

LGST555(Rev4) Legislative Structure and Preliminary and Final Provisions Detailed Syllabus

Module 1: Legislative Structure

This Module deals with two related topics:

- how legislative sentences are structured and linked into a single legislative text;
- how to set about designing an outline for a legislative text.

The first topic is concerned with an important feature in the process of composing the contents of legislation. The second deals with a stage in the preparation process that should be initiated before any composition is undertaken. It concerns the process for deciding what the legislative text will look like when it is completed, that is, for providing an outline or blueprint for the contents.

We have brought these two topics together in this Module as they both relate to forming a complete legislative text.

Objectives of this Module

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

- Arrange and link legislative sentences into a logical structure in a legislative text.
- Design a legislative outline for drafting a short Bill.

Studying this Module

This Module has two Sections:

1. How should we structure a legislative text?
2. How should we organize a legislative text?

Each section contains very different kinds of material from the other. Section 1 is essentially concerned with techniques for composing legislative provisions. It has many examples and exercises. Although Section 2 also explains techniques, these are of a different nature; they are

concerned with the methods for organizing the provisions that together make the complete legislative document.

Section 1 is considerably longer than Section 2 as it deals with a wide range of practical matters. It will require several study sessions. But you may find Section 2 more demanding intellectually, as it is necessarily more conceptual in its approach. Though relatively short, Section 2 calls for concentration; try to cover the whole Section in a single session. Note that you may need to repeat your work on it before undertaking the final exercise.

Section 1: How should we structure a legislative text?

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 must 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

This Section is designed to enable you to:

- order and link legislative sentences to make a logical section;
- make effective use of paragraphing in setting out components of a legislative sentence;
- order and link legislative sentences into a rational structure in a legislative text;
- determine when provisions in other legislation should be linked with a legislative text or incorporated into it;
- decide when a legislative text needs to be formally divided, and how those parts should be organized.

Section Outline

This Section is divided into nine subsections, organized as 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 special 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?

Section 2: How should we organize a legislative text?

In this Section, we explore in greater detail one of the stages in preparing legislation that should precede composition—preparing an outline for a legislative text. An outline should be taken as the bridge between analysis of the legislative proposals and the composition of the legislative provisions.

You may be tempted to pass over this stage when drafting legislation—many legislative counsel do. But if properly undertaken it can greatly ease your task of composing the individual provisions, as you will have a much clearer view of where you are going, what you need to provide and how those rules are to relate to each other. In short, it prepares the ground for structuring the provisions in the ways you worked with in Section 1.

Any car driver will tell you that a long journey to an unfamiliar destination through unknown country needs a good map and a prepared route. In designing an outline for a legislative text, see your task as that of providing a map and a route for your future travel through the drafting process. The shorter the text (and the journey), the easier the task.

Section Objective

By the end of this Section, you should be able to prepare an outline for a short legislative text.

Section Outline

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

1. General Considerations
 - Why prepare an outline before composing the detailed provisions?
 - What advantages does an outline provide?
 - How final is an outline?
2. Preparing an Outline
 - What do we need to start?
 - How do we arrive at suitable groupings?
 - How do we allocate individual items to their appropriate group?
 - How do we order the items in the groups and the groups themselves?
 - What should the outline look like when it is completed?
3. Factors Influencing an Outline for a Bill
 - How are formal and technical provisions arranged?
 - How are provisions grouped together?
 - How is subsidiary legislation used?
 - How are amending Acts treated?
 - How are distinct subject matters dealt with?

Module 2: Drafting Preliminary and Final Provisions

At the beginning and end of a legislative text, legislative counsel conventionally include several provisions to perform mainly technical functions. Most of these do not contain substantive rules of law. But they play important functions in establishing the authenticity of the legislation, in supporting its operation and use and in ensuring that new legislation is compatible with existing legislation. The discussion of transitional provisions includes provisions that preserve to some extent the former law or pre-existing rights: *saving* provisions.

This Module deals with provisions usually found either at the beginning of a legislative text or at the end. However, the practices of placing these provisions either at the beginning or the end are not uniform across all jurisdictions. This is why they are dealt with together in this Module.

Objectives of this Module

By the end of this Module, you should be able to draft provisions that appear as preliminary or final provisions in legislation in your jurisdiction, particularly in Bills and Acts. These provisions include the following:

- provisions that appear as the preliminary provisions in legislation in your jurisdiction;
- appropriate definitions or other interpretation provisions;
- appropriate application provisions;
- transitional provisions.

Studying this Module

This Module is divided into eight Sections:

1. What are preliminary provisions and what other explanatory material may be included?
2. How do we draft titles, preambles and words of enactment?
3. How do we draft commencement and duration provisions?
4. How do we draft interpretation provisions?
5. When and how do we draft purpose clauses?
6. When and how do we draft application provisions?
7. When and how do we draft saving and other transitional provisions?
8. When and how do we draft schedules?

Although you have come across most of these matters in other Modules, this Module contains much that is new. This offers an opportunity both to put your present knowledge into a more systematic framework and to look at some of the finer points in detail.

You will need several study sessions to complete this Module since it contains a substantial number of activities and exercises. The text is written so you can take a convenient break after completing any of the sections.

Your aim in this Module is to become familiar with the way preliminary and final provisions are dealt with in your jurisdiction and to compare the local practice with developments elsewhere. The [Resource Materials and Supplementary Readings](#) webpage contains some illustrative precedents, which you should examine in addition to the examples in the text and the material you gather from your own jurisdiction during your activities. The exercises are designed to enable you to consolidate what you learn.

Section 1: What are preliminary and final provisions and what other explanatory material may be included?

This Section describes the nature and conventional arrangement of technical provisions that commonly appear at the beginning or the end of legislation. Some of these features are provided as a matter of course; others are not essential but facilitate the use the legislation.

Section Objectives

This Section is designed to enable you to:

- find out what matters are included in preliminary and final provisions in your jurisdiction and how they are arranged;
- become familiar with the kinds of explanatory material that may accompany legislation.

Section Outline

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

1. Preliminary and Final Provisions
 - What matters are usually contained in preliminary or final provisions?
 - How are preliminary and final provisions arranged?
2. Explanatory Material
 - What is a roadmap and what purposes does it serve?
 - What other explanatory material may be included?

Section 2: How do we draft titles, preambles and words of enactment?

In most jurisdictions Bills have a long title that describes their effect, a short title by which they are cited and an enacting formula that indicates their origins and authenticity. Subsidiary legislation also has a short title and enacting formula. This Section looks at these features as well as preambles, though preambles are not used as regularly as the others.

Section Objectives

This Section is designed to enable you to:

- find out local practice on the technical features of draft titles, preambles, and words of enactment;
- examine and put into practice the techniques for drafting these items well.

Section Outline

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

1. Long Titles of Bills
 - What purposes do long titles serve?
 - How should a long title be drafted?
2. Preambles
 - What purposes does a preamble serve?
 - When might a preamble be used?
 - How should a preamble be drafted?

3. Words of Enactment
 - What purposes do words of enactment serve?
 - How are words of enactment dealt with?
4. Short Titles
 - What purposes does a short title serve?
 - How should a short title be selected?
 - How should a short title be drafted?

Section 3: How do we draft commencement and durations provisions?

This Section deals with two components commonly found among preliminary provisions, both relating to the temporal operation of legislation. First, we look at the steps that may be needed to prescribe the date or dates on which legislation is to come into force (“commencement provisions”). Second, we consider provisions that set limits on the length of time legislation may have effect (“expiry provisions”), which are required much less often. Although they have direct effect upon the application of legislation, these features support substantive provisions.

This Section is designed to enable you to:

- find out the practice in your jurisdiction on these matters;
- examine when these provisions may be needed, and to put into practice techniques for dealing with them satisfactorily.

Frequent reference is made throughout this section to the model *Interpretation Act* in the Course Resources module. You should keep it handy when you are working with this Section.

Section Objective

In this Section the objective is to enable you to draft provisions for the commencement and expiry of legislation.

Section Outline

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

1. Commencement Provisions
 - What purposes do commencement provisions serve?
 - When are they needed?
 - What are good reasons for including them?
 - How should they be drafted?
2. Expiry Provisions
 - What purposes do expiry provisions serve?
 - How should they be drafted?

Section 4: How do we draft interpretation provisions?

Legislative counsel in legal systems based on the parliamentary model make great use of interpretation provisions when drafting both primary and subsidiary legislation. It is standard practice to include definitions and other provisions that explain how expressions and terms used in legislation are to be construed. Many of the benefits of interpretation legislation that were mentioned in LGST 553 can be gained by these devices. They may also be helpful in solving certain problems facing the legislative counsel. Mastering the techniques of drafting them is both important and necessary. If sensibly and correctly used, they can materially improve legislation, not least because they may clarify the meaning of substantive provisions.

Frequent reference is made throughout this Section to the model *Interpretation Act* in the Course Resources module. You should keep it handy when you are working with this Section.

Section Objective

The objective of this Section is to enable you to draft appropriate definitions and other interpretive rules in legislation when and where they are needed or helpful.

Section Outline

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

1. General Considerations
 - What are interpretation provisions?
 - What is the difference between a definition and an interpretive rule?
 - Where should interpretation provisions be placed?
 - Do interpretation provisions have any shortcomings?
2. Definitions Generally
 - What purposes do definitions serve?
 - What is the relationship between statutory definitions and dictionary meanings?
 - How should definitions be drafted?
3. Labelling Definitions
 - When should labelling definitions be drafted?
 - How should they be drafted?
4. Stipulating Definitions
 - When should stipulating definitions be drafted?
 - How should they be drafted?
 - What should be considered in drafting them?
 - What pitfalls are there?
5. Syntax of Definitions
 - What grammatical considerations should be borne in mind?
6. Interpretive Rules
 - When should interpretive rules be used?
 - How should interpretive rules be drafted?
7. Hints and Checks

- What practical points should we bear in mind?
- What final checks should we make?

Section 5: When and how do we draft purpose clauses?

This Section deals with a type of preliminary provision that is used regularly in some jurisdictions but rarely in others: *purpose clauses*. However, their value is increasingly recognized. This Section explains when they may contribute to a better understanding of the aims of legislation and how it may be used.

Section Objectives

This Section is designed to enable you to:

- find out local practice on the use of purpose clauses;
- examine and put into practice the techniques for producing sound and well-drafted purpose clauses.

The objective of this Section is to enable you to draft a purpose clause when one is required.

Section Outline

This Section considers the following questions.

1. What is a purpose (or objects) clause?
2. Why use a purpose clause?
3. Why do legislative counsel not use purpose clauses more often?
4. When is a purpose clause useful?
5. How should a purpose clause be drafted?

Section 6: When and how do we draft application provisions?

This Section looks at application provisions and begins by discussing them generally. It then considers three types that must be used carefully:

- provisions to determine when legislation applies (“temporal application”), including its application in the past;
- provisions making legislation apply to the State (“binding” the State);
- provisions making legislation apply outside the borders of the State (“extra-territorial application”).

These types are the subject of important interpretative presumptions about the application of legislation, with which you must be familiar. You need to know when it is safe to rely on these presumptions and when they should be reinforced or displaced by express provisions.

Section Objectives

In this Section your objectives are to learn when to use and how to draft appropriate application provisions, in particular those that:

- apply provisions to circumstances that are already in being when the legislation comes into force;
- make legislation bind the State;
- give legislation extra-territorial application.

You should also aim:

- to be aware of when an application provision is needed;
- to become familiar with the circumstances in which the presumptions connected with retrospective legislation, binding the State and extra-territorial extension arise;
- to be able to write provisions that confirm or displace the presumptions, when necessary.

Section Outline

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

1. Application Provisions Generally
 - What assumptions underlie the application of legislation?
 - When should application provisions be used?
 - When are application provisions most commonly used?
 - How should application provisions be drafted?
2. Application to Things in the Past
 - What types of past-application are there?
 - How has past-application generally been treated in law?
 - When should retroactive provisions be drafted?
 - When should retrospective provisions be drafted?
 - When should provision be made for procedural changes?
3. Provisions Binding the State
 - What are the relevant presumptions?
 - What are the legal effects of these presumptions?
 - How do we draft provisions to bind the State?
4. Extra-territorial Application
 - What is the relevant presumption?
 - What legislative competence is required to make extra-territorial legislation?
 - Do the presumptions relate to the law of other countries?
 - What territorial limits are envisaged?
 - What are the drafting implications of the presumptions?

Section 7: When and how do we draft saving and other transitional provisions?

In this Section, we are concerned with matters that are vital for the coherent introduction of new legislation to ensure that the relationship between the existing law and the new legislation, and the transition from one to the other, are properly bridged.

These provisions determine how circumstances that have already arisen under existing law are to be treated after that law is amended (including by being repealed or replaced). Matters of these kinds require the drafter to exercise careful judgment as to when they are needed and what they should contain.

Section Objectives

This Section is designed to enable you to:

- decide when saving and other transitional provisions are necessary;
- draft sound saving and other transitional provisions.

Section Outline

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

1. General Considerations
 - What is the function of transitional provisions?
 - How do saving provisions differ from other transitional provisions?
 - What purposes do these provisions serve?
 - How important are these provisions?
 - Are these provisions required in all legislation?
 - When should you work on these provisions?
2. Legal Effects of Repeals
 - What are the legal consequences of a repeal?
 - What are the common law rules on the effects of repeals?
 - What modifications are made by the Interpretation Act?
 - How should the Interpretation Act be used?
3. The Content of Saving and Other Transitional Provisions
 - What matters are likely to require these provisions?
 - How are unqualified saving provisions expressed?
 - How are transitional provisions affecting past matters expressed?
 - How are provisions instituting transition arrangements expressed?
4. Drafting Saving and Other Transitional Provisions
 - How does the presumption against retrospective legislation relate to these provisions?
 - How do we decide which matters should be saved?
 - What forms may saving provisions take?

- How should the drafting of transitional provisions be approached?
- What forms may transitional provisions take?
- What practical points should be borne in mind?

Section 8: When and how do we draft schedules?

In this Section, we focus particularly on the drafting of Schedules to contain legislative material that can usefully be separated from the main part of an instrument.

Section Objective

The objective of this Section is to enable you to decide when to use Schedules and how to draft them.

Section Outline

This section considers the following questions.

- What are schedules to legislative texts?
- When should schedules be used?
- How should schedules be drafted?