

LGST 557(Rev4) Compliance and Amending Provisions and Subsidiary Legislation Detailed Syllabus

Module 1: How Do We Draft Compliance Provisions?

This Module deals with two types of provisions that legislative counsel are frequently called upon to draft. Section 1 deals with provisions for the enforcement of legislation through offences and penalties (penal provisions). Section 2 deals with the delegation of subsidiary legislative powers, and Section 3 deals with drafting subsidiary legislation. Although much of what you have learned about drafting Bills in general applies equally to subsidiary legislation, the drafting of subsidiary legislation has distinctive features that justify its separate consideration.

Objectives of this Module

By the end of this Module, you should be able to draft the following in keeping with the practice in your jurisdiction:

- penal provisions to enforce requirements of the legislative scheme;
- provisions enabling the making of subsidiary legislation;
- the main types of subsidiary legislation.

Studying this Module

This Module is divided into three Sections:

1. How do we draft penal provisions to enforce legislation?
2. How do we delegate powers to legislate?
3. How do we draft subsidiary legislation?

Each Section is a distinct topic, and each should be completed before you start on another. Although you will already have met some of the matters examined in this Module, each Section is designed to provide both a method of approach in dealing with the provisions in question, and a framework within which to build your existing and new knowledge. They also provide an opportunity to reinforce matters you have come across earlier. We suggest that you do not rush them.

Section 1: How do we draft compliance provisions?

The criminal law is the principal mechanism used to prevent or control anti-social behaviour and unacceptable activities. Many statutes, including those that impose regulatory requirements, are enforced through penal provisions. Since individual liberty may be affected, legislative counsel have to take particular care to produce drafts that clearly state the circumstances in which the provisions may be applied and the limits upon the use of related enforcement powers. But legislative counsel should be prepared to consider the range of alternative methods to secure compliance that are described in this Section, some of which may be as effective as penal provisions, but without its expense and repercussions.

However, this Section is concerned mainly with penal provisions and the way they are conventionally drafted in parliamentary jurisdictions. In addition, we work out the steps that might be followed in settling the contents of penal provisions.

Section Objectives

This Section is designed to enable you to:

- describe the main alternatives to penal provisions for securing compliance with legislation;
- adopt a systematic approach for determining the contents of penal provisions;
- draft penal provisions, in keeping with the practice in your jurisdiction;
- create substantive criminal law;
- provide for the enforcement of a legislative scheme.

Section Outline

This Section is divided into three subsections that consider the following questions:

1. General Considerations
 - When are penal provisions likely to be useful?
 - What alternatives are there to penal provisions?
 - What factors should we bear in mind when using these alternatives?
2. Determining What Penal Provisions Are Required
 - What general factors should we bear in mind?
 - What steps should we take to determine the content of penal provisions?
3. Drafting Penal Provisions
 - How should we draft penal provisions?
 - How may offence provisions be expressed?
 - When should we use these different forms?
 - Can the style of writing offence provisions be improved?
 - What points should we look out for when:
 - describing the offender;
 - prescribing the conduct;
 - including the mental element;
 - providing special defences?

- When might penal provisions also give rise to civil liability?

Section 2: How do we delegate powers to legislate?

Subsidiary legislation is extensively used in parliamentary systems to supplement primary legislation. It is employed for a wide range of purposes and may be made by a variety of bodies. For those affected by legislation it may have more important implications than the primary legislation under which it is made.

Subsidiary legislation can only be made if primary legislation has delegated the necessary enabling authority by means of enabling provisions, and it may only be made within the limits laid down by the enabling provisions. Accordingly, particular attention must be paid to the drafting of enabling provisions for subsidiary legislation. They must be sufficiently wide to permit the delegate to provide subsidiary legislation for all the matters that are contemplated as requiring it. At the same time, the delegated powers should be only those needed to enable the legislative scheme to be given full effect. As process for making subsidiary instruments does not involve parliamentary debate, consideration may need to be given to ways in which there can be parliamentary oversight without impairing the convenience of this form of law-making.

This Section is designed to enable you to develop a systematic approach when preparing enabling provisions and to draft them in line with best practices and the practices of your jurisdiction. Although the Section focuses on legislative powers, some of the techniques under discussion are also relevant when you are conferring executive powers.

Section Objectives

This Section is designed to enable you to:

- determine the matters for which delegated powers to legislate are needed and should be authorized;
- draft provisions that delegate legislative powers to make subsidiary legislation in keeping with the practice in your jurisdiction;
- draft provisions requiring external consultation about proposed subsidiary legislation or providing for parliamentary scrutiny.

Section Outline

This Section is divided into three subsections organized in terms of the following questions:

1. General Considerations
 - When should delegated powers be conferred?
 - How should matters be divided between primary and subsidiary legislation?
 - When is an instrument subsidiary legislation?
 - How do the courts approach powers to make subsidiary legislation?
 - What are your objectives when drafting enabling provisions?

- When are delegated powers needed?
- How widely should enabling provisions be drafted?
- 2. General Approaches to Drafting Subsidiary Legislative Powers
 - What are the basic steps?
 - Are there matters that should be expressly authorized?
 - What other factors can influence the drafting of subsidiary legislative powers?
 - What general legislation may affect the drafting of subsidiary legislative powers?
- 3. Particular Questions
 - What type of instrument?
 - Who is to be the delegate?
 - Is any body to be linked with the making? If so, how?
 - What powers are to be delegated?
 - Are the powers adequate to cover the matters intended?
 - What procedures are to be required for making the subsidiary legislation?
 - Should external interests be involved in making subsidiary legislation?
 - What procedures are required after the making?

Section 3: How do we draft subsidiary legislation?

This Section concentrates on subsidiary legislation. Much of the earlier Material is focused on Bills, though in many respects what is discussed there is equally relevant to subsidiary legislation. Here we look at the special demands made by this kind of legislation, and in particular the responsibilities of legislative counsel.

In some jurisdictions, the legislative counsel who drafted the enabling legislation also drafts the subsidiary legislation. This can bring efficiencies to the drafting process because the legislative counsel already understands the legislative context. However, in many jurisdictions preparation of this type of legislation is undertaken by legal officers attached to the executive authority on which the legislative power is conferred. Even when a centralized drafting office deals with both primary and subordinate legislation, subsidiary legislation is often not drafted by the same legislative counsel who drafted the enabling legislation. Those who draft the subsidiary legislation come to this task with a fresh perspective. This calls for a distinct approach.

Subsidiary legislation has its own forms and must comply with distinctive conventions, which vary a little from one jurisdiction to another. You must be able to prepare instruments according to the local style in your jurisdiction.

Section Objectives

This Section is designed to enable you to:

- determine what matters may need to be dealt with in a simple subsidiary instrument;
- prepare and draft the main types of subsidiary legislation in keeping with the practice and style in your jurisdiction.

Section Outline

This Section is divided into four subsections organized in terms of the following questions:

1. General Considerations
 - How does drafting subsidiary legislation differ from drafting Bills?
2. Drafting Approach
 - How should we approach the drafting of subsidiary legislation?
 - How do we check to prevent unauthorized subsidiary legislation?
3. Drafting Details
 - What forms can subsidiary legislation take?
 - What are the characteristic features of subsidiary instruments?
 - What type of instrument is required?
 - What headings are required?
 - What authorizing words should be used?
 - How should the title be drafted?
 - When should provision be made for commencement?
 - When should definitions be included?
 - What special factors should be borne in mind in drafting substantive provisions?
 - Should section notes be provided?
 - Are there special features for amending, revoking or re-enacting provisions?
 - What signifying words are needed?
 - How should the making of the instrument be dated?
 - Should an Explanatory Note be added?
4. Drafting Executive Instruments
 - What should we bear in mind when drafting executive instruments?

Module 2: Drafting Amending Provisions

This Module deals with provisions that change existing legislation in some way and address the legal consequences of these changes. In most jurisdictions, these provisions constitute a very substantial portion of the legislation enacted each year. This reflects the need to keep legislation aligned with the ever-changing conditions of the community for which it is enacted and the world in which we live. The discussion of amending provisions addresses all types of provisions used to make changes in the law, including repeal and replacement provisions.

Objectives of this Module

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

- draft amending provisions, including repeal and replacement provisions;
- take account of the law on repeal, including implied repeal, and the legal effects of repeals in drafting amending provisions.

Studying this Module

This Module is divided into two sections:

1. What are amending provisions and how are they arranged?
2. How should we repeal and amend legislation?

Section 1: What are amending provisions and how are they arranged?

This Section presents an overview of provisions required to make changes to existing legislation—amending and transitional provisions. It relates principally to Bills, but much of it is applicable to subsidiary legislation as well.

Section Objectives

The objective of this Section is to enable you to become familiar with amending and transitional provisions and the order in which they should be arranged in a Bill.

Section Outline

The following questions are considered in this Section:

- What are amending and transitional provisions?
- In what order are amending and transitional provisions arranged?
- What section notes are appropriate?

Section 2: How should we repeal and amend legislation?

You are likely to be called upon often to draft legislative texts to make changes to existing Acts and subsidiary instruments. The predominant method for making substantive changes to legislation in parliamentary jurisdictions based on the Westminster model is by amending existing legislation rather than by introducing completely new legislation. Even when new substantive legislation is prepared, consequential amendments to existing legislation are frequently needed to make it fully consistent with the new legislation.

Drafting repeals of entire pieces of legislation is less common and more straight-forward. They are needed when an Act or piece of subsidiary legislation is no longer needed, or when it is to be replaced or re-enacted. Repeals of provisions within a legislative text are generally treated as part of the process of amendment.

In this Section, we explore how repeals and amendments are best made, in particular the technique of direct textual repeal or amendment, and the pitfalls to be watched for. We place emphasis on using this technique rather than relying on repeal or amendment by implication.

We also consider how you may develop a procedure for working out repeals and amendments needed in particular cases, and how they are to be dealt with in your draft. We introduce you to devices for communicating to the various classes of users the nature and effect of repeals and amendments, which are not always apparent on the face of a legislative text. In addition, your attention is drawn to the steps that may be needed for amendments to Bills during the parliamentary process. Legislative counsel who work for a legislative assembly are especially likely to be engaged in that task.

Section Objectives

This Section is designed to enable you to:

- work out systematically what repeals and amendments are needed when drafting a legislative text;
- draft provisions for repealing complete instruments;
- draft substantive or consequential amendments in keeping with the practice in your jurisdiction;
- avoid the more common errors when drafting repeal and amendment provisions;
- describe the principal techniques for adding formal information to a legislative text explaining the effects of the amendments it is to make;
- give an account of the responsibilities of legislative counsel in your jurisdiction with respect to the preparation of amendments to Bills during the legislative process.

Section Outline

This section is divided into five subsections, organized as a series of questions.

1. General Considerations
 - How do repeal and amendments differ?
 - Does amendment involve repeal?
 - How can legislation be repealed and amended?
 - When is legislation impliedly repealed?
 - Should repeals and amendments be made by primary or subsidiary legislation?
 - When are repeal and amending provisions needed?
 - When should we replace rather than amend legislation?
2. Deciding What to Repeal or Amend
 - How do we decide what needs to be repealed or amended?
 - How do we prepare for repeals?
 - How do we prepare for amendments?
3. Drafting Repeal Provisions
 - What should be our objectives when drafting repeal provisions?
 - How are repeal provisions drafted?
 - Are there any special features for re-enacting or replacement legislation?
4. Drafting Amendments
 - What methods of amendment can be used?
 - What should be our objectives when drafting amendments?
 - How should amendments be arranged?

- How should we draft amendments?
- 5. Concluding Questions
 - What can go wrong when drafting repeals and amendments?
 - How can we explain the effects of amendments?
 - How do we draft amendments for the parliamentary process?