

Chapter 1

What is Legislation and why is it Drafted the Way it is?

1.1 What is legislation?

If asked to define what is meant by 'legislation', most people would probably say that it is 'a set of written rules for the conduct of society'. That is of course correct in very general terms, but leaving aside the fact that rule-making authorities exist at different levels in society (national, state, municipal and other authorities such as those set up to manage airports and harbours, even down to local sports or social clubs of various kinds), the term 'legislation' is usually used to mean rules that are made by a body that has been given the power under the Constitution to make them. This body goes under a variety of names in different jurisdictions but it is typically referred to as 'Parliament'.

In view of the fact that Parliament often delegates the power to make subsidiary legislation in the form of regulations, by-laws, etc. (see Chapter 15), it could more accurately be said that legislation consists of 'written rules for the conduct of society made by or under the authority of Parliament'.

1.1.1 'Rules'

However, this definition still does not tell the whole story, for when reference is made to legislation it is to sets of rules, both mandatory and empowering, with which those who are affected must comply, or which set out the limits of powers or duties of corporations or of individuals who are charged with administering or enforcing the legislation. These rules typically contain, in modern writing, the words 'must' or 'may', and where they are mandatory there is usually a liability to some sort of penal sanction for failure to comply with them.

Texts that give guidance and advice on how to do certain things or how to conduct oneself in given situations (often made by subsidiary legislation and called guidelines or codes of practice), even though they might contain the words 'must' or 'may', and even though of considerable importance, do not normally qualify for inclusion in a definition of legislation. They do not **in themselves** directly lead to liability for penal sanctions, although in some

cases non-compliance with them might constitute evidence of contravention of a rule somewhere else. For example:

A public official must refuse to accept any gift or hospitality which might place him or her under an improper obligation, or might reasonably appear to do so.

A public prosecutor must not sanction a prosecution unless:

- (a) there is sufficient evidence to provide a realistic prospect of conviction;
and
- (b) it is in the public interest that the case should be proceeded with.

Even though mandatory words are used, the first of these provisions, which is taken from guidelines on conflict of interest, contains matters that are tentative (as evidenced by the auxiliary ‘might’). They require context and interpretation to be fully assessed. In the second example, quite clearly there are a range of professional judgements to be made. Although each direction is precise, breach would not directly involve a legal sanction. It is said that these texts are ‘guiding’ rather than ‘binding’.

1.1.2 ‘For the conduct of society’

This phrase implies that rules are made for **everybody** in society, but in reality very little legislation applies to society as a whole. The body of general criminal law of course does, as do other general requirements for the regulation of society such as birth, marriage and death registration, electoral and census law, and liability to income tax; but far more often rules are made for **particular sections** of society. This can easily be illustrated by taking a random series of widely differing matters that would be the subject of Acts of Parliament in a typical jurisdiction:

- adoption of children
- banking and financial institutions
- factories
- firearms
- medical practitioners
- mining
- the police
- quarantine
- road transport
- stamp duties
- town planning
- wildlife.

So a working definition of legislation can now be created:

Rules for the conduct of society, or more usually particular sections of it, that are binding in their effect and made in written form by or under the authority of Parliament.

For most general purposes that will do, although it can be noted in passing that legislation, besides laying down requirements with respect to conduct, also does other things:

- It provides mechanisms that enable legally enforceable relationships to be entered into (e.g. charities, civil marriages, companies, trustees) and regulates those relationships
- It regulates non-statutory relationships between people (e.g. buyers and sellers of goods, employers and employees, landlords and tenants)
- It establishes statutory corporations and defines their functions and powers.

A single piece of legislation will sometimes seek to incorporate more than one of these features.

Legislation does not of course form the whole body of law that applies to a given jurisdiction. In many areas the law has been developed from precedents in case law (i.e. judge-made law), especially in contract, tort and conflict of laws.

1.2 How is legislation created?

The body charged under the Constitution with executive power to oversee peace and good order in society is typically known under the Constitution as 'the Executive' but is usually referred to both in legislation and in general writing as 'the **Government**'.

A framework of legislation will of course be in place in any jurisdiction, but as societies develop and technology increases it will be necessary to make changes to it from time to time. To this extent the Government needs to take steps to create new, or amend existing, legislation. It cannot itself create that legislation, for this function is constitutionally the province of the legislature. As already noted, this body is usually referred to broadly as **Parliament**.¹

¹ Technically, in the Westminster model of government there is a difference as, following the UK (unwritten) constitution, 'Parliament' consists of **both** the Head of State **and** the legislature. However, it is convenient in this Manual to use this term.

Laws are therefore created by Parliament passing Bills that when enacted into legislation become known generally as Acts (in dependent territories, these are often known as Ordinances or Laws) or, more broadly, statutes. In jurisdictions that follow the Westminster style of governance these Bills are introduced into Parliament mainly by the Government, although some Commonwealth jurisdictions have made constitutional changes that require legislation to originate to a large extent in Parliament itself. The principles that apply to drafting, and which are examined in the subsequent chapters of this Manual, are however exactly the same.

In the common law system the role of the judiciary (i.e. **the courts and tribunals**) is restricted to interpretation and application of legislation. They will not add to, diminish, vary or qualify requirements laid down in legislation, unless in the course of declaring it to be in some way incompatible with the Constitution, or in the case of subsidiary legislation, the enabling legislation.

Appendices A and B set out in some detail typical outline procedure for the preparation of legislation.

1.3 Why is legislation drafted in the way it is?

The fundamental principle behind the common law is that everyone may do as he or she wishes unless the law provides otherwise.

Bills proposing legislation must therefore be drafted in sufficient detail to prescribe as precisely as possible the exact nature of the obligations, duties, rights, powers or privileges being imposed or given. They must set out fully and unambiguously what is required of those to be affected by the legislation, and thus must include not only the necessary rules themselves but any qualifications, exemptions or other matters relevant to their observance.

This is more difficult in practice than it sounds, and attainment of a high degree of proficiency in legislative drafting requires experience and skill. It is the function of this Manual to assist legislative counsel to attain the necessary degree of precision.