

LGST553(Rev4) Legislative Drafting Processes and Limits Detailed Syllabus

Module 1: Law-Making Processes and Working with Clients

This Module is designed to provide essential background material. We will begin with an overview of lawmaking, the typical procedures connected with it and the responsibilities of legislative counsel. We can better understand what is expected of legislative counsel if we understand what is involved in their work and how their functions came to take the form they do.

We then continue with an account of what legislative drafting entails in countries with legislative systems based on the parliamentary model in order to provide a context for using these course materials. Module 1 also contains guidelines about how to proceed when drafting legislation and the general approach that you may wish to develop.

This Module also deals with the general procedures that are typically followed in the preparation of legislation and the law-making process, giving particular emphasis to those stages with which legislative counsel are likely to be principally concerned. We pay particular attention to one procedure above all others—getting instructions from the client—because of its importance to legislative counsel. This Module is designed to encourage you to find out what the procedures are in your jurisdiction.

Objectives of this Module

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

- Describe the nature of legislative drafting in the parliamentary tradition, and explain how that tradition developed.
- Explain the duties and responsibilities of legislative counsel.
- Present an overall picture of why legislative texts take the form they do.
- Describe for your jurisdiction the steps by which legislative proposals are formulated and transformed into legal provisions, and explain the procedure by which those provisions are enacted as legislation.
- Explain the functions of instructing official and legislative counsel in the preparation process, both in principle and in the practice of your jurisdiction.
- Give an account of the value and functions of drafting instructions in preparing legislation and the practice in relation to them in your jurisdiction.
- Undertake an analysis of simple instructions to determine when further instructions may be needed.

- Take appropriate action when instructions are inadequate.

Studying this Module

Module 1 has three Sections:

1. What is legislative drafting all about?
2. What are the processes for making laws, and what is our role as legislative counsel?
3. How do we do work with drafting instructions?

Much of this Module describes a model of how legislation is to be prepared. Few systems have all the features described or operate at all times in the way this model suggests. Indeed, in many jurisdictions the arrangements are considerably less systematic than in the model. But whatever your local arrangements, you should find value in considering the process from basic principles as this brings out matters that are of great importance to achieving effective and workable legislative schemes. Failures in legislation are sometimes attributable to the defects in the machinery used for its preparation. Legislative counsel need to be aware of these potential defects.

The model is given so that you discover what you need to know by comparing it to your local practice. As practice is determined by local circumstances and resources, some activities will not be relevant to your jurisdiction, or information sought there will be slight. Do not spend time trying to find information about cases that are not typical. For the purposes of your study, you need to be familiar with what happens *typically*. In some instances, you need to know only that a feature of the model is *not typically followed* in your practice.

In contrast with Module 2, this one contains few examples or exercises. The topics do not lend themselves to that treatment.

Section 1: What Is Legislative Drafting All About?

This Section will give you a general background of the profession of legislative counsel and the practice of legislative drafting. It introduces some general themes that arise throughout the course, notably the responsibilities of legislative counsel.

Section Objectives

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

- 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.

Section Outline

This Section is organized as a series of questions.

1. DRAFTING AND LEGISLATIVE COUNSEL
 - What is legislative drafting?
 - Why is legislative drafting important?
 - Who should draft legislation?
 - What are the advantages of a centralized drafting office?
 - What are the drawbacks of a centralized drafting office?
 - How is legislative drafting viewed by users of legislation?
 - What are the principles of “traditional” legislative drafting?
 - What are the responsibilities of legislative counsel?
 - How do we fulfil these responsibilities?
 - What should be our aims as legislative counsel?
 - Are there any constraints on legislative counsel?
 - What work practices will facilitate drafting?

Section 2: What Are the Processes for Making Laws, and What Is Our Role as Legislative Counsel?

In this Section, we examine the process typically followed in parliamentary jurisdictions for preparing and enacting legislation, the role played in this process by legislative counsel and how legislative counsel may be expected to contribute to the activities carried out at each stage. We are concerned mainly with the preparation of Bills, but similar stages are likely to be followed for subsidiary legislation.

Section Objectives

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

- Describe the steps by which legislative proposals in your jurisdiction are formulated and transformed into legal provisions, and explain the procedure by which those provisions are enacted as legislation.
- Explain the functions of administrators and legislative counsel in the preparation process, both in terms of principle and in the practice of your jurisdiction.
- Give an account of the duties legislative counsel may be called on to perform at each stage of the preparation process.

Section Outline

This Section is divided into three subsections, organized as a series of questions.

1. PREPARING A BILL
 - How is policy made?

- What techniques are there for assessing policy?
 - How is a policy option developed into an operational scheme?
 - What Executive approval is required?
 - How is the legislative text prepared?
 - How should the contents of the Bill be arranged?
2. ENACTING A BILL
 - How is a Bill enacted as legislation?
 - What is the role of legislative counsel during the enactment process?
 3. HOW DOES THE PREPARATION OF SUBSIDIARY LEGISLATION DIFFER?

Section 3: How Do We Work with Drafting Instructions?

The practice of using formal instructions to communicate policy requirements is central to the preparation of legislative texts in parliamentary jurisdictions since the functions of policy development and drafting (by legislative counsel) are typically kept distinct. In this Section, we consider how drafting instructions are made available to legislative counsel, how they are intended to assist their work and what they should contain. More practically, we examine how legislative counsel should respond to instructions and what to do if the instructions provided do not contain what is needed.

Section Objectives

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

- Give an account of the value and functions of the instructions for preparing legislation and of their practice in your jurisdiction.
- Undertake an analysis of simple instructions to determine when further instructions may be needed.
- Take appropriate action when instructions are inadequate.

Section Outline

This Section is divided into 2 subsections, organized as a series of questions.

- GETTING INSTRUCTIONS
 - In what form should instructions be given?
 - Why should instructions not take the form of a Bill?
 - Why might instructions be incomplete?
 - What questions should instructions answer?
 - What if the instructions are incomplete?
- ANALYZING INSTRUCTIONS
 - What should we be looking for when analyzing instructions?
 - What questions might we ask to understand the instructions?
 - What questions might we ask to ascertain the elements of the proposal?
 - How might we approach the task of analysis?
 - What other analytical aids can we use?

- Should the analysis be discussed with the client Ministry?

Module 2: Working within Limits

Legislative drafting is concerned with the governance of your jurisdiction. Its practice is influenced by the general legal context that prevails there. That context is shaped by the Constitution of your jurisdiction, by its system of law, law-making processes and form of government, and by the legal and judicial values that prevail there.

This Module deals with four contextual features typically found in jurisdictions based on the parliamentary model that are of particular relevance to legislative counsel:

- interpretative approaches and rules developed in the main by the judges to help resolve uncertainties of meaning and application;
- interpretation legislation, which contains legislative rules about the construction, interpretation, application and operation of legislation;
- the constitution that creates the institutional framework within which legislation is made and implemented, and which imposes constraints on the allocation and exercise of public power;
- fundamental rights and freedoms, which are often found in constitutions or protected under international treaties to which many jurisdictions adhere.

All these topics affect the way drafting is carried out, including both its form and content. They also involve underlying values concerning the way written law should be used in a democratic and law-governed society.

Section Objectives

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

- Take into account interpretive approaches and rules applied by common law judges, including the principal interpretive assumptions and presumptions.
- Apply the drafting practices recognized by the interpretation legislation in your jurisdiction and generally implement its other requirements.
- Work within the constraints imposed by your jurisdiction's constitution, and take full account of its requirements so that the legislation is not vulnerable to legal challenge.
- Draw attention to legislative proposals or provisions that may be inconsistent with the fundamental rights and freedoms protected in your jurisdiction and find ways to achieve consistency.

Studying this Module

Module 2 has four sections:

1. How do we work with interpretive approaches and rules?

2. How do we work with interpretation Acts?
3. How do we work with the Constitution?
4. How do we work with fundamental rights and freedoms?

All these sections are long and demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods; you may require several for each.

Sections 1 and 2 should be studied one after the other since they are linked by a common theme.

You should be familiar with many features of Section 1 and for that reason may be able to complete it relatively quickly. But Section 2 introduces many matters that are likely to be new to you and have important consequences for drafting. You will need to spend more time on that Section.

Sections 3 and 4 deal with a different subject area, although they too are closely linked. You should study them in sequence. The matters examined in them are relevant to other Sections to a limited extent only. They can be studied at almost any point. These Sections are not concerned with developing particular drafting skills; they contain more descriptive material than many other Sections. So, work on them may make a welcome contrast with the Sections that are more skill-based.

Section 3 calls for you to complete many activities to gather relevant local information. Section 4 contains much that is likely to be new, either from a legal standpoint or in terms of approach. Neither Section should be studied too quickly.

Section 1: How Do We Work with Interpretive Approaches and Rules?

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 specific linguistic practices and expressions.

Section Objectives

By the end of this Section, you should be able to account for 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 [Select Bibliography](#).

Section Outline

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, organized as a series of 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

Section 2: How Do We Work with Interpretation Acts?

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. 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 authorized by the Interpretation Act in your jurisdiction;
- work with its provisions as to the form, application and presentation of legislation.

Section Outline

This Section is divided into three subsections, organized as a series of questions.

1. IMPORTANCE OF INTERPRETATION ACTS
 - Why are Interpretation Acts important to legislative counsel?
 - How are the benefits of Interpretation Acts 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
 - Standardized definitions
 - Standardized rules for a common legislative style
 - Resolution of interpretive uncertainties
 - Implied rules of substantive law

Section 3: How Do We Work with the Constitution?

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 must 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 interpret 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 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.

Section Outline

This Section is divided into two subsections, organized as a series of questions.

1. THE CONSTITUTION AND THE 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?
 1. Supremacy of the Constitution
 2. Restrictions on constitutional amendment
 3. Separation of powers
 4. Rule of law
 5. Limitation of legislative authority
 6. Delegation of legislative power
 7. Principles of state policy
 8. 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?

Section 4: How Do We Work with Fundamental Rights and Freedoms?

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 that Section). However, approaching 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 peoples;
- and to find ways in which such inconsistencies can be prevented.

Section Outline

This Section is divided into two subsections, organized as a series of 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 legislative counsel?
 - 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?