of public safety and public order and for providing, maintaining and securing such supplies and services as the Minister in his or her absolute discretion considers to be essential supplies and services.

(2) Regulations under subsection (1) may repeal, replace, add to or otherwise amend any other enactment.

You can reduce the risk of abrogation by ensuring that:

- enabling provisions set out the limits on the delegated power;
- the delegate's function is to elaborate on or supplement the basic scheme that is contained in the Act.

The delegation of legislative powers is considered in greater detail in **LGST 557, Module 1, Section 2**).

7. Principles of State Policy

Many Constitutions contain a series of provisions that direct the State and all its institutions to give effect to stated objectives when carrying out their functions. In some instances, these principles are close to treaty undertakings that the State has entered into (for example, under the International Convention on Economic, Social and Cultural Rights). These can include:

- promotion of the health and welfare of the people, and the elimination of poverty;
- pursuit of a particular form of economic order (for example, a mixed economy);
- development of educational opportunities, including for those who have been particularly disadvantaged in the past;
- assertion of stated duties of citizens.

Typically, these principles are not directly enforceable by the courts. But they are increasingly influential as to how legislation is to be interpreted since the Parliament or Legislature is presumed, as the Constitution requires, to give effect to the principles when legislating. They may also be called in aid by the courts when determining the scope of the Fundamental Freedoms and Rights.

Example 11

The Namibia Constitution provides:

101. The Principles of State Policy herein contained shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based upon them.

In working with legislative proposals, remember that the Courts may have recourse to these principles in interpreting your drafts. Draw the attention of the client Ministry to any proposal that contradicts one of the principles, not least because it may attract political and Parliamentary criticism.

Activity 10

1. Note with the references whether your Constitution contains principles (or directives) of social policy.
2. Remind yourself of the coverage of those principles by reading through them and noting any features that are likely to be particular legislative significance.
3. Are the principles stated not to be legally enforceable?
4. May they be used in interpreting legislation?

8. Fundamental Rights and Freedoms

Most Constitutions now set out certain fundamental rights and freedoms that are legally guaranteed to individuals. Many of them are founded on notions derived from principles and values that underlie the common law. In the main, these are designed to protect people from abuse of State power. As legislation is the primary authority for the exercise of that power, legislative counsel have a particular responsibility to ensure that their drafts do not infringe those guarantees.

Bills of Rights (or in some jurisdictions Charters of Rights) are written in the form of wide-ranging principles and are cast in very generalised language; their application depends on how the courts interpret their open-ended contents. There is much common ground in content between them and Human Rights treaties; in many cases they are designed specifically to give effect to international treaties such as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *European Convention on Human Rights*. Commonwealth courts have generally adopted a similar purposive and liberal approach to the interpretation of the provisions, which are taken to reflect the basic values of a democratic society by which all governmental action should be measured.

As a result, there is a fast-growing trend in Commonwealth courts to have regard to the jurisprudence and practice in other countries and institutions. This body of law is giving shape to many of the rights and freedoms, sometimes in unexpected ways. In any constitutional challenge to your legislation, you can expect that this case law will be influential. As it becomes widely known, it is likely to be taken into account in the scrutiny of your work during and after enactment (by members of the Legislature, public interest groups, lawyers and the courts). This places a heavy responsibility on drafters to keep in touch with the trends in comparative and international law on human rights standards and to take every step to keep drafts in line with these standards.

Example 12

Section 39(3) of the Constitution of Papua New Guinea states:

(3) For the purposes of determining whether or not any law, matter or thing is reasonably justified in a democratic society that has a proper regard for the rights and dignity of mankind, a court may have regard to:

(a) the provisions of this Constitution generally, and especially the National Goals and Directive Principles and the Basic Social Obligations; and

(b) the Charter of the United Nations; and

(c) the Universal Declaration of Human Rights and any other declaration, recommendation or decision of the General Assembly of the United Nations concerning human rights and fundamental freedoms; and

(d) the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, and any other international conventions, agreements or declarations concerning human rights and fundamental freedoms; and

(e) judgments, reports and opinions of the International Court of Justice,... the European Court of Human Rights and other international courts and tribunals dealing with human rights and fundamental freedoms.....

It is not just in cases where legislation directly contradicts the basic freedoms that a challenge may be made. Courts read into legislation certain minimum rights guaranteed by the Bill of Rights (for example in relation to arrest, detention, and fair trial) when those matters are relevant but absent from the statutory scheme. Legislative counsel need to work out whether the ways by which the courts may apply those provisions is likely to be satisfactory, or whether it is better to deal with the matter explicitly.

As you will see in Section 4 of this Module, Constitutions recognise that the rights and freedoms cannot be absolute but must sometimes give way to an overriding public interest or be restricted in order to protect the rights of others. Legislative proposals that are inconsistent with a basic right or freedom must be brought within the permitted qualifications to be constitutional. This calls for the most careful crafting to ensure that the legislation does not exceed the limits within which such qualifications may be made. Those limits are set by the Constitution as interpreted by the courts.

Presumption of constitutionality

Courts may have recourse to the presumption of constitutionality discussed above when considering a challenge to legislation for non-compliance with the Bill of Rights. Since the Parliament or the Legislature is to be taken to have acted constitutionally in enacting the law, the onus lies on the challenger to rebut the presumption. This means that legislation is presumed:

- not to hinder the enjoyment or infringe any protected right or freedom; or
- if it does, to do so only on a permitted ground and within the permitted limits.

Such a presumption rests on an unstated assumption that these issues have been addressed in the preparation of the legislation. This imposes a responsibility on legislative counsel; those who enact legislation depend on them to play their role in assessing whether legislation is compatible with fundamental rights and freedoms and raising any concerns in this regard.

Multiple Rights and Freedoms

The range of matters covered by the Bill of Rights is very wide. Having identified that a legislative proposal touches on a particular protected right, it is easy to overlook the possibility that other rights or freedoms may be affected during the implementing of the legislative scheme. To be consistent with the Bill of Rights, provisions may be needed to deal with issues covered by several of the protected rights and freedoms. When analysing a legislative proposal, the legislative counsel has the added responsibility of envisaging what effects the legislation may have on other rights and freedoms.

Example 13

A statutory provision authorises the summary deportation of a non-national male for having entered the country illegally. He is married to a woman who is a national. This can give rise to a variety of issues as well as freedom of movement, for example:

- the right to a family life;
- security of the person (in respect of arrest and detention);
- due process and a fair hearing;
- inhuman and degrading punishment;
- discriminatory treatment on grounds of national origin or gender.

2. PARTICULAR CONSTITUTIONAL CONSTRAINTS.

This subsection contains a series of activities that provide an opportunity for you to remind yourself of features of the Constitution of your jurisdiction that have particular application in the preparation of legislation. If some are not relevant to your jurisdiction, you should skip them. When you have found the relevant constitutional instruments, familiarise yourself with their general contents and note down the references in the activities for future use.

a) What are the main constraints on legislative functions and procedures?

- Restriction on the legislative power in criminal cases

Activity 11

Does the Constitution of your jurisdiction expressly prohibit legislation that:

- makes conduct criminal retrospectively?
- increases the penalties for criminal conduct already completed?

- Mode of legislating

Activity 12

Does the Constitution of your jurisdiction contain any provision stating how the legislative power is to be exercised (for example, by an Act)?

Restrictions on the introduction of legislation

Activity 13

Is there any provision in the Constitution of your jurisdiction or the Standing Orders of the Parliament or Legislature that restricts the categories of persons who may introduce Bills, either generally or of specified kinds (for example, money Bills), into the Legislature?

- Different categories of Bills

Activity 14

Do the Constitution or the Standing Orders:

1. draw a distinction between Bills introduced by the Government and by members of the Legislature?
2. prescribe different procedures for these different categories?

create any special procedures for Bills dealing with private, rather than public, interests or that affect essentially private rights?

- Intervention by legislative veto

Activity 15

1. Has your Head of State a constitutional power to veto or refer back a Bill when presented for assent?
2. If so, are there any special procedures or actions that must be carried out?

- Restrictions on Bills in a bicameral (two-chamber) Parliament or Legislature

Activity 16

1. Are there any restrictions on the categories of Bills that may be initiated or dealt with in the upper chamber?
2. Are there any restrictions on the powers of the upper chamber when dealing with Bills?
3. Briefly note how the Constitution in your jurisdiction provides for the resolution of disagreements between the chambers about Bills.

- Restrictions deriving from legislative procedures

Activity 17

Do the Standing Orders provide for:

1. the stages through which Bills must pass?
2. how notice is to be given of the intention to introduce a Bill?
3. the procedure to be followed in debates?
4. committal of Bills to committees and their procedure?

5. how notice is to be given of amendments to Bills?
6. limits on the scope of those amendments?
7. whether or not a Bill can be carried over from one legislative session to another?

- Review of Bills before Assent

Activity 18

Does the Constitution of your jurisdiction require Bills to be examined formally by any body other than the Legislature before they are presented for assent?

b) <u>What are the main constraints on judicial functions and procedures?</u>

- Adjudication must be by independent and impartial courts

Activity 19

Does the Constitution in your jurisdiction (for example in a Bill of Rights):

1. create a general right to have civil rights and obligations determined by an independent and impartial court, or is this limited to criminal cases?
2. require the rights to be determined by a fair hearing within a reasonable time?
3. permit other adjudicatory bodies (for example, tribunals) to determine civil rights too?

- Restrictions on establishing courts

Activity 20

Does the Constitution in your jurisdiction:

1. establish all the courts in your system, or only the superior courts?
2. authorise the Parliament or the Legislature to establish any categories of courts?
3. stipulate the essential jurisdiction of the courts it establishes, or merely provide for jurisdiction to be provided for by Parliament or the Legislature?

- Constitutional review

Activity 21

1. Does the Constitution in your jurisdiction vest a particular court (or all superior courts) with a general power to review legislation for its constitutionality?
2. Are there special arrangements for dealing with infringements of the Bill of Rights?

- Restriction on excluding judicial review

Activity 22

Does the Constitution in your jurisdiction expressly prohibit enactments that exclude, or purport to exclude, the jurisdiction of the courts or other judicial tribunals to determine questions of law or concerning a person's rights?

c) What are the main constraints on executive functions and procedures?

- Exercise of executive authority

Activity 23

1. In which body is the executive authority formally vested in your jurisdiction?
2. Who may exercise the executive authority?

- Functions of the Head of State

Activity 24

1. Does the Head of State in your jurisdiction have substantial executive authority or is the office largely ceremonial?
2. When the Head of State is a ceremonial figure, what modifiers does the Constitution use to describe the relationship with those who actually take the decisions (for example, "acting on/in accordance with the advice of")?

- Division of executive responsibility

Activity 25

1. Is the Parliament or Legislature in your jurisdiction expressly empowered to confer executive functions on persons in addition to those who are constitutionally required to exercise the executive authority (for example, on Commissions or Councils created by the Constitution)?
2. In addition to the members of the Government, which entities are given a specific executive responsibility by the Constitution (for example, a DPP or Auditor-General)?

- Assignment of Ministerial responsibility

Most Constitutions provide for the assignment of responsibilities to the Ministers of Government. Typically this is done on the installation of a new Government in a formal instrument, which is amended or replaced as responsibilities are changed. It is from this document that you should ascertain which Minister is responsible for any subject of administration with which the legislative proposals are concerned. Some jurisdictions also publish tables of responsible ministers, which can also be used to determine their responsibilities with respect to the administration of legislation.

In drafting legislation, it is possible to refer to the relevant Minister in a number of ways:

- by the official name given to the Ministerial office to which the subject-matter of the legislation is assigned (for example, "Minister of Agriculture");

- as the Minister "responsible for" the general area under which the subject-matter has been placed by the instrument (for example, "Minister responsible for agriculture");
- as the Minister responsible for the particular subject matter (for example, "Minister responsible for fertilisers and animal feed").

However, all can give rise to problems. If there is a change in the names of Ministries or as to the Ministry that is to be responsible for a particular subject-matter, existing references in legislation may have to be amended. Many Interpretation Acts alleviate this by allowing the drafter to use the simple term "Minister", which is defined as, for example "the Minister for the time being having responsibility for the administration of the Act" (see sections 27 and 44 of the model *Interpretation Act* in the Resource Materials).

Which Minister has the current responsibility can usually be found out from the instrument assigning responsibilities. In any case, make a practice of checking that the Ministry identified in your instructions has responsibility for the subject.

Activity 26

1. Does the Constitution in your jurisdiction expressly provide for the assignment of Ministerial responsibilities?
2. Is an instrument issued in your jurisdiction that sets out the assignments? (If so, acquire a copy of the current one for yourjurisdictional materials folder or binder).
3. Does the Interpretation Act in your jurisdiction contain a definition of "Minister"?

- Delegation of executive powers

Activity 27

1. Does the Constitution in your jurisdiction contain a general authority for executive powers of Government to be delegated to any other body (for example Public Service Commission, or other Commissions)?
2. Are any categories of functions expressed to be exercisable only be the person currently holding or performing the functions of the specified office?

d) <u>What are the main constraints on public service functions and official appointments?</u>

- Meaning of "public office" and "public officer"

  Constitutions typically prescribe which offices are to be treated as "public offices". The term generally has application beyond the civil service. It may extend to other officers, such as the judges, members of the police or armed forces, the DPP and the Ombudsman. At the same time, the Constitution may contain provisions that apply to sections of the public service only. So the Public Service Commission may not have authority over legal officers who are within the jurisdiction of a Judicial and Legal Services Commission.

In preparing legislation, check carefully before using these terms, to avoid wider application than you intend. It may be sensible to state, expressly in an application clause, to which categories your draft does or does not apply.

Activity 28

1. Does the Constitution in your jurisdiction define "public office", "public officer" and "public service"?
2. Are these definitions repeated in the same form in the Interpretation Act?

- Appointments to, and removal from, office

  The Constitution (and the Interpretation Act) may confer general powers with respect to particular cases of appointment (for example temporary or acting) or departure from office (for example resignations). These remove the need to include provisions of this kind in legislation dealing with particular public offices.

Activity 29

Does the Constitution (or Interpretation Act) in your jurisdiction:

- authorise the appointing body to exercise powers to remove or suspend the appointee or make temporary or acting appointments?
- extend the term "remove" to cover cases of compulsory retirement?
- contain general provisions on the mechanisms for resignations?
- explain who is considered to be the holder of an office?
- recognise that office-holders are generally eligible for re-appointment?

e) <u>What are the main constraints with respect to financial matters?</u>

Financial considerations are present in many Bills. Money has to be raised and spent in order that legislative schemes can be implemented. Issues of control and accounting arise wherever expenditure of public money takes place. In most jurisdictions, a body of legislation on these matters rests on foundations set by the Constitution. This reduces the need to deal with some or even any of these matters in drafting many Bills. Even so, you should be familiar with what this legislation provides, since:

- it may need to be modified for the purposes of a particular draft;
- you should use the relevant financial expressions in your drafts in order to link them with that legislation.

- Types of financial legislation

  Constitutions of parliamentary jurisdictions commonly follow the Westminster classification:

  - *Appropriation Bill*: authorises expenditure from public funds on the basis of estimates previously presented to the Legislature;

- *Supplementary Appropriation Bill*: authorises additional expenditure, on the basis of a supplementary estimate;
- *Finance Bill:* authorises the imposition of taxation or other duties for the purpose of raising revenue for public expenditure;
- *Money Bill:* is exclusively one of the foregoing, or requires public funds to be drawn upon to meet obligations set by legislation ("statutory expenditure").

In some jurisdictions, legislation of these kinds has to follow special procedures, sometimes designed to limit the powers of an unelected second Chamber or to deal with cases where two Chambers cannot agree. The Legislature may not be permitted to proceed with such legislation unless it is introduced by Government.

Activity 30

1. Does the Constitution in your jurisdiction make special provision with respect to any of the following types of financial legislation (not necessarily using these names):
   - Appropriation Bill;
   - Supplementary Appropriation Bill;
   - Finance Bill;
   - Money Bill.
2. Are there any special procedures governing the enactment of Money Bills?

- **Taxation legislation**

Constitutions do not usually state what constitutes taxation. It is usually taken to cover the compulsory demand for money, under the authority of an Act, that is to be used for expenditure for some public purpose made evident in the Act. Legislation frequently requires payments to be made to the State, for example as an incidental element of licensing or for documents in connection with an administrative scheme run by a part of the public service. Fees for licences may be treated as a form of taxation (and are often linked with "tax" in Constitutional references), as they are an element in a regulatory system created for the public interest. But a charge that does not exceed the cost of providing the particular service received arguably is not a tax since it is not a device for raising revenue for general public expenditure.

The issue of whether a payment is a tax or not has potential importance under due process rights often found in Fundamental Rights and Freedoms. For the compulsory taking of property in satisfaction of a tax does not constitute unconstitutional deprivation of property.

Example 14

A Bill sets up a licensing scheme for second-hand dealers, in which there is an annual fee for the licence and a charge made for an application form.

- The licence fee may be treated as a tax if it is not related to the cost of production and handling of the forms
- The Bill is unlikely to be treated as a Money Bill since it is neither exclusively nor mainly intended as a revenue raising instrument.

- Requirement of legislative authority

Constitutions typically require that Parliament or the Legislature must give its authority, in the form of a duly enacted Bill, for:

- the imposition of a tax or a duty;
- raising money for public purposes by way of loans;
- payments out of public funds.

If taxation is to be imposed by any other body (for example by a statutory body or a Minister), an Act must contain express words authorising the power and prescribing its limits or the circumstances when it may be exercised.

In respect of payments, if the subject matter of the legislation is to be administered out of funds allocated annually to the Ministry, you need not include express authorisation. This will be provided by the Appropriation Act that authorises expenditure to give effect to the Ministry budget.

Activity 31

1. Does the Constitution in your jurisdiction expressly require legislative authority for:
   - the imposition of taxes and duties:
   - borrowing by Government for public purposes:
   - payments out public funds:
2. Is there any single Act in force which governs Government borrowing?

- Consolidated (Revenue) Fund and other public funds

The bulk of public revenue is typically required to be paid into a single central fund, called the Consolidated Fund or the Consolidated Revenue Fund, from which withdrawals can be made only on the authority of the Minister of Finance for purposes authorised by Parliament or the Legislature. A Contingencies Fund for unforeseen emergencies, is also common. Other Funds can usually be established for specific public purposes, into which money allocated by the Legislature, or raised by loans or by specified payments by the public, is to be paid. These additional funds may be regulated by a general Act or by the legislation which created them.

Activity 32

1. Does the Constitution (or other legislation) in your jurisdiction establish (by the same or another name):
   - Consolidated (Revenue) Fund;
   - Contingencies Fund;
   - other types of public funds.
2. Is there any legislation that regulates the administration of public funds generally?

- **Payments from the Consolidated (Revenue) Fund**

  Two types of payment are typically made from this Fund:

- expenditure that, under the Constitution (or other specific enactments), is "to be charged on the Consolidated Fund", and therefore does not need annual authorisation, for example salaries and allowances of the judiciary (sometimes called "statutory expenditure");
- expenditure authorised annually by the current Appropriation Act (or Supplementary Appropriation Act).

The manner of withdrawal from the Fund is regulated by legislation typically it calls for the warrant of the Minister of Finance. The general control and management of the Fund may be provided for by the same statute.

Activity 33

1. What kinds of expenditure does the Constitution in your jurisdiction require to be charged on the Consolidated Fund?
2. Do all other withdrawals require the authority of Appropriation legislation?
3. How are withdrawals from the Consolidated Fund to be done?
4. Is there an Act which provides for the control and management of the Consolidated Fund?

- Control and management of public finance

Legislation, rather than the Constitution, is the typical way of dealing with the control and management of public finances. General legislation covers such matters as:

- the investment of money held in funds;
- the management of special funds;
- duties of the public officers who must account for expenditure in any part of the public service;
- money deposited with Government that has not been raised for the purposes of Government:
- audit and examination of public accounts.

Activity 34

Indicate where the legal provisions on the following are to be found in your jurisdiction:

- investment of money held in funds:
- management of public funds (other than the Consolidated Fund):
- duties of accounting officers:
- money deposited with Government:
- mode of audit and examination of public accounts.

- **Terminology used for financial provisions**

  In drafting financial provisions, use the same terms and expressions as are found in the provisions of the Constitution or in legislation regulating public finance.

Activity 35

Find the provisions in your jurisdiction (for example from recent legislation) that deal with the following and note the form of words in use in your jurisdiction equivalent to that illustrated.

- making sums directly payable from the Consolidated Fund, and not on the authority of the Appropriation legislation ("is a charge on the Consolidated Fund");
- making sums payable from the Consolidated Fund on the authority of Appropriation legislation ("money as from time to time appropriated by Parliament for the purpose");
- requiring payments into funds ("must be paid and credited to");
- describing the mode of withdrawal from funds ("must be paid out by warrant of the Minister responsible for Finance");
- requiring fees/charges to be paid ("the fees/charges [specified in .....] [prescribed by regulations] are to be paid in respect of");
- to require a body to set fees/charges ("the [Minister] is to prescribe by regulations the fees/charges payable under this Act").

The Interpretation Act may contain definitions of terms that relate to financial matters. Use these wherever they are appropriate.

Activity 36

Does your Interpretation Act (or the Constitution) in your jurisdiction contain:

1. a definition of "financial year" (which applies to all public finance);
2. a definition of:
    - "Consolidated Fund";
    - "special fund";
    - "statutory expenditure".
3. provisions regulating the way in which fees may be fixed by subsidiary legislation.

- Finances of statutory bodies

  Legislation on public finances usually does not apply to autonomous bodies set up by statute, even when they are performing public functions. Typically, their financial arrangements (for example revenue, expenditure, borrowing, financial control and management, audit) are provided for in the legislation that sets them up. But as public money is often involved, the requirements may be similar to those for public finances and may be linked with the control and audit systems used for public finances.

  If you are drafting legislation of this kind, you are sure to find several precedents in your jurisdiction. These should indicate the matters that call for inclusion and the prevailing practice.

HOW DO WE WORK WITH FUNDAMENTAL RIGHTS AND FREEDOMS?

[Material Extracted from Course material for Graduate Diploma in Legislative Drafting at Athabasca University]

In this Section we build on the discussion of fundamental rights and freedoms in Section 3 by concentrating on questions of drafting to meet the requirements of a constitutional Bill or Charter of Rights (which we referred to as a Bill of Rights in this Section). However, to approach this matter solely from the standpoint of the Constitution no longer suffices. Interpretation of a Bill of Rights is increasingly influenced by the standards that are set and are constantly being developed at the international level. For many countries, State action can be formally challenged for non-compliance with human rights commitments made under multilateral treaties.

Today, those preparing domestic legislation touching on human rights need to be aware that the practice of other courts and bodies may indicate how their legislation is likely to be judged in a legal challenge. Legislative counsel have a significant responsibility for ensuring that their drafts do not run afoul of either international or domestic human rights standards that are legally binding on the State.

Section Objectives

In this Section, the objectives of your study are to enable you to draw attention to legislative proposals or provisions that may be inconsistent with

- fundamental rights and freedoms provisions of the Constitution in your jurisdiction, or
- treaty obligations on human rights standards that your State has assumed towards individuals;

and to find ways in which such inconsistencies can be prevented.

Essential Questions

This Section is divided into two subsections organised in terms of the following questions:

1. DRAFTING UNDER A BILL OF RIGHTS
    - What rights and freedoms are protected by the Constitution?
    - Do the specified rights and freedoms constitute a comprehensive statement of protected rights and freedoms?
    - What other matters in the Bill of Rights are of particular interest to the drafter?
    - How should we deal with qualifications?
    - How should we deal with derogations?
    - How should we approach Bill of Rights issues?
    - How should we draft legislation to fulfil a permitted qualification?
2. INTERNATIONAL STANDARDS
    - Where do we find the international standards on human rights?
    - How do international standards affect domestic law?
    - What are the implications for law-making?
    - What are the implications for legislative counsel?
    - How can we keep in touch with international developments?
    - What international human rights treaties apply?

Studying this Section

This Section is written on the assumption that you are already reasonably familiar with the Bill of Rights provisions in the Constitution of your jurisdiction and have a general understanding of how they are interpreted. If you are not, refer to a standard text book on the subject. If you are well versed in this subject from previous work, you may be able to complete this Section fairly quickly.

In this Section, as in the previous one, activities are provided to enable you to find out or remind yourself of the position in your jurisdiction. The material on international standards may be new. This part is designed principally to heighten your awareness of this dimension and the approach that you may need to develop. The first part, on the Bill of Rights, is of greater importance and merits your close attention.

No exercises are provided since the topic does not lend itself to matters that can be dealt with in short and precise answers.

1. DRAFTING UNDER A BILL OF RIGHTS.

As we have seen in Section 3 of this Module, legislative counsel have a critical role to play in

- drawing to the attention of Government, through their instructing officers, any proposal that appears to be a *potential* source of constitutional challenge because of conflict with the fundamental rights or freedoms; and
- drafting legislation so as to minimize the risks of legal challenge on the basis of fundamental rights and freedoms.

Although there is much common ground between Bills of Rights across various jurisdictions, each has its distinctive features with which legislative counsel should be thoroughly familiar. The most important characteristics relate to:

- the categories of rights and freedoms protected;
- the form in which they are expressed;
- the qualifications that are permitted to be made by legislation (both to specific rights and generally) and the limits upon those qualifications; and
- the circumstances and method for making legislation that derogates from them.

This part is written on the assumption that you are reasonably familiar with the way in which your Constitution deals with these matters, and with the way in which the courts in your jurisdiction are likely to approach the interpretation of its provisions.

a) What rights and freedoms are protected by the Constitution?

For our purposes, it is enough to look at a short classification of rights and freedoms typically found in Constitutions.

Absolute or unqualified rights

Some rights are guaranteed in absolute terms; the Bill of Rights prohibits the enactment of legislation that imposes any restrictions on the enjoyment of the right. The underlying value is too important to allow any dilution. These typically include rights that protect against slavery, torture and inhuman or degrading punishment or treatment, retroactive criminal law or retrial of the same offence.

Qualified rights

Most protected rights and freedoms are qualified; legislation may be enacted to impose restrictions on their exercise, within the limits prescribed by the Bill of Rights. These permitted qualifications are designed to allow the law to further some communal interest or to strike a balance when protected rights clash. These typically include freedom of expression, assembly, association, movement and conscience, and the rights to personal liberty, privacy of home and person, non-discriminatory treatment, and compensation for compulsory acquisition of property.

Minimum right

Certain rights are conferred by the Bill of Rights to ensure minimum standards of treatment in specific cases when interference by the State with individuals' rights is lawful. They are designed to ensure that individuals are fairly treated and that State action is taken only after due process. Typically, these arise on arrest, detention and trial, particularly for criminal violations. They are minimum rights because it is open to the law to provide more rigorous safeguards if that is thought proper.

Entrenched (non-derogable) rights

Constitutions generally allow specific rights and freedoms to be suspended or ignored in particular circumstances. The principal justification allowed is the existence of a state of emergency; but in some cases the general power is granted to enact inconsistent legislation by special procedures (which we looked at in Section 3 of this Module). Certain rights, however, may not be derogated from, as they are regarded as subsisting at all times. Typically, these include the rights to life, equal treatment, and fair trial and to be protected against slavery, torture and inhuman and degrading punishment and treatment.

Activity 1

Read through the Bill of Rights in the Constitution of your jurisdiction. Remind yourself whether each of the rights and freedoms is unqualified, qualified, minimum or non-derogable. In particular, take note of the limits the Bill of Rights imposes on the permitted qualifications.

b) Do the specified rights and freedoms constitute a comprehensive statement of protected rights and freedoms?

Some Bills of Rights start with an introductory statement or preamble of the rights and freedoms that individuals enjoy. The statement can be construed as covering a broader range than those specifically dealt with in the later provisions. Two cases can be mentioned:

- the statement may refer to the enjoyment of rights regardless of sex or gender, although the provisions on equal treatment make no reference to discrimination on that ground;

- the statement refers to a general right to enjoy property, although only the right to protection against compulsory deprivation of property without compensation is specifically provided for.

The courts have been inclined to treat the statement as a source of protected rights on these matters, and not merely as a rhetorical preamble.

Activity 2

If the Constitution of your jurisdiction contains a statement of this kind, note any aspects in which it appears to guarantee rights not covered by the provisions that follow it.

c) What other matters in the Bill of Rights are of particular interest to legislative counsel?

Saving of existing law

Some Constitutions provide that legislation in existence at the date of the Bill of Rights is to be treated as consistent with its provisions; it may not be the subject of constitutional review for non-compliance. The restriction applies also to provisions of existing law that are re-enacted in the identical form in consolidation or revision legislation. These savings clauses may have been inserted on the assumption that the existing law reflected the same values as the Bill of Rights. But it is now clear that, but for these clauses, legal challenges to existing legislation might have been successful.

Example 1

26. (1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Chapter 2 (*Fundamental Freedoms*) to the extent that the law in question:

(a) a law ("an existing law") that was enacted or made before Independence Day and has continued to be part of the law of Utopia at all times since that day; or

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of Chapter 2 in a manner in which, or to an extent to which, it was not previously inconsistent.

Provisions of this kind specifically preserve types of punishment (for example, capital and corporal punishment) that otherwise might be vulnerable to challenge as conflicting with the rights to life and to be protected against inhuman and degrading punishment. In principle, extension of those punishments to new categories of case cannot be challenged on these grounds.

Example 2

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises:

(a) the infliction of any punishment; or

(b) the administration of any treatment,

that was lawful in Utopia immediately before Independence Day.

But consider carefully whether to rely on these provisions. Courts tend to construe them strictly and may allow challenges to new provisions modelled on them. Moreover, no such savings clauses exist under treaties, which may require all law, existing and future, to comply with their provisions.

Most Constitutions, however, do not contain savings provisions of this kind. Existing law, and any legislation modelled on it, is open to constitutional review in the same way as new legislation.

Activity 3

1. Does the Bill of Rights in your jurisdiction contain a saving clause for existing legislation?
2. Is there a saving for existing types of punishments that treats them as consistent with the protection against inhuman and degrading punishments?

Restriction to state action

Some Constitutions make clear that the Bill of Rights provides protection from interference by private persons with the rights and freedoms of others, as well as by State and other public institutions and authorities. But most are silent on the matter. In those cases, the courts have tended to construe the Bill of Rights as offering protection from State and public bodies only.

Activity 4

Does the Bill of Rights in your jurisdiction specifically extend its protection against actions by private persons?

However, this issue of "horizontal application" is now seen as potentially of great importance. For state action is involved in the processes of making law for private persons (including the provision of adequate arrangements for litigation) and of applying private law in the courts. Whether enacting legislation dealing with private or with public relationships, Parliament or the Legislature is obliged to give effect to the Bill of Rights. A private individual in relying on provisions of statute law is entitled to expect that the Bill's requirements have been fulfilled. A statutory provision may be challenged if the way that it regulates private rights is inconsistent with the Bill. Similarly, the courts are tending to see it as their duty to apply private law, including the common law, in ways that achieve compatibility with the protected rights.

This is of some importance to legislative counsel. You must be on guard for provisions that authorise action to be taken, or that prevent activities, by private individuals that are incompatible with the Bill of Rights, as much as for cases involving public bodies. Your task includes assisting the State to abide by the Bill of Rights when exercising legislative power.

Example 3

1. A statute that deals with defamation must meet the standards involved in the freedom of expression. A party to proceedings may be able to challenge the legislation on the ground that it restricts the freedom of the press or of speech or that it fails to strike a proper balance with the right to privacy or personal reputation. Any deficiencies in the law are traceable to State action.

2. A statute that enables a private landlord to discriminate as to the tenants to whom to rent private property could be challenged if it is in breach of the equal treatment requirements. Parliament or the Legislature is responsible for permitting conduct that is inconsistent with the Bill of Rights.

Making qualifications to protected rights and freedoms

As we have noted, many of the rights and freedoms are qualified. The Bill of Rights permits restrictions on their enjoyment or exercise in specified circumstances. Broadly expressed powers to qualify them are found in some jurisdictions (for example is Canada see *Nova Scotia Pharmaceutical Society* [1992] 2 S.C.R. 606). However, qualifications tend to be set out in one of two forms:

- in subsections following the particular right or freedom to which they relate, where all the conditions to be met in drafting the restricting legislation are set out;

Example 4

1. **17**. (1) Except with a person's consent, a person must not be subjected to the search of their person or property or the entry by others of their premises.

   (2) Nothing contained in or done under the authority of any written law is inconsistent with or in contravention of this section to the extent that the law in question makes provision that *is reasonably required*:

   (a) in the interests of defence, public safety, public order, public morality, public health, town or country planning or the utilisation of property in such a manner as to promote the public benefit;

   (b) for the purpose of protecting the rights or freedoms of others; or

   (c) for the purpose of authorising the entry upon premises for the purpose of preventing or detecting criminal offences.

- in a single general statement in the Bill that applies to all the relevant rights and freedoms, laying down the conditions that must be met by any legislation that restricts them.

Example 5

Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of this Chapter to the extent that the law in question makes provision that *is reasonably required*:

(a) in the interests of defence, public safety, public order, public morality or public health; or

(b) for the purposes of protecting the rights or freedoms of other persons;

and except in so far as the provision, or as the case may be the thing done, is shown not to be *reasonably justifiable in a democratic society*.

Activity 5

Note which of these two approaches is followed in the Constitution of your jurisdiction. If there is a different approach, summarise it.

However, in all cases, restrictions are permissible only if they are contained in legislation. So, legislative counsel have a particular responsibility for seeing that:

- intended qualifications are provided for expressly by legislation;
- restricting legislation keeps within the limits set by the Bill of Rights.

d) How should we deal with qualifications?

Bills of Rights necessarily impose constraints on what the State and its agencies may do. Governments are inclined to ask for powers that come up against those constraints. But the principal duty of Parliament or the Legislature is to further, and to give the fullest effect to, fundamental rights and freedoms. Legislative counsel should work to the same end:

- by asking first whether the proposals can be achieved through legislative provisions that are consistent with the rights and freedoms;
- and only if they cannot, by searching for ways in which they can be brought within a permitted qualification; and
- then, by making clear that the legislation is *intended* to restrict the protected right, using terms that show the restriction to be within the limits of the permitted qualification.

Permitted qualifications allow restrictions to be imposed on fundamental rights and freedoms so that:

- a reasonable balance is struck between the right in question and other rights the enjoyment of which may be infringed if the right were to be exercised to the full in the circumstances being regulated;
- community needs are given priority over individual rights when it is in the general interest.

Remember that every enactment made under the qualifying provisions restricts the scope of the right or freedom. Therefore, limits upon reliance on the qualifications are essential if the basic right or freedom is not to be eaten away by particular restrictions. Bills of Rights contain standards that the qualifying legislation must satisfy. While it is for the courts in the last analysis to decide whether these standards have been met, it is clearly the function of those preparing the legislation to take every step to ensure that they do. Two general standards are typical:

- reasonably required / necessary in the public interest; and
- reasonably justifiable in a democratic society.

Example 5 illustrates both (as highlighted). In some jurisdictions, only one or the other is used (as in Example 4).

Reasonably required/necessary in the public interest

A court may find that a restriction measures up to this standard only if it can be shown to be:

- *necessary* to achieve the particular head of public interest asserted or to protect the rights of others; and

- the restriction is *proportionate* to securing its objective (i.e. *is no greater a restriction* than is required to achieve its purpose).

This has implications for drafting. If courts are to be satisfied that this standard is met, the legislation must contain specific provisions from which they can assess that it is necessary and proportionate. Sound drafting uses terms that lead the court to that conclusion or, better, make it unlikely that such a challenge is made in the first place.

The following types of drafting may not meet these standards:

- Over-broad restrictions

  A restriction is *over-broad* if it can be construed as authorising cases beyond those necessary for producing the intended results. In particular, it may be over-broad if the terms of the restriction enable the administering or enforcing body to determine the general circumstances in which the restriction will apply or the entities that are entitled to invoke it. It is the function of Parliament or the Legislature, not the Executive, to determine the scope of the restriction.

Example 6

1. A statutory restriction on the holding of "public gatherings" is over-broad if it is capable of extending to religious meetings as well as to political meetings when the aims in restricting the freedom of assembly are connected with elections.
2. A power conferred on the police to refuse police bail to those "using serious personal violence" is over-broad if it applies to persons arrested in the course of a domestic dispute when the intended objective of the restriction on the right to be protected by the law is to deal with violence in the course of property crimes.

- Vague restrictions

  A restriction is *vague* if it uses terms that leave its scope uncertain or fail to indicate the conduct that it prohibits or permits, or its purpose. Users of the legislation should be able to ascertain from the language used whether they are covered or caught by the restriction. If that is not clear, courts are likely to give effect to the basic rights unlimited by the restriction.

  The line between broad and vague restrictions is not clear-cut. Both are cases where Parliament or the Legislature may be treated as failing to set out the restriction sufficiently precisely to show that it within the limits authorised by the Bill of Rights.

Example 7

1. A power to impose restrictions on the right of a citizen to travel abroad to be used when "the Minister is satisfied that the restriction is reasonably required in the interests of defence, public safety, public order, public health or public morality" is over-broad. It is not possible to know in what circumstances the power may be used; it leaves the Minister to decide both the scope of the right itself and whether it measures up to the required standards.
2. A requirement that the permission or consent of the Attorney-General must be obtained before any action for damages can be instituted against the Government (which is intended to eliminate frivolous and vexatious actions) is too vague because it is not subject to any checks and controls

and over-broad because it can be used to prevent the exercise of individuals' right to have access to court to determine their civil rights.

Reasonably justifiable in a democratic society

In some Constitutions that use this standard you should apply considerations similar to those we have just looked at. However, its effect is to allow a court to strike down legislation because it goes beyond what is acceptable in a democracy. These considerations are arguably implicit in the standard of necessity in jurisdictions that have sound democratic systems of government. There are unlikely to be many cases where legislation fails the second test without also failing the first.

Another element that this standard makes clear is that the burden lies on those asserting that legislation measures up to that standard since there must be a sound basis for concluding that a limit is "justifiable".

This standard has been extensively considered by courts in Canada where it is set out in section of the *Canadian Charter of Rights and Freedoms*. For further details on its application, you should consult Canadian jurisprudence or commentary on this subject.

e) How should we deal with derogations?

Constitutions typically authorise action that derogates from the protection afforded by Bills of Rights, although as we have seen certain rights cannot be treated in this way.

Derogations in emergencies

Additional restrictions on the exercise of rights and freedoms are unavoidable during natural or humanly-caused emergencies. Constitutions permit the enactment of derogating legislation for that purpose. It is at these times that Governments seek wide-ranging powers that may seriously reduce the scope of the protected rights. For that reason, limits are placed on derogating legislation.

Typically, the Constitution contains provisions that:

- indicate precisely when emergency derogations are permitted;
- restrict the categories of rights and freedoms that may be derogated from or suspended;
- prescribe a basic legal framework within which provisions for emergency detentions must be made.

Activity 6

1. What conditions must be met, under your Constitution before derogating legislation may be enacted for an emergency?
2. List the rights and freedoms that may *not* be derogated from even in an emergency:
3. Are there provisions controlling the use of detention during emergencies?

Derogation by inconsistent legislation

Some Constitutions expressly permit Parliament or the Legislature to enact legislation that is inconsistent with the Bill of Rights so long as special procedures are followed. In others, a similar effect can be achieved by following the procedures for amending the Constitution. These devices permit legislation to

be enacted that restricts protected rights and freedoms, even though the restrictions are not within the permitted qualifications. They enable a Government that has the necessary legislative support to escape the constraints of the Bill of Rights.

These devices should be resorted to only in the most exceptional circumstances if the system of basic rights is not to be devalued. It is not a course of action that legislative counsel should readily suggest when dealing with proposals that run up against the Bill of Rights. But, of course, you must respect unambiguous instructions to prepare legislation of this kind.

Some Constitutions prohibit legislation that derogates from the Bill of Rights guarantees; the Bill contains the complete statement of the scope of the protected rights and freedoms and the permitted qualifications. In a case of this kind, if you receive instructions for legislation that is inconsistent with the Bill and goes beyond the permitted limits, you must draw the attention of the client Ministry to the Constitutional prohibition.

Activity 7

1. Note with references whether the Constitution in your jurisdiction allows or prohibits the enactment of inconsistent legislation outside the permitted qualifications.
2. If allowed, note any special procedures that must be followed and any other constitutional limitations on the use of the power.

f) <u>How should we approach Bill of Rights issues?</u>

In principle, every legislative proposal should be examined to determine whether it may give rise to an issue to which the Bill of Rights applies. Such issues may arise in several ways:

- substantive provisions giving effect to the policy may deal with matters covered by one or more of the protected rights and freedoms;
- the procedures necessary to implement or enforce the substantive provisions may attract the provisions of the Bill of Rights that relate to due process, fair hearing and other minimum rights;
- the legislation may authorise actions that, if implemented in particular ways, may conflict with one or more of the protected rights or freedoms.

Your instructions might not tell you how you are to deal with some or any of these issues. Indeed, the need to comply with the Bill of Rights may not have been recognised. It is your task, when working out what must be dealt with by legal rules, to determine:

- the matters that may give rise to inconsistency with any requirement of the Bill of Rights;
- the matters that will attract the application of requirements in the Bill of Rights.

o If the proposals are *consistent* with the Bill of Rights

You may not need to include provisions expressly concerned with the Bill of Rights if:

- the proposals do not restrict the exercise or enjoyment of the protected rights and freedoms (they enhance and support them), or
- the minimum rights are either not applicable or are to apply without qualification or are to be improved upon in the legislation,

It may be enough to draw the attention of the instructing Ministry to the fact that the legislation, though concerned with issues within the scope of the Bill of Rights (which should be identified), is fully consistent with its guarantees. Should the question then arise during the enactment process, the Ministry is on notice that the issues have been considered and legislative counsel is satisfied that a legal challenge for non-compliance is unlikely to succeed.

In some jurisdictions, the Attorney-General is required to certify that every Bill has been "examined" for compatibility with the Bill of Rights and that no incompatibility has been found.

Activity 8

Note whether in your jurisdiction there is a system for formally certifying to the Legislature that Bills have been checked for compatibility with the Bill of Rights.

- If the proposals appear to be *inconsistent* with the Bill of Rights

  If the proposals appear to be inconsistent with the protected rights or freedoms, consider whether in their present form they can be expressed in a way that brings them within a permitted qualification. If they cannot:

  - draw the matter to the attention of the instructing Ministry in a memorandum and seek further instructions;
  - consider suggesting ways in which, in your professional judgment, the incompatible features of the proposal might be modified to bring them within the protected rights or at least within a permitted qualification.

It is then for the Government to decide whether to proceed with the proposal at all, or whether it should be modified to bring it within a permitted qualification or whether the matter is sufficiently important for it to be enacted by a special procedure in its inconsistent form. These decisions have political implications and are taken by Government and not by legislative counsel. Your subsequent actions will be dictated by your further instructions.

If the proposal can be brought within a permitted qualification, draft the Bill in a form that satisfies these constitutional requirements. Draw your client's attention specifically to the provisions that have been prepared for this purpose and to your reasons for taking the particular approach. Again, these considerations may be relevant when the Bill is under consideration in Cabinet and in the enactment process.

g) <u>How should we draft legislation to fulfil a permitted qualification?</u>

This can make considerable demands on legislative counsel. Your function is to produce a draft that fully achieves what the policy instructions require, at the same time ensuring that the exception is shown by the draft itself not to exceed the limits imposed by the Bill of Rights on the particular qualification. Some Constitutions give explicit guidance, though in this respect they may state no more than is sound practice.

Example 8

The Constitution of Namibia contains the following Article:

22. Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation:

(a) shall be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) shall specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Activity 9

If the Constitution of your jurisdiction contains any provision that lays down *general* requirements as to the form and contents of legislation designed to meet the requirements of a permitted qualification, note its essential features.

Example 8 shows clearly what your objectives should be:

- to ensure that the restrictions on the exercise or enjoyment of a right or freedom :
    - fall within the correct permitted qualification;
    - are no wider than is necessary to allow the competing interest to be achieved;
    - do not prevent the exercise of the right or freedom altogether;
- to show on the face of the legislation that its provisions unambiguously satisfy the relevant requirements of the Bill of Rights.

Your draft is likely to meets these objectives if:

- it applies to a general class of persons and circumstances, and is not confined to a particular individual or case;
- it does not employ unusual or extravagant ways to restrict the right or freedom;
- it specifies the nature and the extent of the restriction in precise terms;
- it states the restriction in such a way that its purposes are either express or implied from the context;
- it identifies precisely the head of justification (for example the particular type of public interest) contained in the Bill of Rights which is relied upon, including the reference to the relevant section;
- the restriction can be seen from the language used to be no more than is necessary to achieve its purposes and to fulfil the stated head;
- it does not enable the Executive to determine the scope of the restriction, and therefore the scope of the protected right (for example by giving wide discretions to determine the classes of case to which the restriction is to apply);
- it avoids over-broad or vague terms which cause unintended and inappropriate cases to be covered by the restriction or uncertainty as its extent.

2. INTERNATIONAL STANDARDS.

a) Where do we find the international standards on human rights?

Common law jurisdictions are generally subject to a body of customary international law that contains a number of protective rights, for example against slavery, genocide, torture, arbitrary detention and discriminatory treatment. Typically, this body of law is treated as part of their domestic law.

In addition they are parties to a wide-ranging series of multinational and regional treaties that set general international standards on the rights and freedoms of individuals. These include:

- *Universal Declaration of Human Rights* (1948);
- *International Covenant on Civil and Political Rights* (1966);
- *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950);
- *American Convention on Human Rights* (1969);
- *African Charter on Human and Peoples' Rights* (1981).

There is much common ground among these treaties, which is reflected in national Bills of Rights. The standards have been developed in a series of other multinational treaties on specific human rights. (A listing of international human rights treaties and nations which have ratified them is available from the United Nations.) Because these create international obligations on party States to give domestic legal effect to the rights they contain, most jurisdictions have enacted specific legislation as necessary for that purpose.

The treaties are themselves supplemented by:

- authoritative commentaries on the treaties provided by the international bodies set up to monitor their implementation (sometimes referred to as "soft law");
- the case law of the international courts established by some of the regional treaties to adjudicate on allegations of infringements made in the main by individuals (the most active being the European Court of Human Rights).

b) How do international standards affect domestic law?

The international standards influence domestic law in three ways:

- Interpretation of constitutional requirements

  Constitutional Bills of Rights are modelled on one or more of the principal treaties. As a result, their interpretation is increasingly influenced by the way the treaty standards are applied by the international bodies that deal with violations (for example the European Court of Human Rights; the UN Human Rights Committee) and by other domestic courts when applying their Bills of Rights.

- Incorporation of standards into domestic law

States are under a duty to comply with and give effect to customary and treaty standards through their domestic law. Some treaties give individuals a right to bring infringements of protected rights before an international tribunal or court if the domestic law fails to provide adequate redress.

- Incorporation of international instruments into domestic law

  A number of states give direct domestic effect to the treaties to which they are party, either by legislation or because under their Constitution the treaties are self-executing. As a result, the treaties themselves become a direct source of domestic rights, supplementing those contained in the Bill of Rights.

Activity 10

Take a moment to look at the *Human Rights Act 1998* of the United Kingdom, which gives effect to the *European Convention on Human Rights*. This is an example of a treaty that guarantees certain rights that are given domestic effect by the Act.

c) What are the implications for law-making?

The development of international obligations on human rights has materially altered the impact of international law. It can no longer be seen as creating inter-locking duties between States only. It has become a source of rights for individuals against the State. A State's failure to give effect to those rights not only contravenes its international obligations to other States, but can be a breach of legal responsibilities, which it has deliberately undertaken to discharge, to individuals in its community.

In making legislation States are under international obligations, owed both to other States and to their own people, to ensure that they act consistently with the internationally protected human rights. Accordingly, legislative proposals must be measured, not only against the requirements of the Bill of Rights, but also against the guarantees that the State has agreed to in international treaties. On occasions, tensions may arise between the protection afforded under the treaty and that under the Constitution, especially if the treaty is incorporated as domestic law:

- the interpretation of rights under treaties by international bodies may be more liberal and generous than is given by the local courts to the equivalent rights under the Constitution;
- States may be able, by following special procedures, to derogate from their Constitutional obligations, when derogation from the treaty rights may not be possible under the terms of the treaty.

No State that has respect for democratic principles and the rule of law readily disregards its international obligations. So, it is just as important for this factor to be taken into account in the preparation of legislation as compliance with the Bill of Rights. But few Ministries have the expertise for this task. The Ministry most involved with these international instruments is likely to be the Ministry of External/Foreign Affairs; but that Ministry is rarely involved with the preparation of legislation. For that reason, the task is likely to fall upon departmental legal counsel or legislative counsel, sometimes with the support of specialist legal officers in the Ministry of Justice/Attorney-General's Chambers.

d) What are the implications for legislative counsel?

Your principal responsibility, of course, is to give full consideration to the constraints imposed by the Bill of Rights (since this is supreme law). But be prepared also to consider whether legislative proposals measure up to the international standards binding on your State. As we have seen, this means paying attention to:

- whether relevant provisions of your Bill of Rights may have to be construed in the light of interpretations placed on equivalent provisions by bodies applying international standards;
- whether it is necessary to modify your draft, or to include additional provisions, in order to meet requirements of relevant treaties and to avoid international criticism and challenges;
- if a treaty has been incorporated as domestic law, whether your draft falls short of its requirements (as likely to be *internationally* interpreted) or contradicts the implementing legislation and whether that draft may need changes to prevent domestic challenges on these grounds.

To carry out this task requires keeping in touch, as far as you can, with practice and trends in international human rights law, particularly under the treaties to which your country is a party.

e) How can we keep in touch with international developments?

The literature on this subject is extensive; the case law of international bodies and of national courts is growing quickly. Few jurisdictions are able to acquire large holdings. The following are sources that can be made accessible relatively inexpensively. Enquire whether and where these may be found in your jurisdiction, and whether they can be made available for the Drafting Office.

- International materials
    - *Butterworths Human Rights Cases* (selected judgments of international tribunals)
    - *International Human Rights Reports* (selected decisions and opinions of UN treaty bodies)
    - A useful digest of international case law, and background materials, prepared for practitioners is: *INTERIGHTS Bulletin* (3 times a year).
    - **African Charter on Human and Peoples' Rights** - *Documentation* (decisions and reports) (periodic)
    - **European Convention on Human Rights** - *European Human Rights Reports* (up to 4 times a year)
    - **Inter-American system** - *Annual Reports* (summaries of decisions of the Court and Commission)
    - **United Nations system** - *Annual Reports* (decisions of UN Human Rights Committee).

International instruments can be accessed at https://treaties.un.org/Home.aspx.

- Commonwealth materials

A data base of Commonwealth decisions on Fundamental rights and freedoms prepared for the Commonwealth Secretariat is accessible on the INTERIGHTS website.

A digest of the decisions (issued twice a year) is published by INTERIGHTS.

The following contain relevant case law (in the latter cases, in a digest form):

- Law Reports of the Commonwealth:
- Constitutional and Administrative Law (annual)
- Commonwealth Human Rights Law Digest (periodic)
- Commonwealth Law Bulletin (3 times a year).

f) What international human rights treaties apply?

Your jurisdiction is almost certainly a party to multilateral treaties negotiated under the UN and probably to a regional treaty administered by a regional institution. Some of these allow individuals a personal right to petition against the treatment they have received in their home State. That right is usually conferred under an optional treaty provision. Access to a court, provided for in some treaties, may be similarly optional. Many parties to these treaties have not ratified the relevant protocols.

Activity 11

The chart on the website of the Commonwealth Secretariat refers to the principal international treaties on human rights, with an indication of the Commonwealth states that are parties to them.

1. Note the treaties to which your State is party:
2. If possible, acquire a copy of these treaties for your folder or binder of jurisdictional materials. If that is not possible, enquire whether copies can be made available as part of the holdings of the Drafting Office.