NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LED652

COURSE TITLE: SUBSTANTIVE PROVISIONS

COURSE GUIDE

LED652
SUBSTANTIVE PROVISIONS

Adapted From Commonwealth of Learning

Course Team Obayemi T. Omotayo (Adapter) - NOUN
Dr. Ifidon G. Oyakhiromen (Programme Leader) - NOUN
Omotayo T. Obayemi (Coordinator) - NOUN

NATIONAL OPEN UNIVERSITY OF NIGERIA

National Open University of Nigeria
Headquarters
14/16 Ahmadu Bello Way
Victoria Island
Lagos

Abuja Office
No. 5 Dar es Salaam Street
Off Aminu Kano Crescent
Wuse II, Abuja
Nigeria

e-mail: centralinfo@nou.edu.ng
URL: www.nou.edu.ng

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Introduction

In LED650, you were concerned with the provisions that usually appear at the beginning of a statute. In this course, LED652, we shall be working on those that conventionally are placed towards the end. The provisions considered here differ from the preliminary provisions in that typically they deal with matters affecting substantive law. But they are used too for what may be seen as technical reasons, for example, in order to integrate new legislation with the body of existing law.

Course Aim

The aim of this course is to expose students to the items that are included in the substantive provisions of Bills and to be able to draft them.

Course Objectives

By the end of this course, you should be able, when drafting a Bill to:

(a) Provide suitable final provisions, and in particular, to draft:

(i) delegated powers to legislate;
(ii) amending, repeal, saving and transitional provisions, and Schedules; and
(iii) saving and transitional provisions that have retrospective effect.

(b) Take account of the law on implied repeal and on the legal effects of repeals in drafting amending repeal, saving and transitional provisions.

Working through this Course

To complete this Course, you are advised to read the study units, read recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course, there is a final examination. The course should take you about 18 weeks to complete. You will find all the components of the course listed below. You need to allocate your time to each unit in order to complete the course successfully and on time.

Course Materials

The major components of the course are:

1. Course guide
2. Study units
3. Textbooks
4. Assignment File
5. Presentation schedule

Study Units

We deal with this Course in 15 study units divided into 3 modules as follows:

Module 1

Unit 1 Final Provisions
Unit 2 How to Delegate Powers to Legislate
Unit 3 General Approach to Drafting Delegated Powers to Legislate
Unit 4 Drafting Delegated Powers to Legislate I
Unit 5 Drafting Delegated Powers to Legislate II

Module 2

Unit 1 Repealing and Amendment of Legislation
Unit 2 Deciding the Contents of Repeals and Amendments
Unit 3 Drafting Repeal Provisions
Unit 4 Drafting Amendments I
Unit 5 Drafting Amendments II

Module 3

Unit 1 What can go wrong when drafting Amendments?
Unit 2 When do we need Transitional and Savings Provisions?
Unit 3 Legal Effects of Repeals
Unit 4 Drafting Saving and Transitional Provisions
Unit 5 Drafting Schedules

Each study unit consists of one week's work and includes specific objectives; directions for study, reading material and Self Assessment Exercises (SAEs). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the Course.

Textbooks and References

Certain books have been recommended in the course. You should read them where you are so directed before attempting the exercises.

Assessment

There are two aspects of the assessment of this course; the Tutor Marked Assignments and a written examination. In doing these assignments, you are expected to apply knowledge acquired during the Course. The assignments must be submitted to your Tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the *Assignment file*. The work that you submit to your Tutor for assessment will count for 30% of your total score.

Tutor-Marked Assignment (TMA)

There is a Tutor Marked Assignment at the end of every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best 3 performances will be used for assessment. The assignments carry 10% each.

When you have completed each assignment, send it together with a (Tutor Marked Assignment) form, to your Tutor. Make sure that each assignment reaches your Tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your Tutor before the assignment is due to discuss the possibility of an extension.

Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination and Grading

The duration of the final examination for LED652 – Substantive Provisions is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of Self Assessment Exercises and the Tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your Self Assessment Exercises and Tutor Marked Assignments before the examination.

Course Marking Scheme

The following table lays out how the actual course marking is broken down.

Assessment	**Marks**
Assignments 1-4	Four assignments, marked out of

(the best three of all the assignments submitted)	10% Totaling 30%
Final examination	70% of overall course score
Total	**100%**

Course Overview and Presentation Schedule

Unit	Title of Work	Week's Activity	Assessment (End of Unit)
	Course Guide	1	
	Module 1		
1	Final Provisions	1	Assignment 1
2	How to Delegate Powers to Legislate	1	Assignment 2
3	General Approach to Drafting Delegated Powers to Legislate	1	Assignment 3
4	Drafting Delegated Powers to Legislate I	1	Assignment 4
5	Drafting Delegated Powers to Legislate II	1	Assignment 5
	Module 2		
1	Repealing and Amendment of Legislation	1	Assignment 6
2	Deciding the Contents of Repeals and Amendments	1	Assignment 7
3	Drafting Repeal Provisions	1	Assignment 8
4	Drafting Amendments I	1	Assignment 9
5	Drafting Amendments II	1	Assignment 10
	Module 3		
1	What Can Go Wrong when Drafting Amendments?	1	Assignment 11
2	When Do we need Transitional and Savings Provisions?	1	Assignment 12
3	Legal Effects of Repeals	1	Assignment 13
4	Drafting Saving and Transitional Provisions	1	Assignment 14
5	Drafting Schedules	1	Assignment 15
	Revision	1	
	Examination	1	
	Total	**18**	

How to Get the Most from this Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, your study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of

learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Facilitators/Tutors and Tutorials

There are 12 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials, together with the name and phone number of your Tutor, as soon as you are allocated a tutorial group.

Your Tutor will mark and comment on your assignments, keep a close watch on your progress, and on any difficulties you might encounter and provide assistance to you during the course. You must send your Tutor Marked Assignments to your Tutor well before the due date. They will be marked by your Tutor and returned to you as soon as possible.

Do not hesitate to contact your Tutor by telephone or e-mail if you need help. Contact your Tutor if:

1. You do not understand any part of the study units or the assigned readings;
2. You have difficulty with the self assessment exercises;
3. You have a question or a problem with an assignment, with your Tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face-to-face contact with your Tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

Summary

Rather more than in LED650, you will find much in this course that you have not come across in earlier Courses. Again, you are asked to complete a large number of Self Assessment Exercises. You will need several study sessions to complete all the units. It will usually be possible to make a break at the end of any of the Modules.

We wish you success with the Course and hope that you will find it both interesting and useful.

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Adapted From	Commonwealth of Learning

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Headquarters
14/16 Ahmadu Bello Way
Victoria Island
Lagos

Abuja Office
No. 5 Dar es Salaam Street
Off Aminu Kano Crescent
Wuse II, Abuja
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MODULE 1

UNIT 1 FINAL PROVISIONS

CONTENTS

1.0 INTRODUCTION

In this unit, we have an overview of provisions that are commonly placed towards the end of Bills. We encourage you to identify the provisions that are positioned there in Nigeria and to establish the typical order in which they appear.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- familiarise yourself with necessary final provisions and the order in which they should be placed in bills.

Your aim in this unit is to make yourself familiar with the final provisions in our legislation in preparation for developing the approaches that are appropriate to enable you to decide: how they should best be drafted. This is a short introductory section that you should be able to complete quickly.

3.0 MAIN CONTENT

3.1 Matters that May be Contained in Final Provisions

The following matters are typically included in final provisions:

1. Delegated powers to legislate by subsidiary instrument;
2. Repeal provisions;
3. Amending provisions;
4. Saving provisions;
5. Transitional provisions;
6. Schedules.

They are usually included in the final provisions because they deal with matters that supplement the legislative scheme that is provided for in the preceding parts of the instrument. However, delegated powers and amending provisions tend to be included only when they are short and consequential. When they are more substantial, they take a more prominent position in the text, notably in Bills the sole or major purpose of which is to amend existing legislation. In such cases, they give rise to distinctive drafting practices, as we shall see later.

You will recall, from your work on Preliminary Provisions (**Module 1 of LED: 602**), that in some jurisdictions, certain of those provisions are placed with the final, rather than the preliminary provisions. When we refer in this course to final provisions, we do not include those cases.

SELF ASSESSMENT EXERCISE 1

Confirm for Nigeria:

1. Which, if any, of the provisions listed there are treated as final provisions.
2. The place in which those provisions are usually set out in the final provisions.

Drafting conventions about the use and style of final provisions can differ between primary and secondary legislation. In any case, these provisions are rather more common in Bills than in subsidiary instruments. This course is mainly concerned with how final provisions are prepared for Bills.
Follow the conventional practices in your jurisdiction about what is preliminary and what is final when working out the structure of your Bill or subsidiary instrument.

SELF ASSESSMENT EXERCISE 2

As you work through this course check how your legislation typically sets out and expresses these final provisions by quickly looking through examples of recent Acts and subsidiary instruments.

3.2 Are Final Provisions Optional?

Some of the preliminary provisions (e.g. short title) are essential features of all legislation. None of the final provisions is of that kind. They are all concerned with matters of substance, rather than form. Whether you need to provide them depends upon whether or not the particular legislation requires that kind of provision.

So, for example, saving and transitional provisions may not be required in the circumstances covered by the substantive provisions. Schedules tend to be used where it will be more convenient for users if legislative text is transferred from the body of the instrument to a separate part at the end.

3.3 Order in Which Final Provisions are Dealt with

Unless they are substantial, the order in which the final provisions typically appear is:

1. Delegated legislative powers
2. Amendment provisions
3. Repeal provisions
4. Saving provisions
5. Transitional provisions
6. Schedules.

In countries like Nigeria where the short title and commencement section are final provisions, they are typically placed after transitional provisions, but before any Schedule.

There is logic in this order, derived from the following principles about how legislation should be structured:

- permanent precedes temporary;
- continuing precedes one-off;
- substantive precedes formal;
- functional precedes consequential.

The principles of legislative structuring were dealt with in detail in **LED: 609**.

1. **Delegated legislative powers** are commonly concerned with providing substantive rules of a *continuing* nature. So, they should immediately follow other substantive provisions.

2. **Amending provisions** also typically contain provisions that deal with matters of substance, although they are spent once in force as they merge with the legislation they amend.

3. **Repeal provisions** have substantive effect, but it is a *one-time* function. These provisions generally cease to have operational importance once that function is performed.

4. **Saving provisions** are usually *consequential* upon a repeal (or sometimes an amendment), and so follow those provisions. As they usually preserve some existing provisions for the future, they deal with *continuing* legal rules.

5. **Transitional provisions** are also *consequential* upon repeal or amendment; but they put in place *temporary* rules which, therefore, have only a limited life.

6. **Schedules** take the form of an *addendum* to the legislation, and therefore come at the end.

3.4 Should they be Dealt with in Separate Clauses?

As a general practice, where the matter to be dealt with by each is not substantial:

(i) place each category of final provisions (other than Schedules) in distinct clauses in the legislation;

(ii) provide each with a section note, using the appropriate words to describe the function of the clause.

But:

(i) if the delegated powers are *numerous* and are to be exercised by different persons or bodies, consider providing separate clause for each, placed with the substantive provisions that it supplements;

(ii) if the amendments, repeals, savings or transitional matters are *extensive*, consider whether to use several clauses, or even a Schedule, to cover the material;

(iii) if the provisions are *few* and *short* and of minor importance, consider whether to combine them with other final provisions into a single clause. So, for example, add a single saving or transitional provision to the repeal provision on which it depends, as a subsection.

3.5 Section Notes that are Appropriate

A widespread practice is to provide sections containing a distinct kind of final provision with section notes that merely describe their technical function, rather than their substantive effect. So for example:

Regulations is used for a sole section containing a delegated power to make supplementary legislation.

Amendment [of section 4 of the principal Act] is used rather than a note that states the substance of the amendment.

Repeal [of Act No.24 of 2000] states the legal effect of the section.

Saving similarly explains the technical function of the provisions in the section.

Transitional is similarly explanatory of the technical purpose of the section.

On the other hand, the note to a section that provides with respect to matter contained in a Schedule typically describes the substantive contents of the Schedule.

SELF ASSESSMENT EXERCISE 3

Mark with a tick, whether the expression given is used in your jurisdiction as the section note to a clause dealing with the matter. If an alternative is in regular use, write that in the space provided.

1. Regulations
2. Amendment *
3. Repeal *
4. Saving *
5. Transitional

*These may be in the plural where the clause contains several such provisions.

4.0 CONCLUSION

Matters that supplement the legislative scheme are usually dealt with in the final provisions. These are repeal, saving and transitional provisions and schedules. Delegated powers and amending provisions are included only when they are short and consequential.

5.0 SUMMARY

From this unit you should have a clear view of provisions that are commonly placed towards the end of Bills in your jurisdiction and the typical order in which they appear. If so, then you will have achieved the objective of the unit. You should now become familiar with necessary final provisions and the order in which they should be placed in bills.

On completing this unit you will be ready to look in detail at the function and drafting of final provisions and current practice in respect of your legislation.

6.0 TUTOR-MARKED ASSIGNMENT

Give a summary of what you have learnt from this unit.

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed). London: Butterworths.

UNIT 2 HOW DO WE DELEGATE POWER TO LEGISLATE?

CONTENTS

1.0 INTRODUCTION

Subsidiary legislation is extensively used to supplement the provisions of primary legislation. It is employed for a wide range of purposes and may be made by a variety of executive bodies. For individual users it may have more important implications than the Act under which it is made. But it can only be prepared if the necessary authority has been given under primary legislation, and it may only be made within the limits laid down by the legislation under which it is made.

Particular attention must be paid, then, to the drafting of the statutory powers which authorise the making of 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 powers should be only such as are needed to enable the legislative scheme approved by the Legislature to be given full effect. As process for making subsidiary instruments does not involve parliamentary debate or other public scrutiny, consideration may need to be given to ways in which the public and the Legislature may make an input without impairing the convenience of this form of lawmaking.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- decide when delegated powers should be conferred
- decide how matters should be divided between Bills and subsidiary legislation
- explain when an instrument is subsidiary legislation
- analyse your objectives when drafting delegated powers
- decide when delegated powers are needed.

3.0 MAIN CONTENT

3.1 General Considerations

Acts of the National Assembly often need to be supplemented by other rules of written law made by a body more closely connected with the implementation than the National Assembly. You will recall that, in common law systems:

- Acts frequently delegate such powers to executive authorities;
- the Act must confer the power on the authority by express provisions.

The power is to make subsidiary legislation (though this may be referred to by a variety of terms - "subordinate legislation"; "delegated legislation"; "secondary legislation"; "statutory instruments"; "legislative instruments"). The term to be used is that used in the Interpretation or other general legislation dealing with the matter.

SELF ASSESSMENT EXERCISE 1

Remind yourself of the term in use in Nigeria.

3.2 When Should Delegated Powers Be Conferred?

In modern society, the law has to regulate complex and rapidly changing activities. It must address a wide range of matters, by no means all of equal weight. Legal rules may be required to regulate the substantive rights, powers and duties of those engaging in the activities; others may be directed towards those administering and enforcing the regulatory scheme, providing for their rights and duties, or for the procedures that are to be followed. Some of these rules are more important and need to be more enduring than others and deal with matters with which the Legislature should engage. However, others may be more detailed or of a technical nature or deal with aspects of the legislative scheme which,

though required in order to provide complete legal coverage, are routine or consequential. These may be more appropriately provided for in subsidiary legislation.

If subsidiary legislation is not used in these cases, Bills would have to contain very many more provisions than at present, many of which are of little relevance to the principal users of the legislation. In many countries, this would have adverse effects on the legislative process:

(i) the Legislature would have to spend more time on the Bills as a result of the increase in its size;

(ii) it would have to concern itself with provisions which, though legally necessary, are of little relevance to the policy (which is the Legislature's prime concern), or are consequential upon it;

(iii) changes to those provisions could only be made by (possibly frequent) amending Bills, for which legislative time must be found.

Saving legislative time is a prime justification for subsidiary legislation, so that the Legislature can concentrate its attention on those matters with which a representative body should be concerned:

(i) policy and principles of legal change;

(ii) alterations in the substantive rights and duties of individuals and the general public or particular sections of it;

(iii) changes in taxation and public expenditure;

(iv) increases in the powers of the Executive;

(v) the creation, or dissolution, and competence of public authorities and administrative bodies.

In addition, Government favour powers to make subsidiary legislation because they can be exercised more quickly and the processes are generally less demanding than in the case of primary legislation, and legislative scrutiny may be avoided. For these reasons, proposals to delegate substantial powers have to be looked at critically. This absence of validation by the legislature can to an extent be counter-balanced by enacting a requirement of legislative review that injects a degree of democratic accountability.

On the other hand, certain subject areas may be better dealt with by subsidiary legislation, for example regulatory provisions of a technical nature affecting a specialised industry. Some countries have developed fairly rigorous processes for making such instruments that require consultation and impact analysis of substantial proposals. These can prove to be more effective in producing suitable legislation than legislative law-making.

SELF ASSESSMENT EXERCISE 2

Does Nigeria have standard procedures that must be followed by all Ministries for processing proposals for new subsidiary legislation, in particular those that deal with matters of major substance?

If such a regulatory regime has been introduced, check whether the procedures to be followed are set out in a formal Government instrument. If one exists, try to obtain a copy for your materials.

3.3 How Matters Should Be Divided Between Bills and Subsidiary Legislation

This suggests that Bills should contain the principal substantive rules of a new legislative scheme that gives effect to a new policy and should settle its core features. In particular, they should deal with:

(i) Matters that involve significant questions of policy;
(ii) Rules which will have a significant effect on individual rights and duties;
(iii) Significant criminal offences and penalties;
(iv) Taxes and significant fees and charges;
(v) Procedural matters that go to the essence of the legislative scheme;
(vi) Significant amendments and repeals to existing law.

Subsidiary legislation, on the other hand, should build upon the policy and principles established by the parent Act, and deal with matters of less significance or with the detail of the legislative scheme, filling it out and supplementing the core features of the Act. Only exceptionally should it deal with matters of major substance and principle. Thornton puts it this way (pp.329-330):

there are undoubtedly factors which in certain circumstances make delegated legislation on matters of substance both legitimate and desirable. These include:

- legislative schemes, such as those involving economic controls, that demand a high degree of flexibility for their successful operation;
- circumstances where considerable flexibility may be needed to modify a legislative scheme to meet local or exceptional circumstances requiring special treatment;
- circumstances where the technical content of laws is such that they are incomprehensible to anyone without knowledge in the field .....;
- schemes of a kind that several tiers of legislation are necessary to make it work ..... ;
- the necessity to cope with emergencies of various kinds.

Delegated powers may be useful then in the following cases, where:

1) A great deal of rule-making is needed to put statutory flesh on the structures and procedures set out in the Act and to provide for the detail of the policy behind it (e.g. safety at work in factories or in the building industry or management of a public health scheme).

2) Operational features of the statutory scheme are likely to require frequent adjustment, e.g. because the subject matter is in the process of constant change or when modifications to the scheme are likely to be numerous and detailed, though individually of minor importance (e.g. price controls; regulation of minimum wages of different groups).

3) Rules of a technical nature are required, that are to be used principally in a specialist area of Government (e.g. rules relating to internal financial procedures) or by a specialist body or group in the community (e.g. operation of civil aircraft).

4) A body of provisions is required for the operation of the Act that is entirely procedural or concerned with administration (e.g. under an Act setting up a public corporation or a university).

5) Ancillary fees, notices or forms, or detailed lists of items to which the Act is to apply must be stipulated from time to time, (e.g. under an Act imposing import controls on a range of commodities).

6) The scheme requires a body of distinct rules in which the Legislature is unlikely to have a substantial interest, since they raise no issues of policy nor directly affect the rights and duties of members of the public (e.g. prescribing procedures and

standards to be complied with in mining activities or how advertising is to be carried out in the vicinity of public roads).

7) The legislative scheme requires a series of rules that apply its general principles to different bodies or circumstances, and the differences between them can best be reflected by providing a separate set of rules for each (e.g. regulating conditions of employment).

8) Circumstances can be foreseen in which urgent or rapid law-making will be required to adapt the general principles of the Act, to fast-changing circumstances that cannot wait on the Legislature (e.g. emergency powers to deal with disasters).

3.4 When is an Instrument Subsidiary Legislation?

In the common law tradition, an instrument can only be subsidiary legislation if it is made under enabling powers in an Act of the Legislature that authorise a delegate to make legislation. In most instances, the terms of the enabling power, and the type of instrument to be used (e.g. "regulations"; "rules"; "bye-laws") make clear that the delegated power is to make an instrument that has legislative effect. But this is not always obvious. The enabling power may authorise action of a very specific nature to be applied to particular cases or circumstances. The power to act may be by "order" or, less formally, by "notice" (terms that could relate to administrative action). Is the authorised action legislative or executive?

Example Box 1

The following cases could be construed as legislative or executive.

1. The Minister may declare, by order in the *Gazette*, an area to be a prohibited area for the purposes of this Act, after which sections 8 to 12 apply to that area.

2. The Minister may require, by notice in the *Gazette*, every public utility to keep such books, records and accounts of the conduct of its business as the Minister specifies in the notice.

Fortunately, the distinction rarely needs to be pressed. The action, whatever its nature, is legally valid if the enabling power has been correctly complied with. But in two circumstances of interest to the drafter, the distinction can become important.

1. Publication

In some jurisdictions, general legislation directs that subsidiary legislation must be published in a different way from executive instruments.

Example Box 2

Legislative instruments may be required to be:

- published in a different part of the *Gazette* from executive instruments (e.g. as *Legal Notices*, rather than as *Government Notices*, and collated annually in separate collections; or

- formally registered and numbered as a distinct series.

2. Application of the Interpretation Act

Typically, Interpretation Acts apply only to written *laws*, and therefore not to executive instruments. Provisions of the Act as to form, operation and interpretation of instruments apply to subsidiary legislation only.

Two possible solutions to these problems have been tried in a small number of places, though to contrary effect.

a) Providing a precise definition of "legislative instrument"

As common law courts have been hesitant to give a definitive meaning to this term or to the expression "instrument having legislative effect" (found in Interpretation Acts), attempts have been made to provide a statutory definition. The Attorney-General may be given power to make a conclusive ruling in cases of uncertainty.

Example Box 3

The **model Interpretation Act 1992** contains a subsection of this kind (**section 25(2)**):

(**2**) An instrument made under a written law has legislative effect if:
(a) it determines the law or alters the content of the law, rather than stating how the law applies; and
(b) it has the direct or indirect effect of imposing an obligation, creating a right, or varying or removing an obligation or a right; and
(c) it is binding on its application.

b) Instruments deemed to have legislative effect

Some Interpretation Acts containing general rules about subsidiary legislation provide that certain borderline cases are deemed to have legislative effect *for the purposes of that Act.*

Example Box 4

(**2**) An instrument made under a written law prescribing, fixing or designating a district, area, person, animal or thing, or period of time, within, to, during or in respect of which that law applies or does not apply, in whole or in part, is to be regarded as having legislative effect.

This has the opposite effect to the subsection in **Example Box 3** under which instruments applying provisions of the Act are not regarded as legislative.

SELF ASSESSMENT EXERCISE 3

Note the references to any general legislation in your jurisdiction equivalent to that shown in **Example Boxes 3 & 4**.

3.5 How the Courts Approach Delegated Powers

The courts treat subsidiary legislation as an ancillary device to further the objectives of the primary legislation under which it is made. It is not a mechanism for widening or altering the scope of that legislation. As Bennion (*Statutory Interpretation*, p.167) has it:

> The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it. That is the rule of primary intention.

The nature and extent of the delegate's powers are construed in the context of the policy and overall legislative scheme, and not merely by reference to the form in which the power is drafted. Accordingly, the courts may treat the exercise of a power as ineffective if the instrument goes beyond what they interpret the Act as authorising (the *ultra vires* principle). Although they presume that subsidiary instruments are valid, on challenge they may declare an instrument to have no legal effect on such grounds as the following:

(i) it was made by an unauthorised person or body;

(ii) it was made by a procedure that failed to comply with a statutory requirement;
(iii) it went beyond the scope of the enabling power;
(iv) it was made for an improper purpose, i.e. one not authorised by the parent Act;
(v) it contradicted or was incompatible with the objectives of the parent Act;
(vi) the exercise of the power was in bad faith or arbitrary, or discriminatory, disproportionate or unreasonable in effect.

3.6 Your Objectives When Drafting Delegated Powers

In drafting a Bill for an Act that needs to be supplemented by subsidiary legislation, you must:

(i) include express provisions authorising subsidiary legislation to be made; and
(ii) draft the provisions so that the delegate has full powers to make subsidiary legislation on all the matters for which it may be needed.

However, always keep in mind the *ultra vires* principle. Since the courts can hold an instrument to have no legal effect if it is beyond the competence of the body that made it, you have a particular responsibility to ensure that the parent Act gives all the necessary authority to that body. This requires you to indicate expressly and precisely in the parent Act:

(i) the person or body to whom the power is given, and any other bodies that are to be formally associated in the making of the subsidiary legislation;

(ii) any mandatory procedures that are to be followed before, during or after the making;

(iii) the extent of the power (i.e. the matters on which subsidiary rules can be made, and the purposes for which the power can be used) in terms that enable all contemplated matters to be dealt with.

An enabling power not only authorises the making of subsidiary instruments; it also sets the limits to the use of the power, which in principle can be enforced by court or legislative challenge. The limits can be drafted so tightly that the delegate's power is strictly confined, and easily controlled by judicial review. The delegate may then be left with little flexibility. On the other hand, the authority to legislate can be drawn in such wide-ranging terms that it may be very difficult to

establish that an exercise of the power is *ultra vires*. So, the way the enabling power is drafted can have profound consequences upon the application of the *ultra vires* doctrine.

Legislative Counsel may sometimes be instructed to draft an enabling power in such a way as will reduce the possibility of successful legal challenge. Case law has shown that this may be achieved, e.g. by conferring the power in broad terms that give wide scope for action, or by making the exercise of the power dependent upon the subjective judgment of the delegate. At the same time, the courts have evolved principles of review that enable them to set limits to powers that might on their face be capable of unpredictable use.

Example Box 5

1. The Minister may make regulations, as the Minister considers appropriate, controlling the open hours of shops and the hours of employment of those employed in shops.

The Minister has a wide discretion as to when and for how long shops are to be or may be opened and as to the number of hours, and on which days, employees may or are to be employed.

2. The Minister may prescribe, by order, the hours of duty for domestic employees.

Legal challenge will be difficult whatever the Minister may decide as to the number of hours (maximum or minimum, weekly, monthly or annually), as to starting and finishing times and as to the length of rest times. For a successful challenge the order would have to be one which no reasonable person would make.

Broad and subjective terms (as in **Example Box 5**) may be justified in some legislative schemes, but do not use these as a matter of course. It is not the drafter's function to reduce the possibility of legal challenge in this way. Your function is to draft provisions in such a way that the delegate can provide the rules that you and the client foresee are likely to be needed to complete the legislative scheme and to keep it operational. In principle, wide-ranging executive powers are better dealt with directly by the Bill, when the Legislature can examine the implications, rather than in subsidiary legislation, over which political controls are notoriously ineffective.

3.7 How to Decide When Delegated Powers Are Needed

Good instructions may suggest matters for which the client Ministry believes that subsidiary legislation will or may be required. More often, the value in providing for such legislation to be made for particular matters emerges as you analyse the instructions and devise a legislative plan. Matters suited to regulation by subsidiary legislation also become apparent as you draft the individual provisions of the Bill.

In planning the Bill, you can safely decide that ancillary matters of little significance can be left to be delegated (rather than, e.g. included in a Schedule). But if you are contemplating authorising subsidiary legislation for matters that affect issues of substance or principle, it is sensible to consult the client Ministry (and perhaps through them the likely delegate, if a different body). The final decisions on the use of subsidiary legislation to deal with substantive matters are for the client. It is helpful if these can be taken before the actual composition of the Bill starts.

1. Decisions on ancillary matters

The most common cases for which subsidiary legislation is used are:

(i) procedures for putting into effect the methods of administration and enforcement in the parent Act;

(ii) listing cases to which provisions of the Act do or do not apply;

(iii) specifying the forms to be used when statutory steps are taken;

(iv) fixing the levels of fees or charges for connected matters.

However, give thought to whether, in the particular case, the matter might better be dealt with in the Bill itself (e.g. a Schedule). There may be advantages to some users in having all the rules in the same instrument. A case can be made for this if:

(i) the rules, or fees or charges, are not likely to need alteration in the foreseeable future;

(ii) they are few and not excessively detailed, and will not increase the length of the Bill disproportionately;

(iii) they deal with matters that concern or affect the likely principal users of the Act who may need to consult them regularly;

(iv) no other similar matters will be dealt with by subsidiary legislation made under the Act.

Ask yourself whether this legislative scheme calls for flexibility and ease and frequency of alteration, the typical justifications for subsidiary legislation.

2. Decisions on substantive matters

Today, subsidiary legislation is commonly used to provide for substantive matters. Sometimes it may deal with matters of substance that are only incidental to the scheme in the Act; other times, it may supplement the substantive provisions in the Act with similar rules of less significance; on yet other occasions, it may deal with substantive matters of genuine importance to the legislative scheme.

Example Box 6

25.-(1) The Minister may make regulations as to:
(a) the conduct of elections for the return of elected mayors; and
(b) the questioning of such elections and the consequences of irregularities.
(2) Regulations under subsection (1):
(a) may make different provision for different cases; and
(b) may include supplementary, incidental, consequential and transitional provisions and savings as the Minister considers necessary or expedient.

A power in these terms enables subsidiary legislation to be made upon a substantive topic of importance, as well as supporting matters having a substantive content. The subjective discretion is sensible in this context since the items mentioned, and their treatment, call for the maker's judgment and are not likely to lead to unexpected use.

(a) Incidental matters

In this category are those instruments used to adapt features of the legislative scheme to different cases or different circumstances. Powers can be given to the delegate to modify the basic arrangements where flexibility is needed or new categories of cases need to be brought within the scheme at a later date. In some jurisdictions, they are used to deal with consequential and transitional matters that flow from complex new arrangements.

Example Box 7

The Board may make regulations prescribing the categories of its workers and their dependants to whom allowances may be paid out of its funds under section 12.

This power enables the scheme in the parent Act to be applied flexibly and subsequently adjusted easily.

(b) Supplementary matters

On occasions, if the Act have to be expanded upon or developed to provide certainty in application. Broad rules or terms in the Act may need to be amplified, so that its precise area of operation is clear. Enabling powers are useful where the specialist knowledge required for this purpose lies with a body to whom the power to make the instruments can be delegated.

Example Box 8

A Dental and Medical Practitioners Act requires a person applying to be registered as a practitioner to be, among other things, "a fit and proper person to practise medicine"; it also provides that a practitioner who commits "professional misconduct" may be disciplined. The appropriate professional body can be given delegated power to make regulations:

The Dental and Medical Council may make regulations as to:
(a) the standards of professional conduct expected of registered practitioners; and
(b) their fitness to practise medicine.

Subsidiary legislation is also used to supplement the main body of provisions in the Act by providing for secondary matters that are likely to occur in a wide variety of forms and in varied circumstances. Inclusion of those in the Act may distract unnecessarily from its central purpose; but not to have rules would leave a gap in its requirements.

These matters may involve minor issues of policy. Rather than deal with them in the Act, it may be more appropriate to leave the decisions both on such issues and on the contents of the instrument to the body that has the necessary competence and expertise.

Example Box 9

An Animal Diseases (Control) Act has as its purpose the eradication of diseases among farm animals, providing for such matters as the compulsory treatment or slaughter of diseased or suspect animals and the control of animal movement in specified circumstances (including import and export). But the Act would be overloaded if it dealt with all aspects of treatment and action needed. So a power may be given to the expert body (e.g. the Ministry of Agriculture) to make regulations:

Regulations

31. The Minister [of Agriculture] may make regulations:

(a) prescribing modes of cleansing and disinfection;

(b) regulating the seizure, detention and disposal of diseased or suspect animals carried or kept in contravention of this Act;

(c) regulating the destruction or disposal or treatment of the carcasses of animals dying while diseased or suspect;

(d) prescribing and regulating the disinfection of the clothes of persons coming into contact with diseased or suspect animals;

(e) regulating the payment and recovery of compensation for the destruction of diseased or suspect animals.

(c) Principal rules

Some subjects are so complicated that it is not possible for a Bill to cover all the primary rules needed to settle the main policy matters. This may arise because of the range and variety of issues, their technical complexity, specialist requirements calling for expert knowledge, the probability of having to adapt policy to rapidly changing circumstances. In these cases, subsidiary legislation of considerable importance is increasingly common in such areas as telecommunications, civil aviation, shipping, public health, regulation of monopoly services and environmental planning.

Example Box 10

Civil aviation legislation typically confers powers upon the expert body administering the system (e.g. a Civil Aviation Authority) to make regulations:

The Civil Aviation Authority may make regulations for

(a) securing the safety, efficiency and regularity of air navigation and the safety of aircraft and of persons and property carried on aircraft;

(b) preventing aircraft endangering other persons and property; .....

3.8 How Widely Drawn Can Delegated Powers Be?

Controversy occurs over powers as wide as those in **Example Box 10** when the subject matter is less specialist. Given the typical lack of legislative controls over the making of subsidiary legislation, powers of this kind limit, almost to exclusion, the Legislature in its function of validating the policy and the principles of new legislation. More so, if the matters evoke legitimate differences of political judgment as to policy or approach. Legislatures are generally prepared to allow a competent delegate to decide the policy on questions of air safety; they may be less ready to give a free hand to a Ministry to develop and legislate a policy for lending money to students entering higher education.

In countries with heavily worked Legislatures, wider use may be sought for powers of this kind, through "*skeleton*" or "*framework*" Bills:

(i) these contain only the bare bones of the law, sometimes no more than the authority to do whatever that the delegate considers appropriate to achieve a purpose stipulated in the Bill;
(ii) the subsidiary legislation contains the principles and details of a policy option selected by the delegate only after the Act is passed.

In such cases, Legislative Counsel have to draft without knowing what policy will be adopted; the powers have to be drawn in sufficiently wide terms to enable subsidiary legislation to be made whatever the policy chosen.

It is not for Legislative Counsel to decide to draft in this way, or to propose this approach, on their own initiative. Await explicit instructions and be prepared to question whether the approach is justified in the particular case.

Exceptionally this approach may be justified in the following circumstances:

(i) the matter is of a complex technical nature, calling for the special expertise, on which there are unlikely to be political differences of opinion.
(ii) the scheme is wholly regulatory and needs a range of alternative provisions to deal with different circumstances at different times or places.

Example Box 11

Regulations

3. The Minister may make regulations for the control, prohibition and removal of advertisements of any kind that:

(a) are situated outside the boundaries of the cities; and

(b) are visible:

(i) from a street or other place to which the public have access; or

(ii) from land or buildings not belonging to or in the possession of the owner or occupier of the land or building on or in which the advertisements are exhibited.

(iii) the delegate needs legislative powers to complement its governmental responsibility for a particular area (e.g. a local government authority) or service (e.g. a statutory corporation). Typically, these bodies are given sufficient bye-law making powers to enable them to carry out their functions.

Example Box 12

General functions of Council.

121. Every Council shall do all things that it lawfully may, and as it considers expedient, to promote the health, welfare and convenience of the inhabitants of the local government area and to preserve its amenities or credit.

Council bye-laws.

122.-(1) A Council may make bye-laws:

(a) that appear to the Council to be necessary or convenient:

(i) for the peace, good order and government of the local government area;

(ii) for the purpose of effectively carrying out its functions under this Act or another written law; or

(iii) for better carrying into effect its operation, objects and purposes;

(b) prescribing forms, fees, matters and things which are contemplated by this Act or are required or permitted by this Act to be prescribed.

(2) All bye-laws made by a Council under this Act or another written law are of no effect until they are approved by the Minister.

4.0 CONCLUSION

To conclude, subsidiary legislation is an ancillary device to further the objectives of the primary legislation under which it is made. The nature and extent of the delegate's powers are construed in the context of the policy and overall legislative scheme.

5.0 SUMMARY

In this unit, you have learnt about delegated powers. You should now be able to explain when legislative powers need to be delegated.

6.0 TUTOR-MARKED ASSIGNMENT

How important is subsidiary legislation?

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed). London: Butterworths.

UNIT 3 GENERAL APPROACH TO DRAFTING DELEGATED POWERS TO LEGISLATE

CONTENTS

1.0 INTRODUCTION

This unit focuses on the general approach to drafting delegated powers to legislate. The unit is designed to enable you to develop a systematic approach to follow when preparing delegated powers. Although the unit focuses on legislative powers, some of the techniques under discussion are relevant too when you are conferring executive powers.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- determine the matters for which delegated powers to legislate are needed and should be authorised
- draft delegated powers with the right approach
- explain the factors that can influence the drafting of delegated powers.

3.0 MAIN CONTENT

3.1 How We Might Approach the Drafting of Delegated Powers

As elsewhere, drafters develop their own approach with experience. Typically, it covers the same ground as the following three steps:

Step one:

Satisfy yourself that subsidiary legislation is needed, in addition to the provisions of the Bill, in order to provide a complete body of rules for the subject matter of the Bill.

It may become clear that enabling powers are needed after analysing the instructions or when working out a legislative plan. However, the need may emerge only as you draft the rules, when some appear to be better suited to subsidiary legislation.

Step two

Work out for which matters subsidiary legislation is needed and draw up as complete a list as possible.

As you draft the individual clauses, keep a separate note of the items that arise from them for which subsidiary legislation is required. This becomes a valuable starting point when you draft the enabling powers themselves.

Step three

In drafting the power, include provisions that embrace all the matters you have identified. Check back that the powers are wide enough to achieve all that may need to be done by subsidiary legislation.

As a matter of good practice, the powers should go no wider than is necessary for the requirements of the scheme. Conversely, make sure that they are wide enough for that purpose.

3.2 Are There Matters Which Should Be Expressly Authorised?

Courts interpreting enabling powers may apply presumptions as to legislative intent. The Legislature is presumed not to authorise the making of certain types of instrument, in the absence of clear terms. These concern cases in which the use of subsidiary legislation is likely to be controversial. If you are instructed to draft any of the following, include the matter in the delegating power in the clearest words:

1. Instruments to repeal or amend the parent Act or other Acts.
2. Instruments exempting cases from the operation of the parent Act.
3. Instruments having retrospective effect.
4. Instruments creating offences and penalties.

5. Instruments that bind the State.
6. Instruments that imposes taxes or make fees or charges.
7. Instruments further delegating the legislative power.
8. Instruments providing for matters of evidence.

1. Instruments to repeal or amend the parent Act or other Acts

Instruments of this kind enable the Executive to repeal or amend primary legislation that was enacted by the National Assembly. Some critics regard this practice as an unacceptable interference by, usually, a single Minister with a function that is the prerogative of the Legislature. From a legal standpoint, there is no question that such a power may be conferred as long as it is done expressly. In fact, it is widely used for minor or incidental amendments and repeals (e.g. to items in a Schedule of the parent Act).

Example Box 1

Second-hand Dealers Act:

Minister may amend, etc, Schedules.
7. The Minister, by notice in the *Gazette* may amend, add to or delete from, the goods or classes of goods specified in Schedule 1 or 2 [*of this Act*].

The following are examples of where specifically authorised powers of this kind may be helpful (see further, Thornton, pp.343-346). To:

(i) enable emergency action to be taken which is inconsistent with the parent Act (e.g. where the Act deals with a hazardous activity);

(ii) bring Acts with local application only into line with the parent Act that is to have general application;

(iii) alter the parent Act, which implements an international treaty, to take care of subsequent revisions of the treaty;

(iv) alter specific provisions in a wide range of Acts to give effect to a generalized change in the law introduced by the parent Act (e.g. metrication of measurement);

(v) adjust provisions of an Act that affects a broad class of persons to take account of unforeseen circumstances that affect a part only of that class;

(vi) provide for transitional or saving matters consequential upon the enactment of the parent Act.

Even here, ask for confirmation of the power to make such subsidiary legislation. More so, if you are asked to provide the power to make major amendments or repeal. Raise too the desirability of making instruments of this kind subject to a requirement for express approval by resolution of the Legislature, in draft or before it takes effect.

2. Instruments exempting cases from the Operation of the Parent Act

A power to remove cases specified in an instrument from the operation of the rules in the parent Act is tantamount to amending it. But here too authorising the practice can be valuable if you foresee the need is likely to arise in the course of administering the legislative scheme.

Example Box 2

Safety on Public Transport Act:

Exemption from section 14.
15. The Minister may prescribe, by order, classes of persons to whom, by reason of a physical disability, section 14 (which deals with access to aircraft) is not to apply.

3. Instruments having Retrospective effect

If subsidiary legislation is likely to be needed for a particular purpose that affects activities already concluded or started but incomplete, include the necessary authority to make it in the parent Act. Although a court may imply the power as part of a general delegated power to implement the Act because the legislative scheme as set out in the Act contemplates those cases, deal with the matter expressly if you foresee that the need will arise. Interpretation legislation sometimes confirms this requirement.

SELF ASSESSMENT EXERCISE 1

Note down the reference to any equivalent provision in the Interpretation Act to **section 18(5) of the model Interpretation Act 1992** (which requires express authorisation if instruments are to be effective from a time before their making or publication).

Legislation of this kind is not common; it may be required for benefits or allowances that are to be backdated or where the matters to be regulated already exist.

Example Box 3

(2) Regulations made under this section may be framed so as to have effect from a date earlier than the making of the regulations.

4. Instruments Creating Offences or Penalties

Courts may be prepared to imply a power to make behaviour an offence and punishable by criminal sanctions from general words authorising subsidiary legislation to "prohibit", "control", regulate", "restrict" certain activities. But a power to "regulate" does not necessarily imply that this may be done through the criminal law if the delegate so decides. If the client foresees that the delegate may need to regulate behaviour or activities through the use of the criminal law, deal with the matter expressly. Give the power in terms that:

(a) enable the delegate to specify that breaches of the instrument constitute offences;
(b) set upper limits to the penalties that may be attached by the delegate.

Example Box 4

(2) Regulations made under this section may:
(a) provide that contravention of a provision of the regulations constitutes a summary offence; and
(b) prescribe penalties for the offence, which must not exceed a fine of ₦50,000 and imprisonment for 3 months.

You may not need provisions of this kind if your Interpretation legislation already contains a general authority and the penalties prescribed there are adequate for the purpose. If inadequate, state the maximum penalties permitted under the delegated power.

SELF ASSESSMENT EXERCISE 2

Note down the reference to any equivalent provision in the Interpretation Act to **section 40(5) of the model Interpretation Act 1992** (which gives general authority for instruments to create offences and penalties up to a stated maximum). Note the type of offence and penalties permitted by your Act, if any.

5. Instruments that Bind the State

Courts apply the same presumption to subsidiary legislation, in this respect, as to Acts, though they are usually prepared to imply the power from the fact that the Act binds the State expressly or by necessary implication. An express power to make subsidiary legislation with this effect is essential if the parent Act does not bind the State but it is foreseen that regulations may need to extend to some State authority. This too may be confirmed by the Interpretation Act.

SELF ASSESSMENT EXERCISE 3

Note down the gist (and reference) of any provision in the Interpretation Act which provides for the binding of Government by subsidiary legislation (cp. **section 9(2) of the model Interpretation Act 1992**).

6. Instruments that Imposes Taxes or make Fees or Charges

Authority to levy taxation of any kind typically requires the authority of an Act of the National Assembly. Courts expect express authority if this is to be done by subsidiary legislation under the Act. On the other hand, fees and charges are not treated as taxes as long as they are commensurate with the services for which they are demanded. In those cases, a court may be prepared to imply a power to include these in an instrument from a general power to make subsidiary legislation to give effect to the provisions of the Act. Good practice suggests that it is better done expressly, if foreseeable.

Again, some Interpretation legislation (though not the model Interpretation Act) contains a general authority to impose fees and charges by a subsidiary instrument in respect of any matter dealt with by the parent Act or the instrument.

SELF ASSESSMENT EXERCISE 4

Note down the gist (and reference) of any provision in the Interpretation Act giving a general authority to impose fees and charges by subsidiary legislation.

You may give the authority:

(i) in the form of a power to impose the tax or fee, so allowing the delegate to decide whether or not to act in this way (but it is very unusual for the Legislature to act in this way in respect of *taxes*); or

(ii) alternatively, to fix the *level* of a tax or fee required or permitted by the parent Act.

Example Box 5

12. The Minister may make regulations prescribing the fees to be paid in respect of matters arising under or provided for by the regulations.

14.-(1). Subject to subsection (2), the tax is to be charged at the rate of 15 per cent.
(2) The Minister may, by order, increase or decrease the rate of tax for the time being in force to one of not less than 10 per cent or not more than 20 per cent.

7. Instruments Further Delegating the Legislative Power

Although they may have recourse to a presumption that a delegate of Parliament cannot delegate further, courts may be prepared to imply from general enabling words a power in the delegate to authorise another person to make the subsidiary legislation, especially if that appears to be necessary in order to make the legislative scheme work. Again, good practice indicates express words where the need is foreseen. In principle, this allows the Legislature itself to be assured that the sub-delegation will be to an appropriate body.

This power is most likely to be called for in regulations creating a body of substantive rules that itself is likely to require supplementation by an authority more closely connected with the administration than the original delegate.

Example Box 6

Road Traffic Act:

(2) Regulations under this section may authorise a local government council, designated by order of the Minister, to exercise the power to make the regulations regulating the speed of vehicles on the routes of travel, within the area of the council, specified in the order.

In this example, regulations are to be made by the Minister or, if the Minister makes the appropriate sub-delegating order, by the designated councils.

8. Instruments Providing for Matters of Evidence

Again, a court may imply from the general authorising words the power to deal with evidence questions in subsidiary legislation. But again, if

you foresee that the subject matter to be dealt with by that legislation may call for substantive rules settling particular issues of taking or admitting evidence, say so expressly in granting the power.

Example Box 7

24.-(1) The Minister may make regulations:
(a) requiring any information or document required to be provided under this Act to be verified by statutory declaration;
(b) with respect to the proof, in legal proceedings, of a disqualification imposed under this Act .....

3.3 Other Factors that Can Influence the Drafting of Delegated Powers

In some countries the Legislature has set up a committee to monitor the clauses of all Bills that authorise the delegation of legislative power. Typically, the committee keeps a check upon the balance between the substance in the Bill and what the Bill proposes to deal with by the subsidiary legislation. It comments on clauses that permit unexpected uses of delegated powers. Its reports become a source that guides drafters as powers that may attract criticism, although specific guidelines are not usually issued. As a result, a policy may emerge as to acceptable practice.

Try to keep regularly informed about the committee's thinking and the responses of the Legislature and Government to its reports.

SELF ASSESSMENT EXERCISE 5

1. Note down the name of the committee of the Legislature that has the specific function of examining delegated legislative powers contained in Bills.
2. Add a copy of its terms of reference to your collection of documents.
3. Note down whether it issues general guidelines or an Annual Report from which drafters can find out what may be regarded as acceptable drafting practices.

3.4 General Legislation that May Affect the Drafting of Delegated Powers

General provisions of law concerning subsidiary legislation, and the way it is to be made are found in many countries. Almost certainly you will find some in the Interpretation legislation. But in some places, an Act is

in force that is concerned specifically with this type of legislation. Such Acts typically contain provisions that affect the following:

(i) the terms to be used for describing particular types of instrument;

(ii) the procedures for their making and coming into effect;

(iii) their relationship with the parent Act, in particular the effects on the one in construing the other;

(iv) interpretation of the delegating powers, including presumptions as to what is to be implied;

(v) the effects of repealing them;

(vi) their registration, numbering and publication;

(vii) tabling in the Legislature, and requirements for their approval or disallowance by the Legislature.

Obviously, you must be fully conversant with legislation of this kind. We look at their effects on drafting delegated powers in the following two units.

4.0 CONCLUSION

In conclusion, courts in interpreting enabling powers to legislate, may apply presumptions as to the legislative intent. Power to remove cases specified in an instrument from the operation of the rules in the parent Act, is tantamount to amending it.

5.0 SUMMARY

In this unit, you have learnt about the general approach to drafting delegated powers to legislate. You should now be able to determine matters for which delegated powers to legislate are needed and should be authorised.

6.0 TUTOR-MARKED ASSIGNMENT

(a) Note down the citation of any Act in your jurisdiction that contains rules about the form, operation or interpretation of subsidiary legislation.

(b) How do we approach the drafting of delegated powers to legislate?

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed). London: Butterworths.

UNIT 4 DRAFTING DELEGATED POWERS TO LEGISLATE - PART I

CONTENTS

1.0 INTRODUCTION

This unit is designed to enable you to develop a systematic approach to draft the required provisions in line with best practice and consistently with the house-style in Nigeria. The unit contains a large number of Self Assessment Exercises which aim is to give you the incentive to find out local practice. Though necessarily detailed, they should enable you to consolidate the more tricky matters you are asked to study.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- draft provisions that delegate legislative powers to make subsidiary legislation in keeping with the practice and house-style in Nigeria.

3.0 MAIN CONTENT

3.1 Type of Instrument

An enabling provision must specify the type of instrument to be made when the particular power is exercised. In every system, there is a range of types. These may be referred to in your general legislation (e.g. in the definition of "subsidiary legislation" in the Interpretation Act).

Unfortunately, none of the terms in common use is a precise term of art. Some are used interchangeably. Which is used and when may depend on local conventions or drafting instructions. Often you will be left to select the form that seems best suited to the present case, after looking at appropriate precedents.

SELF ASSESSMENT EXERCISE 1

1. Remind yourself of the terms used in Nigeria.
2. Note down the reference to any general directions on the terms to be used. Add copy of them to your collection of documents.

Consider using the following terms for the following matters, unless this would be inconsistent with our practice.

Regulations

Provisions, especially those dealing with rights, duties, powers, that have a continuing regulatory effect, similar in character to provisions of a Bill that are always speaking.

Rules

Provisions that have a continuing regulatory effect in respect of step-by-step procedures to be followed by a formally constituted body, such as a court, tribunal, or by persons applying to such bodies, or to other authorities (e.g. for licences or permits).

Bye-laws

Provisions similar to those contained in regulations or rules, when made by a local government authority, statutory corporation or similar public body, that is empowered to legislate widely on matters within a geographic area or within its competence.

Orders

directions, usually relating to particular persons, bodies or things, that have specific effect, or an effect at a specific time, (e.g. stating lists or classes of case to which the continuing rules in the parent Act are to apply), as opposed to directions that have general and continuing application; orders alter the *effect*, or detail the application, of a rule rather than the content of the rule.

Proclamations

Special forms of orders, of a particularly formal and significant kind on matters of constitutional importance made, e.g. by the Head of State in summoning or dissolving Parliament. (In former times these orders were "proclaimed" by oral announcement in public places).

Notices (or Notifications)

Announcements as to changes in the law of a minor kind, usually relating to matters of administration, but that need to be brought to public attention.

Standing Orders

Rules governing the manner in which the business of an organisation is to be conducted. (These are sometimes known as Procedure and Conduct of Business Rules). They are provided for most legislatures, but may also be needed for local authorities and other large organisations that carry out their business in a formal manner.

The first three and the last terms indicate that the instrument is intended to be legislative in effect. The status of the others is not as self-evident since the terms are often used for executive instruments too. Indeed, other terms are found in some systems, such as "directions", "schemes", "codes of practice" which can be just as ambiguous in this respect. If you use any of those terms, draft the power itself so that it is clear that it makes changes in the law, if that is the intention.

SELF ASSESSMENT EXERCISE 2

Look quickly through a collection of recent subsidiary legislation in your jurisdiction and note down if any of the terms mentioned are used in relation to subsidiary legislation in different ways from those just suggested.

Complete Self Assessment Exercise 3 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 3

For *each* of the following, draft a clause that authorises the Minister to make the appropriate kind of instrument for the stated purpose.

1. To prescribe the protective headgear that the Bill requires persons using motorcycles to wear.

2. To empower the Minister to specify categories of persons who may be exempted from the requirement to wear protective headgear.
3. To stipulate the procedure to be followed by the Motorcycles Tribunal in hearing appeals (as authorised by the Bill) from persons refused exemption from the requirement to wear protective headgear.

3.2 Who is to be The Delegate?

The enabling clause must make clear the person or body on whom the power to make the subsidiary legislation is conferred. This is typically the authority most competent to deal with the subject matter or that has the responsibility for carrying out the legislative scheme or for ensuring that it is carried out. In relation to matters administered by the Federal Government, this is the relevant Minister or, in some systems, the Government collectively. Matters that potentially affect sections of the public or individual rights or interests directly should be dealt with no lower than the Minister. But an administrator at a lower level than the Minister (e.g. the chief executive of an agency) might be appropriate if:

(i) the matters are of a minor nature (e.g. concerns procedures or other internal administration);
(ii) the drafting needs the technical expertise of the body of which the administrator is in charge; or

(iii) the making is to be made subject to the approval of the responsible Minister.

However, it is uncommon to confer a power directly on an official in a Ministry, as those officials can be authorised by the Minister to act in the Minister's name under the agency principle (*Carltona Ltd v. Commissioner of Works* [1943] 1 All ER 560).

SELF ASSESSMENT EXERCISE 4

1. Note down whether in Nigeria the practice in these cases is to delegate to Government collectively or to individual Ministers.
2. If to the Government, note down the term used to describe the delegate.

If the power is to be conferred upon a Minister, the appropriate Minister should be specified following the conventional form in Nigeria. Some Interpretation Acts authorise the use merely of "the Minister", meaning the Minister with responsibility for the Act. That is determined from the Government's assignment of Ministerial responsibilities. This device

avoids having to amend legislation if the responsibility is transferred to a Minister with a different title.

SELF ASSESSMENT EXERCISE 5

Note down the reference in the Interpretation Act that has an equivalent definition for "Minister" as in **section 27** of the **model Interpretation Act 1992**.

Outside Federal Government, the power can be conferred on the principal body making policy or administering the scheme, e.g.:

(i) local government authorities;

(ii) the Board of a statutory corporation;

(iii) the Council of a professional or occupational body;

(iv) the entity recognised by the membership of a public body as exercising the executive authority on the matter.

3.3 Is Any Body to be Linked with the Making? If So, How?

Government may wish the power to be given to the relevant Minister if there is a public interest in the subject matter through its effect on the public or because of its implications for public expenditure. The power may be placed with the Minister but made exercisable only on the basis of action started by the administering authority. Alternatively, Government may vest the power in a non-government delegate but retain some oversight over its exercise. For example, the Minister can be linked with making the subsidiary legislation, e.g. by requiring Ministerial approval or confirmation of the instrument.

Example Box 1

1. The Board may make regulations, which are to be subject to the approval of the Minister, for the administration of this Act.

2. Regulations under this section have no effect until confirmed by the Minister.

3. The Minister may make regulations, on the recommendation [acting in accordance with the advice] of the Board, determining, adding to or deleting from the categories of approved contractors under this Act.

Ministerial powers are only exceptionally constrained as in the last case. A requirement of the Minister's consent or approval for instruments made by the delegate is a more typical technique.

But make sure that only one body is charged with actually making the legislation, even if others are associated in the process. By putting the responsibility firmly in one place, no conflicts can arise as to where the legislative initiative must come from.

Other bodies having a substantial interest in the legislation can be formally linked with the making in a variety of ways, through consultation, consent or confirmation. So, for example, instruments that have implications for public finances typically require the consent or approval of the Minister of Finance.

Consider whether the other body is to be involved from the start (e.g. "consent", "concurrence") or only after the instrument has been prepared ("approval" or "confirmation").

Take care too that bodies involved in the making are correctly designated. Full titles may be shortened by relying on definitions in the Interpretation legislation or the parent Act.

Complete Self Assessment Exercise 6 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 6

For *each* of the following, enter, as you think appropriate:

in column 1, the type of subsidiary legislation instrument that should be used;

in column 2, the authority to whom the powers should be delegated;

in column 3, any body that might be linked with the making, and the kind of link.

1. An instrument to regulate the acquisition and holding of shares in the National Development Bank, and the rights of the shareholders.

2. An instrument to govern legal proceedings in the Supreme Court in relation to infringement or revocation of patents.

3. An instrument to control the use of airports managed by the Federal Airports Authority (a corporation registered under the Companies and Allied Matters Act).

4. An instrument stipulating the levels of payment from public funds that legal practitioners may receive for legal aid work.

1. type of instrument	**2. delegate**	**3. linked bodies (if any) and type of link**
1.		
2.		
3.		
4.		

3.4 Powers to be Delegated

The enabling clause should indicate the full range of matters for which the delegated authority is given. This is typically expressed as a power ("may"), even in those cases where the making of the first set of instruments is essential to the operation of the legislative scheme. The expression is to indicate the delegate's competence, rather than to confer discretion. You can confer the authority in several ways:

(1) As a general power to legislate
(2) As a power to legislate for a particular purpose or in relation to a particular subject area
(3) As a power to legislate on a specific matter
(4) As a combination of these powers.

Example Box 2

General power

The Minister may make regulations for giving effect to this Act.

Particularised powers

The Minister may make regulations for the purpose of controlling the use of the public parks and beaches of Lagos.

The Commission may make regulations, subject to the approval of the Minister, respecting the preservation of order and good conduct among members of the public using public parks and beaches.

Specific power

The Minister may make regulations prescribing the fees chargeable by the Commission for entry to, or for the use of, the public parks and beaches under its management.

(1) General power to legislate

Powers of this kind confer a general authority to make subsidiary legislation where it appears to be needed in order that the scheme in the parent Act can be given its intended effect. A variety of formulae are used, sometimes even within the same jurisdiction.

SELF ASSESSMENT EXERCISE 7

Refer to a collection of recent subsidiary legislation for your jurisdiction and tick any of the following formulae (or a close variant) that have been used.

1. ..... for the better carrying into effect of the purposes and principles of this Act

2. ..... for carrying the provisions of this Act into effect

3. ..... for giving effect to this Act

4. ..... for the better administration of this Act

5. ..... as the Minister considers necessary for giving effect to this Act

If a different version is in typical use, note it down:

These formulae do not give the same width of power. For example, versions 1 and 2 in **Self Assessment Exercise 7** may be construed as giving authority to provide substantive rules to supplement those in the Act. The versions 3 and 4 are likely to be construed as restricted to the making of procedural or administrative rules of a subsidiary or incidental kind that affect the operative features of the legislative scheme.

In any case, these powers, for all the apparent breadth of their terms, will be construed in the context of the Act and may be restricted by the nature and detail of its substantive provisions and the presence and absence of other enabling clauses. If you have any doubts as to whether the formula you are using will enable rules to be made for particular circumstances, draft precise provisions rather than relying on the formula.

Typically, general formulae are used to authorise the making of supplementary procedural or administrative rules to complete the legislative scheme, rather than to enable additional substantive matters to be regulated. **Example Box 3** sets out one tried and tested in New Zealand.

Example Box 3

The Minister may make regulations providing for such matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for their due administration.

Version 5 in **Self Assessment Exercise 7** introduces a subjective element into the power. Such a formula leaves the delegate as the final judge of what procedural or administrative matters the subsidiary legislation should cover. Formulae that rely upon the delegate's subjective assessment considerably reduce the capacity of the courts to test whether the power has been used consistently with the intentions behind the parent Act. It is rarely appropriate to use these generalised formulae to give delegates (especially those not politically accountable) broad subjective powers to legislate the substantive provisions needed to implement the legislative scheme of the Act. If the client considers that an enabling power to make additional substantive rules is needed, provide for that possibility in explicit terms, by one of the means described in the following paragraphs.

(2) Power to Legislate for a Particular Purpose or in Relation to a Particular Subject Area

Powers of this kind should be used when the delegate will need to provide substantive rules, even principal rules, to supplement those contained in the parent Act. This can be achieved in two ways, by authorising the making of legislation for a stated purpose or in relation to a stated subject area.

(a) Powers for a Particular Purpose

Formulae of this kind state the end for which the delegate is competent to make subsidiary legislation. As long as the legislation can be shown to contribute to that end, it is *intra vires*, whether it contains principal, ancillary or incidental provisions.

Example Box 4

The Minister may make regulations for the purpose of prohibiting the export or import of diseased or suspect animals.

This formula gives the Minister full power to create the necessary scheme in terms of policy, principle and administration, on the assumption that the parent Act does not deal with those.

Complete Self Assessment Exercise 8 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 8

In the space provided, note down the essential difference in effect between the following:

1. The Minister may make regulations for the purpose of regulating the sale of imitation firearms.
2. The Minister may make regulations for the purpose of prohibiting the sale of imitation firearms.

(b) Powers Relating to a Particular Subject Area

Here too the power is designed to give the delegate considerable authority to determine both the policy and the substantive rules. Rather than stating the end for which the power may be used, a clause of this kind states the subject area in relation to which it may be used. The delegate is free to decide the objectives in legislating in this area.

Example Box 5

The Minister may make provision, by regulations, as to the ethical standards that are expected of public officers in the conduct of their offices under this Act.

This formula gives the Minister wide powers to determine the nature and extent of the standards to be covered by the regulations and, for example, the matters in respect of which standards are set.

Complete Self Assessment Exercise 9 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 9

In the space provided, note down the essential difference in effect between the following:

1. The Minister may make regulations with respect to the sale of imitation firearms.
2. The Minister may make regulations restricting the sale of imitation firearms.

(3) Power to Legislate on a Specific Matter

The power given by clauses of this kind is to make legislation on particular features of the legislative scheme, usually to give fuller effect to the policy and legislative approach contained in the parent Act. The matters on which action may be taken are typically specific and rather precisely drawn in order to relate to those aspects of the parent Act that the drafter considers need to be amplified. The delegate has limited room to make substantive provisions of any significance, as the legislation must be confined to doing exactly what the power requires.

Example Box 6

The Minister may make regulations prescribing the mode of cleansing and disinfection to be used by public health inspectors under this Act.

The Act imposes a duty on inspectors to cleanse and disinfect (e.g. after an outbreak of bird flu). Under this provision, the regulations can be concerned with only the one precise aspect of the scheme stated in the power.

Example Box 5 uses the valuable term "prescribe". Matters that are to be supplemented by regulations may be identified by attaching this term (or variants of it). This practice is reinforced if your Interpretation legislation defines “prescribed” (as meaning prescribed by subsidiary legislation made under the Act in which the term is used). The Interpretation Act defines the term as meaning “prescribed by or under the enactment in which the expression occurs”.

Example Box 7

Uses of the term “prescribed”:

..... the tribunal is to sit as the times prescribed.

..... on payment of the prescribed fee.

..... may apply, on the prescribed form, to the licensing authority.

..... must record in the register the details of the transactions as are prescribed [by regulations made under this Act].

A definition of “prescribed” in the Interpretation legislation or the parent Act allows you to leave out such phrases as that bracketed in the final example.

Where this device is used, the enabling power can then merely authorise the delegate to make subsidiary legislation for prescribed matters, e.g.:

> The Minister may make regulations prescribing matters that may or are to be prescribed under this Act.

Alternatively, and more effectively, each of the matters to be prescribed can be listed in the enabling power, rather than merely giving such a general authority. This list is helpful to the drafter of the subsidiary legislation.

SELF ASSESSMENT EXERCISE 10

Note down the reference to any definition of "prescribed" in your Interpretation legislation.

(4) Combination of Powers

Perhaps the most common form of enabling clause is one that combines a series of particularised or specific powers (particularly for prescribed

matters) with a general or residual “sweep-up” power. This authorises the delegate to make legislation on a range of specified matters to supplement the parent Act and, more broadly, for any other incidental matters of administration that call for additional regulation.

There are many possible variations. But the following guidelines embody good practice:

1. Begin with words that give the delegate the competence, rather than the duty, to make legislation "for all or any" of the matters that follow. This eliminates any question as to whether an instrument must deal with all the listed matters or can be confined to only some of them.

2. List each different use of the legislative power separately in lettered paragraphs.

3. Place the particularised and then the specific powers before the general power, so that the general power appears as a sweep-up provision.

4. Place powers concerned with substantive matters before those concerned with administration or procedure.

5. Order the powers in descending order of importance. The general power, as the last item, is then seen to be concerned with incidental, rather than substantive matters.

Example Box 8

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

(a) for the development and maintenance of public parks and beaches;
(b) for the protection of members of the public when using a public park or beach;
(c) prescribing the terms and conditions on which members of the public may enter and use public parks and beaches;
(d) prescribing fees for entry or use of public facilities in public parks or beaches;
(e) providing for such other matters as are contemplated by, or necessary for giving full effect to, the provisions of this Act or their due administration.

A conjunction (“and” or “or”) is unnecessary after (d) since the paragraphs constitute a simple list.

However, it may be the practice in your jurisdiction to place general powers first. It may then also be the practice to add, before the statement of specific powers, some such phrase as the following:

"without prejudice to the generality of the foregoing"

"including, but not limited to,".

This is intended to preclude the argument that the general powers must be construed as confined by the characteristics of the specific powers that follow. Some Interpretation legislation creates a general rule to this effect, so that the phrase can always be omitted.

The Interpretation legislation may contain other general rules that affect the drafting of the enabling clause, by making it unnecessary to state that:

(i) the power may be exercised "from time to time" (words originally included to preclude the argument that the power is to be used once only);

(ii) the power to "make" includes the power to "amend or revoke" earlier instruments;

(iii) the power may be used to make for specific classes of case only or to make different provisions for different classes, or similar variations.

SELF ASSESSMENT EXERCISE 11

Note down any equivalent provision in your Interpretation legislation to the following sections of the **model Interpretation Act 1992**. If there is no provision, tick if it is the practice to include words to the same effect in enabling clauses.

section 40(3) (omission of "without prejudice ..."):

section 45 (omission of "from time to time"):

section 40(2) (omission of power to amend and revoke):

section 40(4) (omission of differentiating power):

Particularly in detailed regulatory schemes, delegated powers may need to be applied in different ways for different classes of persons or for different cases or sets of circumstances. As we have seen in **Self Assessment Exercise 11**, general provisions in the Interpretation Act may allow for this. But including specific and precise provisions with your delegated power removes any doubt as to whether, or to what extent, those general provisions apply to your draft. A case for adding them is much stronger if no such general provisions exist in your jurisdiction.

Ask yourself then whether the subsidiary legislation you are authorising will be applied in the same way to all the cases to which the power extends. If exceptions are likely to be needed to the standard rules in the subsidiary legislation, or different arrangements for different cases, consider authorising these as part of your enabling provision, for example in terms derived from **section 40(4)** of the **Model Interpretation Act 1992**.

The legislative scheme, or a substantive part, of some Bills cannot be applied uniformly to all cases or persons to whom it relates. These may not be sufficiently foreseeable or may be too varied to be dealt with in the Bill itself. If, after discussion with your client, it is agreed that the implementing authority should have power to make exceptions or exemptions to the scheme or some part of the Bill, include the necessary authority in an enabling clause. As Thornton (p.346) points out, the effects are potentially discriminatory. So that authority should be conferred expressly by subsidiary legislation.

Example Box 9

(2) Regulations under this section may provide for the exemption:
(a) in a specified case or class of case, of persons or things; or
(b) of a specified class of persons or things,
from all or any of the provisions of this Act or the regulations; and any such exemption may be unconditional or subject to specified conditions, and either total or to an extent that is specified in the regulations.

3.5 Are the Powers Adequate to Cover All the Matters Intended?

The alternatives you have just worked with should enable you to select formulae suited to your particular requirements. For example:

(i) if you need to confer power to make legislation on matters that implement policy, use particularised powers stating a purpose or the subject area;

(ii) if you wish to authorise subsidiary legislation that is merely incidental or giving fuller effect to existing provisions, use powers that identify the specific matters, with a general sweep-up power.

Check the combined effect of the powers in the clause or clauses delegating legislative powers. Make sure that, as far as you can foresee:

(i) all the matters that need to be regulated by subsidiary legislation have been identified;

(ii) you have conferred powers in wide enough terms to enable those matters to be regulated as intended.

Bear in mind the important differences in legal effect of the various ways of expressing powers, particularly under the *ultra vires* doctrine.

4.0 CONCLUSION

In conclusion, an enabling provision must specify the type of instrument to be made when the particular matter is exercised. It must also make clear the person/body on whom the power to make the subsidiary legislation is conferred, and indicate the full range of matters for which the delegated authority is given.

5.0 SUMMARY

In this unit, we have considered how to draft delegated power to legislate. You should now be able to put this into practice in line with the house-style.

ANSWER TO SELF ASSESSMENT EXERCISE 3

1. The Minister may make *regulations* prescribing the specifications for the protective head gear that is to be worn under this Act by a person driving or riding on a motor cycle.

"*Regulations*" is the appropriate term for general rules of this kind.

A range of precisely defined features of headgear will have to be prescribed (e.g. types of materials, shapes, linings, fastenings, visors, etc). "*Specifications*" (i.e. "the detailed description of construction, workmanship and materials") ensures that the regulations will concentrate on these characteristics.

Instead of the expression "*under this Act*" (which relies upon the definition of "*under*" in **section 29** of the model **Interpretation Act**), one of the other terms in that definition can be used, or the clause could read, e.g. "that is required by this Act to be worn". Reference to a precise section by number is acceptable if the requirement is contained in a single section of the Bill.

The Bill needs to apply to both the motorcyclist and any passenger. This draft uses a simple way to make that evident (as presumably will other provisions of the Bill).

2. The Minister may specify, by order in the Gazette, the category or categories of persons who are exempt from the requirement in section ** to wear protective headgear when driving or riding on a motor cycle.

"*Order*" is the appropriate term for an instrument that applies or disapplies provisions of an Act in specific cases.

Using the alternatives "*category or categories*" makes certain that the Minister has the discretion to exempt more than one group of persons.

Reference to a precise section by number is acceptable if the requirement is contained in a single section of the Bill.

3. The Minister may make rules with respect to the procedure to be followed by the Motorcycles Tribunal in determining appeals under section ** by persons refused exemption from the requirement to wear protective headgear when driving or riding on a motor cycle.

"*Rules*" is the appropriate term for an instrument that lays down the procedure to be followed by a tribunal.

The expression "*with respect to*" goes a little wider than, e.g. "*prescribing*". It ensures that the rules can deal with matters that touch upon or are connected with procedure, but do not contain a procedural step.

The plural "*persons*" is desirable since a reference to a class is called for, rather than single individuals.

Reference to a precise section by number would be acceptable if the appeal process is covered in a single section of the Bill. It is not necessary to refer to the provision under which exemptions can be refused; that should be made clear in the provisions dealing with appeals.

ANSWER TO SELF ASSESSMENT EXERCISE 6

Type of instrument	**Delegate**	**Linking bodies**
1. **Regulations**	Minister of Finance	No other body need be linked formally with the making.
2. **Rules of Court**	The body responsible for making the rules of the Supreme Court (CJN)	No other body need be formally linked with the making
3. **Bye-laws**	The Federal Airport Authority	Approval/confirmation of the Minister for Aviation (*the matters affect the public and the Authority is not a public body*)
4. **Order**	Minister of Justice/ Attorney-General of the Federation	Concurrence of Minister of Finance Consultation with the Nigerian Bar Association

Case 1

"*Regulations*" are the most appropriate type of subsidiary legislation for making general rules of this kind.

The Ministry of Finance (Central Bank of Nigeria) typically has full responsibility for banking. It would be unusual for another Ministry or, even more so, for an external authority to have a formal say in the rules governing the operation of a Bank set up by the State. But if the

responsibility for banking lies with another Ministry, the Ministry of Finance should be formally linked with the making, since the operation of this Bank has implications for national finance. The link might then be "*with the concurrence of the Minister of Finance*".

Case 2

"*Rules of court*" are the most appropriate type of subsidiary legislation for governing court procedure.

The Chief Justice of Nigeria has the power to make rules for regulating the practice and procedure of the Supreme Court of Nigeria, subject to the provisions of any Act of the National Assembly. See Section 236 of the 1999 Constitution.

Case 3

"*Bye-laws"* are the most appropriate type of subsidiary legislation for regulating operations that are the responsibility of a corporate body.

The Federal Airport Authority, the body responsible for managing the airports, can be assumed to have the necessary expertise and special knowledge of their working.

Implementation of the bye-laws will have direct effect on the public, but the Authority, as registered company, is not a public body. The Ministry with the responsibility for aviation matters is an appropriate body to watch over the public interest, by being required to approve or at least confirm the bye-laws before they take effect.

Case 4

"*Order*" is the most appropriate type of subsidiary legislation for fixing levels of payment.

The Ministry of Justice/Attorney-General of the Federation typically has responsibility for overseeing the administration of legal aid. Fixing the rates should fall within that. However, as public expenditure is involved, the Ministry of Finance has a major interest which should be reflected in a close formal link, as through concurrence.
The rates at which legal practitioners are paid for their legal aid work may affect the extent to which they are prepared to participate in the scheme. It will be of value to the Ministries to take into account, in making the instrument, the likely response of practitioners. This can be achieved by a requirement to consult their representative body/bodies (e.g. the Nigerian Bar Association).

ANSWER TO SELF ASSESSMENT EXERCISE 8

Clause 1 contains a wide power that permits the Minister to set up a scheme of the Minister's choosing to control sales of imitation firearms (e.g. which might provide for a system of identification for purchasers of certain types of these imitations), sanctioned by the criminal law).

But it does not permit the Minister to prohibit all sales. "Regulate" implies that sales are to be permitted but subject to controls (which could include the prohibition of certain types).

Clause 2 also contains a wide power, but this time the Minister's scheme must be aimed solely at stopping the sale of all imitation firearms. The Minister can decide exactly how this is to be achieved. But the Minister cannot, e.g. exempt the sale of particular types (such as children's toys).

ANSWER TO SELF ASSESSMENT EXERCISE 9

Clause 1 contains another wide power. It permits the Minister to make regulations on any matters connected with the sale of imitation firearms. The Minister has a free hand to decide how to proceed, e.g. by prohibiting some or all, by confining sale to certain persons, by controlling advertising and so on. The Minister has full authority to work out the policy for dealing with this matter and to provide a complete scheme of rules.

If complete prohibition is contemplated, it is good practice to put the matter beyond doubt by providing for that in express terms.

Clause 2 is a narrower power. It is an example of a *power to legislate on a specific matter*, rather than in relation to a particular subject area. The Minister can make regulations only if they restrict sales. The Minister's room for manoeuvre is limited to the mode of restriction (e.g. who may sell to whom) and the use of the criminal law and penalties.

6.0 TUTOR-MARKED ASSIGNMENT

Draft a single enabling clause that gives authority to the Tourism Board to make subsidiary legislation in order that:

1. Arrangements can be made for a lifeguard service for whichever beaches the Board thinks require it;
2. The Board can formulate the sanitary conditions that are to be complied with in respect of public parks and beaches;
3. The Board can lay down the duties of its officers and employees and how they are to be exercised;
4. The Board can deal with any other matters that will facilitate the operation of the Act.

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed). London: Butterworths.

UNIT 5 DRAFTING DELEGATED POWERS TO LEGISLATE - PART II

CONTENTS

1.0 INTRODUCTION

This unit is a continuation of the last one. It deals with further considerations in drafting delegated power to legislate.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- require external consultation about the contents of the proposed subsidiary legislation
- enable instruments to be subjected to legislative scrutiny.

3.0 MAIN CONTENT

3.1 Procedures Required for Making the Instrument

It is rare for drafters of Bills to be required to prescribe procedural steps that have to be followed by those making subsidiary legislation. Typically general legislation (such as the Interpretation Act) contains standard rules on procedures to be followed in making subsidiary legislation, e.g. as to:

(i) how the instrument is formally validated (typically, it is "made" by being signed by the delegate and other bodies linked to the making.

(ii) when subsidiary legislation comes into force (typically on publication in the *Gazette* or on the date designated by the instrument.

SELF ASSESSMENT EXERCISE 1

Note down, with references to any general legislation in Nigeria:

1. How and when a subsidiary instrument is made into valid law:
2. When subsidiary legislation comes into force if it contains no provision on the matter:

Exceptionally, provision may need to be made in the Bill:

(i) prescribing external consultations that the maker must conduct before the final instrument is made;

(ii) requiring the instrument to be tabled in the Legislature in draft to provide an opportunity for legislative consideration before the draft is finally made.

Cases may arise where the making of the instrument has to be postponed until the Legislature has had an opportunity to examine and approve its contents. This is an exceptional step, and should be reserved for subsidiary legislation likely to contain important policy matter or to have potentially controversial effects, especially on the public.

In such cases, the enabling power must provide that the instrument is to be tabled in the Legislature *in draft* and that it cannot be made until the Legislature has approved it or, alternatively, if the Legislature resolves to disallow it. Provisions of this kind are more typically applied to instruments *after* they have been made. Accordingly, we describe how to draft them below (*Procedures required after the making).*

3.2 Should External Interests be Involved in Making Subsidiary Legislation?

In most respects, the making of subsidiary legislation is an internal administrative process that need not be regulated by law. Unlike Bills, these instruments are rarely open to public examination or legislative debate before they become law. Few jurisdictions prescribe standard procedures for representative or other interest groups to be consulted or

for the public or sections of the public to be invited to make submissions on the proposals.

However, there is a steady, and desirable, trend to provide for consultation as a mandatory requirement in individual Bills where the subsidiary instruments are likely to be of public importance or may significantly affect the interests of particular sectors in the community. These procedures offer interested parties an opportunity to state their position and, often, to provide insights that administrators lack. This can result in a more workable instrument, as well as one more acceptable to those affected.

SELF ASSESSMENT EXERCISE 2

Note down, with the references, any general legislation in your jurisdiction concerning:

1. Consultation on proposed subsidiary legislation:
2. Public notification of proposed legislative instruments (with a view to public submissions):

In drafting enabling clauses, then, consider whether the subject matter of the instruments calls for, and permits, the contents to be opened to outside comment before they are finalised. This has practical implications:

(i) it extends the length of time for making;

(ii) it imposes additional work on the administrators preparing the instrument;

(iii) it is necessarily more costly.

Accordingly, the views of the client Ministry (and the proposed delegate, if different) should be sought. Remember too that it is always open to a Ministry, if it chooses, to consult interested parties without legislative authority from an enabling clause.

1. Consultation

Consultation involves seeking and considering the views of another (though not necessarily accepting them). If consultation is to be made a mandatory requirement, give clear directions in the enabling clause as to the persons to be consulted. Again, the client must confirm these.

(a) Consultation with specific bodies

The subject matter of the Bill may well suggest that a particular body or bodies should be consulted. Typically, these are the bodies that:

(i) are likely to be directly and significantly affected by the subsidiary legislation; or
(ii) are recognised as looking after the interests of persons significantly affected; or
(iii) have been specifically created to provide advice to Government on the matter.

Example Box 1

The Minister, after consulting the Nigerian Tourism Development Corporation, may make regulations for the purpose of developing and maintaining public parks and beaches.

The Chief Justice of Nigeria, after consulting the National Judicial Council and the Nigerian Bar Association, may prescribe the court dress to be worn by legal practitioners during hearings before the Supreme Court.

(b) Consultation with Representative Bodies

Some subsidiary legislation can affect a large group of persons whom it would be impractical to consult individually. Typically, in these cases, consultation takes place with a representative body. But sometimes a large number of bodies may legitimately claim to represent the interests of those likely to be affected. In that case, consider authorising the delegate to consult those bodies that the delegate considers are properly representative. This is a case when a subjective discretion may reduce the possibility of legal challenge from bodies that have been overlooked.

Example Box 2

The Minister, before making regulations under this section, must consult:
(a) those organisations that the Minister considers represent secondary school teachers; and
(b) those organisations that the Minister considers represent parents of children attending secondary schools.

The repetition and paragraphing emphasises that two distinct groups must be consulted.

(c) Consultation with the Public

In exceptional cases where subsidiary legislation is likely to have serious and adverse consequences, you may require that comments and objections to a draft of the proposed subsidiary legislation are to be invited from the public at large, or a specified section of it (e.g. residents of the place immediately affected). These procedures are rare for subsidiary legislation, but may be appropriate for major development schemes that will make an environmental impact. Those are more usually authorised in *executive* instruments.

Example Box 3

(2) Before making an order under this section, the Minister must cause a draft of the order to be published locally in the manner directed by the Minister, inviting written representations in relation to the draft order within 21 days after the publication.

(3) The Minister must make such modifications, if any, to the draft order as the Minister considers appropriate having regard to the representations received.

3.3 Procedures Required after the Making

The action to be taken with respect to subsidiary legislation after it is made is largely administrative and needs no authorisation in the enabling clause. But you may need to prescribe certain procedures, especially if these are not provided for by general legislation. These concern publication, registration and numbering, and tabling in the Legislature.

3.3.1 Publication

General legislation typically requires subsidiary instruments to be published and specifies manner of the publication (as we have seen, usually in the *Gazette*). Certain types of instruments may be exempt from this requirement.

Publication may be ensured by the requirement that instruments do not come into force until published. But in principle, you can authorise particular instruments to come into force when made, by inserting appropriate words in the enabling clause. This might be suitable where the subsidiary legislation will be used for emergencies or urgent action (e.g. to provide for public order during a disaster or for imposing economic controls where advance notice would be counter-productive).

SELF ASSESSMENT EXERCISE 3

Note down with the appropriate reference to the legislation in your jurisdiction:

1. Any statutory duty to publish subsidiary legislation:
2. Any specified exemptions to that duty:
3. Where subsidiary legislation must be published:
4. Whether instruments come into force on publication (unless contrary provision is made in the particular case):
5. Whether, by express provision, specified legislative instruments may be made to come into force before publication:

3.3.2 Numbering and Registration

In most countries, instruments are numbered in the sequence in which they are published in the *Gazette*, when the number is assigned by the Government Printer. More formal procedures are used elsewhere, often as part of a central registration procedure. These cases are provided for in general legislation concerned solely with subsidiary legislation.

SELF ASSESSMENT EXERCISE 4

Note down, with appropriate references to legislation in your jurisdiction:

1. Whether there is a registration scheme for subsidiary legislation:
2. The method used for allocating numbers to subsidiary legislation:

Obtain a copy of any separate Act dealing with these matters for your collection.

3.3.3 Tabling in the Legislature

Some Legislatures have introduced a formal procedure for supervising more important legislative instruments. These are required to be presented to the Legislature (or, typically both Chambers if the Legislature is bicameral, like Nigeria at the Federal) and made available to members. The procedure can be used for instruments in draft as well as those already made.

In some, a legislative committee has the function of scrutinising all tabled instruments and reporting back to Parliament on perceived shortcomings. The reports are not concerned with policy issues or the merits of the contents but in the main with legal or technical features of the instruments. Typically, the committees report on instruments that:

a) are not in accordance with the general objects and intentions of the parent Act;

b) trespass unduly on personal rights and liberties;

c) appear to make some unusual or unexpected use of the powers conferred by the parent Act;

d) make rights and liberties of persons unduly dependent upon administrative decisions that are not subject to review on their merits by a judicial or other independent tribunal;

e) exclude the jurisdiction of the courts without explicit authorisation in the enabling statute;

f) contain material more appropriate for enactment by the Legislature;

g) are retrospective where this is not expressly authorised by the empowering statute;

h) are not made in compliance with particular notice and consultation procedures prescribed by the parent Act;

i) for any other reason concerning their form or purport, call for elucidation.

These reports can be helpful to Legislative Counsel. They may provide guidelines that enable drafters of legislative instruments to avoid practices that give rise to legal or other challenge to instruments. They may also draw attention to weaknesses that stem from the drafting of the enabling powers.

SELF ASSESSMENT EXERCISE 5

1. Note down the name of any committee which your State House of Assembly has set up to scrutinise subsidiary legislation.
2. If so, add a copy of its terms of reference to your collection of documents.
3. Does the committee publish periodic reports on its work from which you can obtain guidance as to what the committee regards as good drafting practice in this area?

In the absence of a committee of this kind, mere tabling of an instrument achieves little more than to provide information to members. Rarely in practice is any parliamentary action taken (e.g. by questions or motion).

(i) Reserve simple tabling for instruments that contain significant substantive matter, particularly having policy implications, or that affect rights or interests of the public or important sections of it.

(ii) For very important matters, consider making the continuance in force of an instrument dependent on tabling within a specified period after it is made. This ensures that the exercise of the power is quickly drawn to the attention of members of the Legislature.

(iii) Do not require tabling for instruments of a routine nature that do not affect the public interest. Legislatures are unlikely to pay any attention to these, and would regard the procedure as making unnecessary demands on the legislative processes.

Example Box 4

Regulations under this section must be tabled in the Legislature within 7 sitting days after they are made.

Subsidiary legislation ceases to have effect if it is not tabled in the Legislature within 7 sitting days after it is made.

Requirements such as these guarantee only that the Legislature is formally informed as to the exercise of the delegated power.

SELF ASSESSMENT EXERCISE 6

1. Note down if the practice of tabling subsidiary legislation is standard in your jurisdiction.
2. What expression do enabling clauses use to refer to the procedure (e.g. "laying before" or "tabling in" the Legislature):
3. Note down any general provision that make the operation of subsidiary legislation dependent on tabling.

A. Tabling for Approval or Disallowance

Some Legislatures have established procedures for approving or disallowing specific instruments, within a specified period after tabling, by passing a resolution after a short debate. Too widely used, however, this device can diminish a major advantage of subsidiary legislation, the

saving of legislative time. Accordingly, it tends to be reserved for Government regulations and orders that deal with issues of significance.

When providing for these procedures, set out the precise method of control and the time limits in the enabling clause, unless these are regulated by general legislation. Some Interpretation legislation contains both the standard procedures and specific phrases that are to be used to apply the procedure as part of the enabling powers.

SELF ASSESSMENT EXERCISE 7

1. Note down any equivalent provisions, whether in your Interpretation legislation or other general legislation relating to subsidiary legislation, to **section 25(3)-(5)** of the **model Interpretation Act 1992.**
2. Check (e.g. from The House Rules of Business) the procedures laid down to complement these powers.

(i) Instruments Subject to Negative Resolutions

These instruments are disallowed if a resolution to that effect is passed within the specified period. Disallowance is rare in practice, since positive steps have to be initiated by opponents to set the appropriate procedures in motion. Most legislators lack the resources to check all subsidiary instruments for this purpose.

Use this device for issues of significant substance, rather than routinely for all instruments.

In most cases, the instrument will have come into force already, having been *Gazetted*. Accordingly, a saving provision is required to validate everything done between coming in force and any disallowance (unless this is covered by general legislation).

Example Box 5

(2) Regulations under this section are to be tabled before the legislature within 7 days next following their publication in the *Gazette*.

(3) If the legislature passes a resolution disallowing the regulations within 24 sitting days after they are tabled, or if they are not tabled before the legislature as required by subsection (1), the regulations cease to have effect, *but without affecting the validity of anything done in the meantime.*

(4) Subsection (2) applies although the period of 24 sitting days (or part of that period) does not occur in the same legislative session or during the same Legislature as that in which the regulations are tabled.

The italicised phrase removes any doubt as to the validity of action taken under the subsidiary instrument before it is negatived.

Our Interpretation legislation does not have provisions equivalent to **section 25** of the **model Interpretation Act 1992**, the following is however sufficient:

> **(2)** Regulations under this section are to be tabled in the Legislature within 7 days next following their publication in the *Gazette* and are subject to negative resolution.

SELF ASSESSMENT EXERCISE 8

Note down the formula used in individual enabling clauses for the purpose of authorising the legislature to disallow subsidiary legislation, noting any differences in terms used (e.g. "annul" instead of "disallow").

(ii) Instruments Subject to Affirmative Resolution

These instruments cease to have effect unless a resolution is passed within the specified period to continue them in operation. Here, Government must take steps to ensure that a motion for the resolution is tabled, debated and passed, if the instrument is not to die automatically.

Reserve this device for matters likely to give rise to major policy issues or to be politically controversial.

It is valuable for instruments that:

- put the flesh on the bones of skeleton or framework Acts (i.e. those using very broad delegated powers);

- give effect to clauses amending or repealing significant provisions of Acts;

- provide for financial matters, especially when imposing taxation or altering tax levels.

Consider carefully whether to apply the procedure to instruments that will be operating already when the motion is debated. Difficulties may arise if these were to be overlooked and not affirmed although they have been in force for a while, despite the fact that a saving provision is added.

Example Box 6

(2) Regulations under this section:
(a) are to be tabled before the Legislature within 7 sitting days next following their publication in the *Gazette*; and
(b) if, at the end of 21 days after they have been tabled, the Legislature has not passed a resolution that they are to continue in force, cease to have effect from that date, *but without affecting the validity of anything previously done under them*.

The instrument continues in force only if it is affirmed. The italicised phrase removes any doubt as to the validity of prior action taken if the resolution is not passed and the instrument ceases to have effect.

Our Interpretation Act does not have provisions equivalent to **section 25** of the **model Interpretation Act 1992**, however the following is sufficient:

(2) Regulations under this section are to be tabled before the Legislature within 7 days next following their publication in the *Gazette* and are subject to affirmative resolution.

This procedure is particularly suited for instruments in draft and those which are not to come into effect until affirmed.

Example Box 7

(2) No regulations may be made under this section unless a draft of the regulations has been tabled before the legislature and approved by a resolution passed by the House.

(2) Regulations under this section are to be tabled before the Legislature within 7 sitting days next following their publication in the *Gazette*.
(3) The regulations do not come into force unless, within 24 sitting days after they are tabled, the House passes a resolution to the effect that they are to come into force from the date of the resolution.

SELF ASSESSMENT EXERCISE 9

Note down the formula used in individual enabling clauses to authorise your Legislature to affirm subsidiary legislation, noting any differences in terms used (e.g. "approve", "affirm", "confirm").

4.0 CONCLUSION

The Interpretation Act typically contains standard rules on procedures to be followed in making subsidiary legislation. In most cases, the making of subsidiary legislation is an internal administrative process that need not be regulated by law.

5.0 SUMMARY

In this unit, we have considered more issues in drafting delegated legislation. You should now be able to explain the procedures that are required for making subsidiary legislation and draft them accordingly.

6.0 TUTOR-MARKED ASSIGNMENT

Draft a single clause for an Immigration Bill enabling the Minister to make subsidiary legislation to lay down:

(a) The period for which non-nationals may be given leave under the Act to enter Nigeria; and

(b) The conditions that are to attach to any such leave.

In your draft, include provision to cover the following:

1. As this legislation will affect persons wishing to join a member of the family already settled in Nigeria, the Minister is to be required to consult bodies representing these persons and the families already settled there.

2. Since the issue is politically contentious, the subsidiary legislation must be approved by the National Assembly, within 21 days after being received by it, before it can come into force.

7.0 REFERENCES/FURTHER READING

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Model Interpretation Act of 1992 (See LED: 602)

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting*. (4th ed). London: Butterworths.

MODULE 2

UNIT 1 REPEAL AND AMENDMENT OF LEGISLATION

CONTENTS

1.0 INTRODUCTION

You are likely to be called upon often to draft amendments to existing Acts and subsidiary instruments. Commonwealth countries typically make substantive legal changes by amending existing legislation rather than by introducing completely new statutes or instruments. Even when new substantive enactments are prepared, consequential amendments to existing law are needed to make existing law fully consistent with the new provisions.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- work out systematically what repeals and amendments to existing legislation are needed.

3.0 MAIN CONTENT

3.1 How Do Repeals and Amendments Differ?

Legislation is *repealed* when it ceases to be part of the general body of written law, and it is *amended* when its legal effect is altered in some respect, as the result of a later enactment.

In many jurisdictions (as in this Course) the term "revoke" is widely used to describe the repeal of subsidiary legislation.

(i) Simple Repeals

Where an entire instrument (i.e. an Act or a piece of subsidiary legislation) is repealed (or revoked) without any new law replacing it, the instrument itself cannot be treated as amended since it no longer has present effect. More colloquially, the general body of law can be said to be amended as a consequence.

However, in some circumstances the concepts may overlap. If an enactment *in* an Act (e.g. a section) is repealed, it is perfectly possible to speak of this as *repealing that enactment*, or as *repealing the Act in part*, as well as *amending the Act*. If some feature of an enactment (e.g. a word or phrase) is removed by later legislation, this could be termed a minor repeal, but it is more obviously an amendment both of the enactment and of the instrument. In both instances, the original instrument continues in force but altered as a result of the repeals.

(ii) Substitutions

More typically, we are concerned with replacing or substituting legislation, rather than merely repealing it. In the case of complete instruments, this may involve re-enactment of an existing instrument in a new format or its replacement by an instrument containing new provisions. The second of these two cases is by far the more common.

Even more common is the similar case where an enactment (or some feature of an enactment) *within* an instrument is replaced. Technically, the enactment in its original form ceases to operate and the enactment in

its new form now states the current law; accordingly the instrument and the enactment have both been *amended*. A similar effect results where additions are made to an instrument (e.g. inserting new sections) or to enactments (e.g. inserting new words). In all these cases, the new provisions are treated as integrated into the amended instrument and as having always been part of it. This is the "doctrine of merger".

3.2 Does an Amendment Involve Repeal?

Clearly, it does not when the amendment involves adding new provisions to existing legislation. But where legislation is amended by replacing provisions, the question may be important because the Interpretation Act typically contains general transitional provisions that apply when legislation is *repealed*. (Those provisions are discussed in detail later on in this course). But:

(i) do these also apply where legislation is *amended*?

(ii) in particular, if a new enactment (e.g. section) is substituted for an earlier one, making a significant change in the law, does this amendment to the legislation also constitute a repeal for this purpose?

Example Box 1

In a section setting the penalty for a motoring offence, a requirement of disqualification from driving on conviction is included. A later Act removes that requirement. Mr. X is in the process of being prosecuted for the offence when this alteration takes effect.

If the change is treated as the result of a *repeal*, the Interpretation Act preserves penalties liable to be incurred in these circumstances (See Section 6(1)(a) of the Interpretation Act).

The answer to these questions may be found in the Interpretation Act itself. For that Act may extend its repeal provisions to cases where an enactment "ceases to have effect" (**Section 6(2) Interpretation Act**), which is certainly the effect of an amendment on an enactment.

Example Box 2

The federal Interpretation Act of Canada provides for this case explicitly:

2.-(2) For the purposes of this Act, an enactment that has been replaced, has expired, lapsed or has otherwise ceased to have effect is deemed to have been repealed.

But other difficulties may also arise:

(a) Alternative Expressions to "Repeal"

Some drafters use different words to express these actions, e.g. requiring provisions to be "omitted" or "deleted" and new provisions "added" or "inserted instead". Does this mean that the provisions affected have been repealed or ceased to have effect?

Again the Interpretation Act may provide the answer in the form of an extended meaning of the terms "repeal" and "amend" (**model Act, s.25(1)**);

(b) Limited Alterations

Another uncertainty arises if significant changes are made to *words within* an enactment. These may not be caught by the repeal rules if those are limited to complete enactments.

In cases of these kinds, the courts may be called upon to determine the actual effect, depending on whether they consider it a repeal or an amendment took place. The drafter's words may be a guide, but will not be conclusive in that respect. The courts look to the substance rather than the form.

But only rarely do changes to words or expressions *within* a section or subsection lead to significant consequences following from this distinction. Where whole enactments are replaced, the legal effects of the change are likely to be more substantial and the rules on the legal effects of repeal will almost certainly apply. But:

(i) wherever your draft has the result of altering existing law, consider the legal effects of that alteration on existing cases;

(ii) if such a change could be treated as an amendment and not as a repeal, and the Interpretation Act not applied, consider dealing with the consequences by providing saving or transitional rules.

SELF ASSESSMENT EXERCISE 1

Note down with the references (if any) the provisions in your Interpretation legislation that:

1. Define "amend" and "repeal":

2. Extend the legal effect of repeals to enactments that "cease to have effect":

3. Apply the repeal rules to changes to expression *within* an enactment or restrict them to complete enactment (e.g. sections and subsections):

3.3 Means by Which Legislation May Be Repealed and Amended

Repeals and amendments can only be brought about by the enactment of a legislative instrument. This may take a number of forms:

(i) *an Act* which identifies and expressly repeals or alters the legislation in question;

(ii) a *subsidiary instrument* that, under the authority of its parent Act identifies and expressly revokes or alters the legislation in question;

(iii) an Act, or subsidiary instrument, which *impliedly* repeals, or revokes, or alters the effect of the earlier legislation, because of an inescapable inconsistency between its provisions and those of that earlier legislation.

Repeals and amendments are properly carried out by making *express* provisions, rather than by implication. In consequence, make all in precise terms that indicate:

(i) the provisions that are to be repealed or amended;
(ii) the nature of the repeal or amendment (e.g. by addition or replacement); and

(iii) the extent of the repeal or amendment.

Implied repeals usually occur when the drafter has overlooked the matter, and not because of a deliberate decision to deal with it by that technique. No drafter should rely on that device for the reasons explained in the next paragraphs.

3.4 When Legislation Is Impliedly Repealed

The courts may *infer* a legislative intention to repeal an enactment merely from the fact that later statutory provisions are in conflict with it. But they do not readily make such an inference. In the absence of express repeal, they need convincing indications before reaching the conclusion that earlier legislation has been repealed in this way.

It is rare for arguments to be offered that an entire Act has been repealed in this way. The usual case concerns conflicts between individual provisions.

Courts are likely to infer an intention to repeal, if, after comparing two sets of provisions, they conclude that the later provision directly contradicts the earlier one. For that to happen:

(a) the two sets of provisions must be so inconsistent that they cannot both have legal effect;

(b) they must cover the same ground in mutually exclusive ways, or deal with the same subject matter in ways that cannot legally co-exist.

Courts may reach these conclusions if they are satisfied that:

(i) continuing the earlier provisions will defeat the purpose of the new ones; or

(ii) serious inconvenience will result if both sets of provisions are retained; or

(iii) both sets of provisions cannot be given effect at the same time.

3.5 Does Implied Repeal Invariably Occur When Statutory Provisions Overlap?

Courts generally believe that drafters know their job. So if two instruments deal with the same matter, both are assumed to be there for some purpose. It is expected that both are capable of having effect. In consequence, the courts apply a presumption *against* implied repeal.

Similar questions may arise as to whether a common law rule has been impliedly repealed by an inconsistent statutory provision. In cases of apparent overlap, the courts try to maintain both, in the absence of the clearest evidence that a repeal was intended.

If there is an overlap between two sets of provisions, courts consider other ways to keep both alive. For example, they may conclude that:

(a) The Two Sets of Provisions Supplement Each Other

Both sets of provisions may then be given effect by finding meanings that eliminate the apparent inconsistency. That may lead to strained interpretation and can cause distortion of the meanings originally intended for one or even both provisions.

(b) General Provisions do not Repeal Specific Ones

The canon of interpretation - the general should be read subject to the specific (*generalia specialibus non derogant*, discussed in **LED: 605** offers a way of reconciling inconsistent provisions. Where general provision deals with the same subject matter as a specific provision:

(i) the specific case may be treated as an exception to the general provision;

(ii) if the specific case is contained in earlier rules, those rules may continue unaffected by the general provision;

Example Box 3

A specific provision in an Act requiring firearms offences to be heard by a special Tribunal is not repealed by implication by a later general provision that requires all offences carrying a prescribed level of penalty to be heard by the High Court, even though the offences fall within that class.

The specific will be treated as an exception to the general.

(iii) if the specific provision is introduced by later rules, the general provision may be treated as repealed to the extent (*pro tanto*) that the specific make different provision.

Example Box 4

A statute laying down the procedures for the hearing of all serious offences can be made to co-exist with a later, specific, provision requiring firearms offences to be dealt with by a different procedure, by treating the latter as an exception to the former.

These devices are, in the end, examples of judicial ingenuity to reconcile provisions that overlap in contradictory ways. Actual decisions turn upon differing judicial perceptions of the terms of the legislation. None provides guarantees as to when courts will draw the conclusion that implied repeal, in whole or part, is intended. Indeed, the interpretations put upon the conflicting provisions to keep both alive may be unexpected. There is, therefore, no certain basis upon which you can deliberately set out to rely upon repeal by implication.

3.6 Does an Implied Repeal Have the Same Legal Effects as an Express Repeal?

There is some uncertainty as to the legal consequences that attach to implied repeals. It is by no means clear that the resolution of a conflict between two sets of overlapping provisions in favour of the later provisions involves repeal at all. Driedger, for example, argued that the provisions displaced may only be "inoperative" during the period when the later provisions are in force. They are not *permanently* removed from the corpus of written law.

Two particular difficulties may follow from this:

(i) Application of Transitional Provisions in the Interpretation Act

The provisions of the Interpretation Act that deal with the legal consequences of repeals may not apply to these cases, as they do not involve "repeal".

Interpretation legislation may resolve this by expressly extending the repeal rules to provisions that "cease to have effect" too (cp. section 6(2) of the Interpretation Act). Arguably, this does cover this case.

(ii) Revival of Provisions Repealed by Implication

Similarly, there is uncertainty whether a subsequent express repeal of provisions which impliedly repealed earlier legislation revives the earlier legislation. If, for example, provisions were treated as having been repealed *pro tanto*, do they revive if the later conflicting provisions are themselves repealed? On the argument that the earlier provisions are to be treated as merely *inoperative*, their revival must take place.

Again, the matter may be resolved if the Interpretation Act rule preventing revival on repeal applies with respect to provisions that "cease to have effect" as well as to repeals proper. The rule is contained in Section 6(1)(a) of the Interpretation Act.

SELF ASSESSMENT EXERCISE 2

Compare your Interpretation legislation with the **model Interpretation Act 1992** (**section 39** in particular) on these matters.

Note down whether the rules that preclude revival of matter that has been repealed are stated to extend to matter that "ceased to have effect", as well as to matter that was expressly repealed.

3.7 The Implications for Drafting of Implied Repeal

For our purposes, it is unnecessary to settle questions concerning the effect of implied repeals. As a drafter, do all you can to prevent questions of implied repeal arising in the first place. Accordingly, as a matter of routine:

(i) deal with repeals (including amendments that have a similar effect) by express provisions;

(ii) take steps to detect and prevent inconsistencies between statutory provisions that may give rise to questions of implied repeal;

(iii) if a provision that you are drafting overlaps with an existing provision, but both are to run side-by-side, consider using a saving provision with respect to the earlier.

3.8 Should Repeals and Amendments be Made by Primary or Subsidiary Legislation?

Bills are usually used to:

(i) repeal Acts in their entirety;

(ii) repeal the complete body of subsidiary legislation made under an Act that is being repealed;

(iii) repeal or amend particular enactments (sections or Parts) in Acts.

Subsidiary instruments are usually used to revoke:

(i) earlier instruments made under the same Act;

(ii) specific provisions in those instruments.

The power to amend or repeal subsidiary instruments is generally treated as part of the delegated power to make the instruments. Interpretation

legislation typically confirms that position (**the model Interpretation Act 1992, section 40(2)**). Delegated powers authorising the revocation or amendment of subsidiary instruments made under *different* legislation are not unknown, but again untypical.

Authorisations in an Act of repeal by subsidiary legislation of earlier Acts dealing with the same subject matter are known, but are untypical. However, in some jurisdictions, a growing practice is to authorise the Government to use subsidiary legislation:

(i) to amend the Act in which the power is conferred, at some future occasion;

(ii) to make consequential amendments to a series of earlier Acts to enable the parent Act to have full effect.

Example Box 5

This is a particularly wide-ranging example of such a power:

24.-(1) The Minister may make, by order, such supplementary, incidental or consequential provisions as appear to the Minister to be necessary or expedient to the general purposes or any particular purpose of the Act or in consequence of any of its provisions or for giving full effect to it.
(2) An order under this section may make provision in particular for amending or repealing (with or without savings) any provision of an Act passed before or in the same session as this Act.

The practice is most firmly established in jurisdictions where amendments have to be made to a substantial body of existing statute law contained in long and complex Acts and where the pressure on legislative time is heavy. Elsewhere, resort to this practice is rarely needed, except for changes to matter with no significant policy content, such as:

(i) changing technical specifications or formal documents prescribed in the parent Act;

(ii) altering levels or scales of fees set out in e.g. a Schedule to the parent Act;

(iii) making detailed amendments to a series of Acts that are consequential on a policy change enacted by the parent Act (e.g. a general increase in fine levels).

3.9 When Repeal and Amending Provisions are Called For

In modern society, most legislative proposals touch upon matters that are already governed by existing legislation. New legislation giving effect to the proposals must integrate fully with that existing law by repealing provisions that are no longer required and by amending those parts that are not consistent with the new legislation.

A. Repeals

There are three principal circumstances in which you may need repeal provisions:

1. Simple repeal

This is where legislation on a topic is no longer required, e.g. because it has had its effect and is spent, is obsolete or impractical or no longer reflects the policy of the day.

2. Repeal and re-enactment

This is where an instrument is repealed following incorporation into a new instrument of provisions covering essentially the same ground and operating, largely unchanged, in their stead. This typically occurs where a single consolidating Act is substituted for earlier legislation contained in a series of Acts.

3. Repeal and replacement

This is where an instrument is repealed following the enactment of a new instrument on the same topic that makes new and different provisions in place of the old.

B. Amendments

Typically, two types of amending provision are in use:

1. Substantive amendments

To give effect to proposals by making changes to existing legislation that already deals with the principal subject-matter.

2. Consequential amendments

These may arise in two ways:

(a) when making substantive amendments to an Act, other incidental changes to provisions of that Act are made necessary by the substantive amendments;

(b) where a new body of rules in a Bill necessitates changes to provisions of *other* Acts to produce consistency with those rules.

Different approaches are called for from the drafter in these cases:

(i) when preparing substantive amendments, your main concern is with altering the terms or effect of an existing statute to give effect to the policy proposals.

(ii) in the case of consequential amendments, your principal task is to produce a complete body of rules, including substantive amendments, to give effect to the policy proposals; your secondary task is to make changes to other legislation that are necessary to produce coherence between it and the substantive draft.

However, in both cases your amendments may take a variety of forms:

1. Adding new provisions to the old:
2. Repealing existing provisions no longer required;
3. Modifying or replacing terms in the existing legislation;
4. Altering the scope or effect of existing provisions;
5. Very exceptionally, suspending the operation of an existing provision.

3.10 When to Replace Rather than Amend an Enactment

To give effect to major legislative changes, the principal Act on a subject may have to be substantially amended, for example by adding, repealing or replacing provisions in many places. In principle, in cases of this kind, you have a choice to:

(a) draft a long and detailed amending Bill that directs users to make a very large number of changes to the text of the principal Act;

(b) incorporate the provisions of the principal Act that are not altered with the new law into a replacement statute, that then becomes the single source of the law for the future.

In making a decision on these matters, bear the following factors in mind:

1) In an amendment Bill, the Legislature can only debate the terms of the amendment; it cannot reopen questions that are settled by the provisions that are not the subject of amendments. In a replacement Bill, the entire policy can be reconsidered since the whole statute is before the Legislature. Your client Ministry may not wish this to happen.

2) An amendment Bill clearly indicates to legislators and users the provisions that are amended and how. A replacement Bill contains a statement of the consolidated law.

3) A replacement Bill gives rise, much more frequently, to problems of transition that may have to be resolved by express provisions (Transitional and savings provisions are considered later).

4) An amendment Bill requires users to "cut and paste" the new into the old in order to understand its effect and to apply it. A replacement Bill is easier to work with, since it provides a complete legislative text.

5) An amendment Bill follows the original numbering with which users are familiar. A replacement Act has to be differently numbered because of the changes that it must incorporate.

6) Each gives rise to different problems in communicating the effects of the changes in the law and may require different kinds of explanatory material.

If you conclude in a particular case that a replacement Bill is preferable, first raise the issue with your instructing officer, so that your client can consider the political implications of broadening the potential area for debate.

You face similar considerations when drafting, e.g. a section, a Part or a Schedule that must be amended in many places. Should it be replaced by a new provision that states the law as amended? Or should it merely be amended by however many changes are needed?

In this case the combined effect of the amendments is likely to produce a change of the policy from that underlying the original provision you are amending. The case for a replacement provision here is overwhelming. It is so much easier to understand and to debate.

4.0 CONCLUSION

In conclusion, repeals and amendments can only be brought about by the enactment of a legislative instrument. However, the courts may infer a legislative intention to repeal an enactment merely from the fact that later statutory provisions are in conflict with it.

5.0 SUMMARY

In this unit, we have considered repeal and amendment of legislation. You should now be able to:

(i) Distinguish between repeal and amendment of legislation; and
(ii) Work out systematically what repeals and amendments to legislation are needed.

6.0 TUTOR-MARKED ASSIGNMENT

1. Distinguish repeal of an enactment from amendment of the same.

2. Explain whether an enactment involves repeal.

7.0 REFERENCES/FURTHER READING

Driedger, E.A. (1976). *The Composition of Legislation; Legislative Forms and Precedents*, Ottawa: Dept of Justice.

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4^{th} ed.). London: Butterworths.

UNIT 2 DECIDING THE CONTENT OF REPEALS AND AMENDMENTS

CONTENTS

1.0 INTRODUCTION

In this unit, we consider the content of repeals and amendments.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- decide what provisions need to be repealed or amended.

3.0 MAIN CONTENT

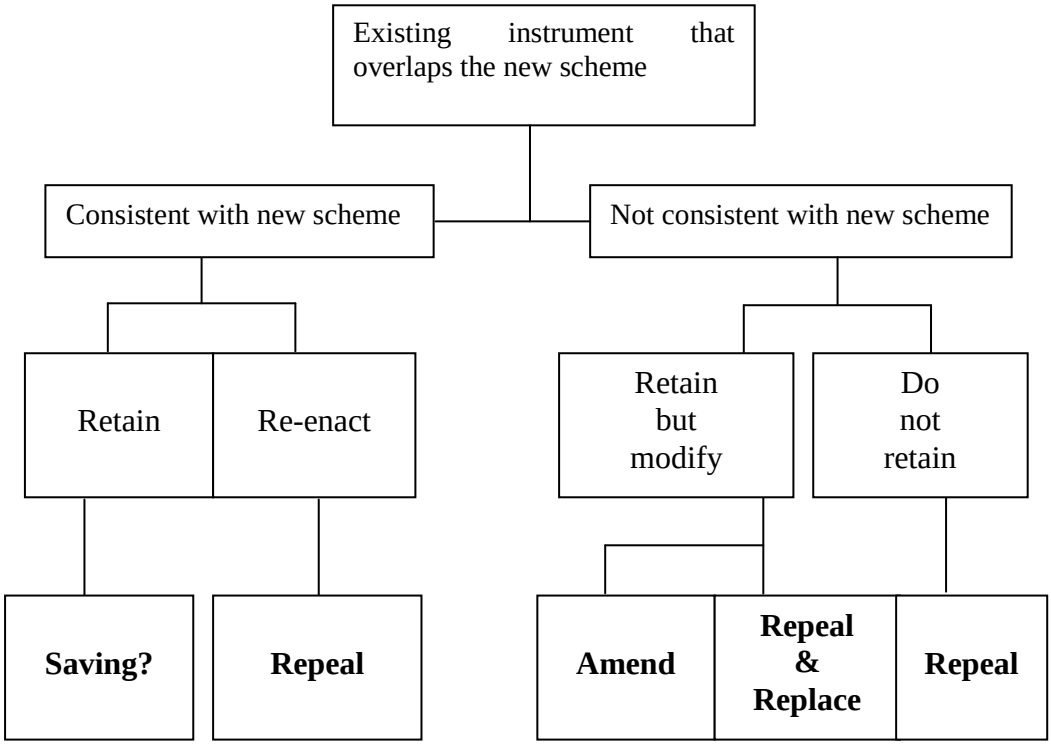
3.1 How to Decide What Provisions need to be Repealed or Amended

As with much in legislative drafting, the best work on this is done at the research and design stages, rather than when you are actually drafting. Start to find out what matters are to be repealed before writing any final provisions.

Although you are likely to come across these issues first during your planning of the Bill, remember that further proposals for changes to your drafts often emerge as the drafting process continues. So, only finalise the relationship of the new with existing law *after* the substantive provisions are complete. Reach decisions on these matters in consultation with the client Ministry, since issues of substance may be involved.

3.1.1 Preparing for Repeals

You may find it useful to follow these steps, illustrated in the following flow-chart. This deals with repeals of entire instruments. Repeals of provisions of instruments are examined under *Preparing for amendments* below.



A. Research

1. Identify all existing legislation that touches upon any of the matters dealt with by the proposed legislation;

2. Decide whether the legislation should:

(i) be retained in its present form as consistent with the new legislative scheme;
(ii) be retained but with changes to bring it into line with the new legislative scheme;
(iii) not be retained as incompatible with the new legislative scheme.

B. Planning

1. Identify the provisions that are not to be retained, for simple repeal.

2. If provisions are to be retained unmodified, decide whether those provisions:

(i) should be re-enacted in new legislation (and the original repealed); *or*
(ii) should be saved by a provision in the new legislation.

3. If provisions are to be retained but modified, decide whether:

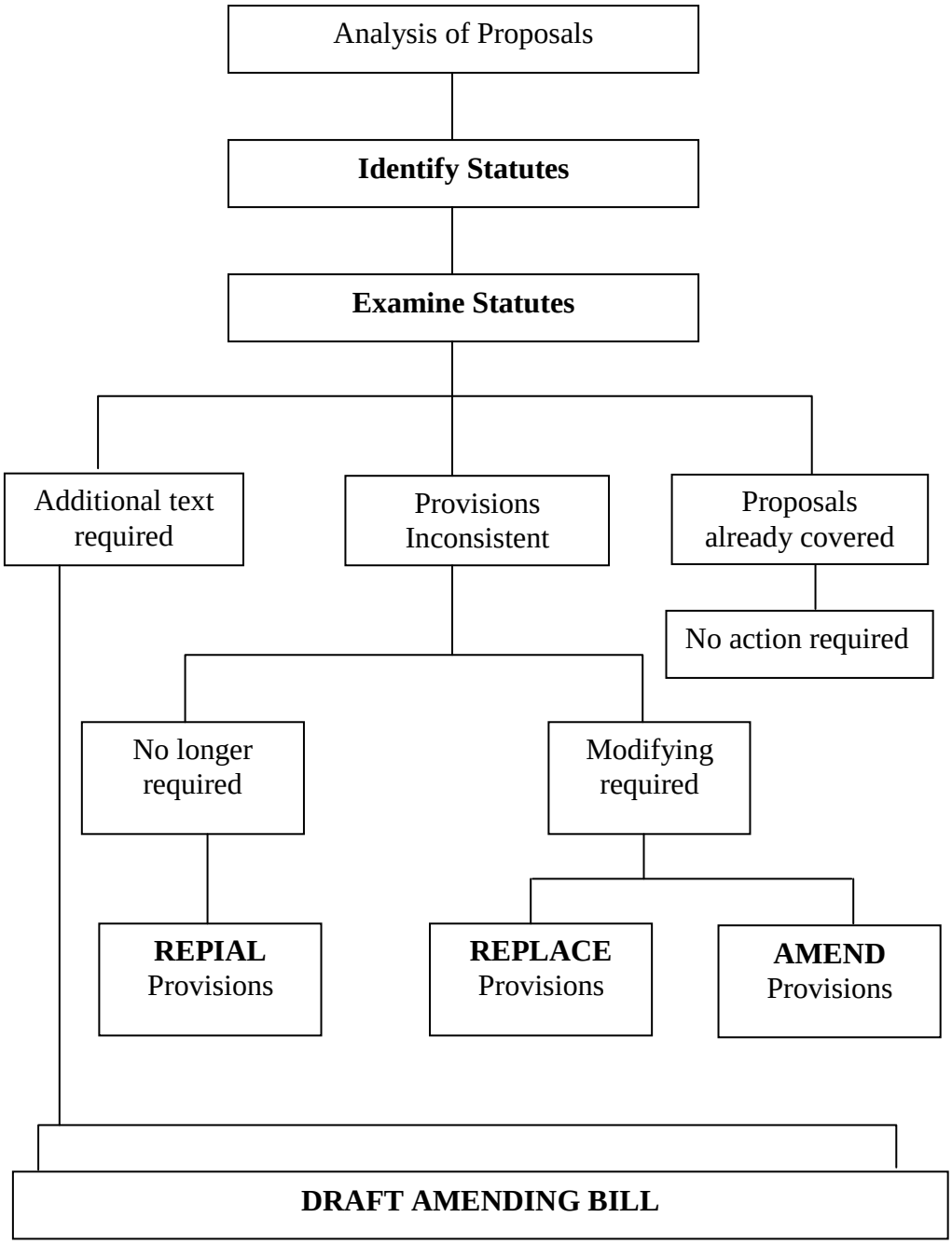
(i) the present legislation should be amended; *or*
(ii) the modified form of the provisions should be included in the new legislation (and the original repealed).

4. If the changes are substantial, decide whether to amend the original legislation or to deal with the matter afresh in replacement legislation.

3.1.2 Preparing for Amendments

1. Substantive Amendments

The following are the principal steps when drafting a Bill to make substantive amendments.



A. Research

1. Before considering what amendments are called for, analyse the legislative proposals fully. You need a complete picture of the new legislative scheme in order to work out how to change the existing legislation to produce the desired results.

2. Make yourself thoroughly familiar with the legislation to be amended. For that contains the legislative scheme upon which you must build. The new proposals can only be effectively implemented in the context set by the existing legislation.

3. The principal legislation will usually be identified in your instructions. Make sure that these are correct and comprehensive in that respect. Check that you have a complete set of amendments already made to the principal Act.

4. Your task is to modify the statutory provisions dealing with the subject matter of the proposals so that:

(i) those provisions as altered give full effect to the proposals;
(ii) the existing legislation and the new together provide a coherent and consistent legislative scheme.

5. Examine the present legislation to determine whether any proposals are already covered. A common failing of instructions is to ask for changes to legislation that are already part of it.

6. Determine which of the provisions of the current law are unaffected by the proposals, and which deal with matters to which your amendments must be directed if the proposals are to be put into effect.

B. Planning

1. Work systematically through the sections of the principal Act (and any other related legislation) and identify specifically:

(i) the provisions that must be repealed or replaced as no longer consistent with the legislative proposals;
(ii) the provisions that must be altered in order to give effect to the proposals;
(iii) the provisions that must be added to provide for new matters not covered by the existing Act, and where they are to be best positioned;
(iv) the minor amendments that are consequential on the substantive changes.

2. Consider whether, as a result of altering the existing legislation, you should include any transitional or saving provisions in your Bill. If these will have a limited life only, there is little need to incorporate them as amendments to the principal Act; they can stand as separate provisions of the amending Act.

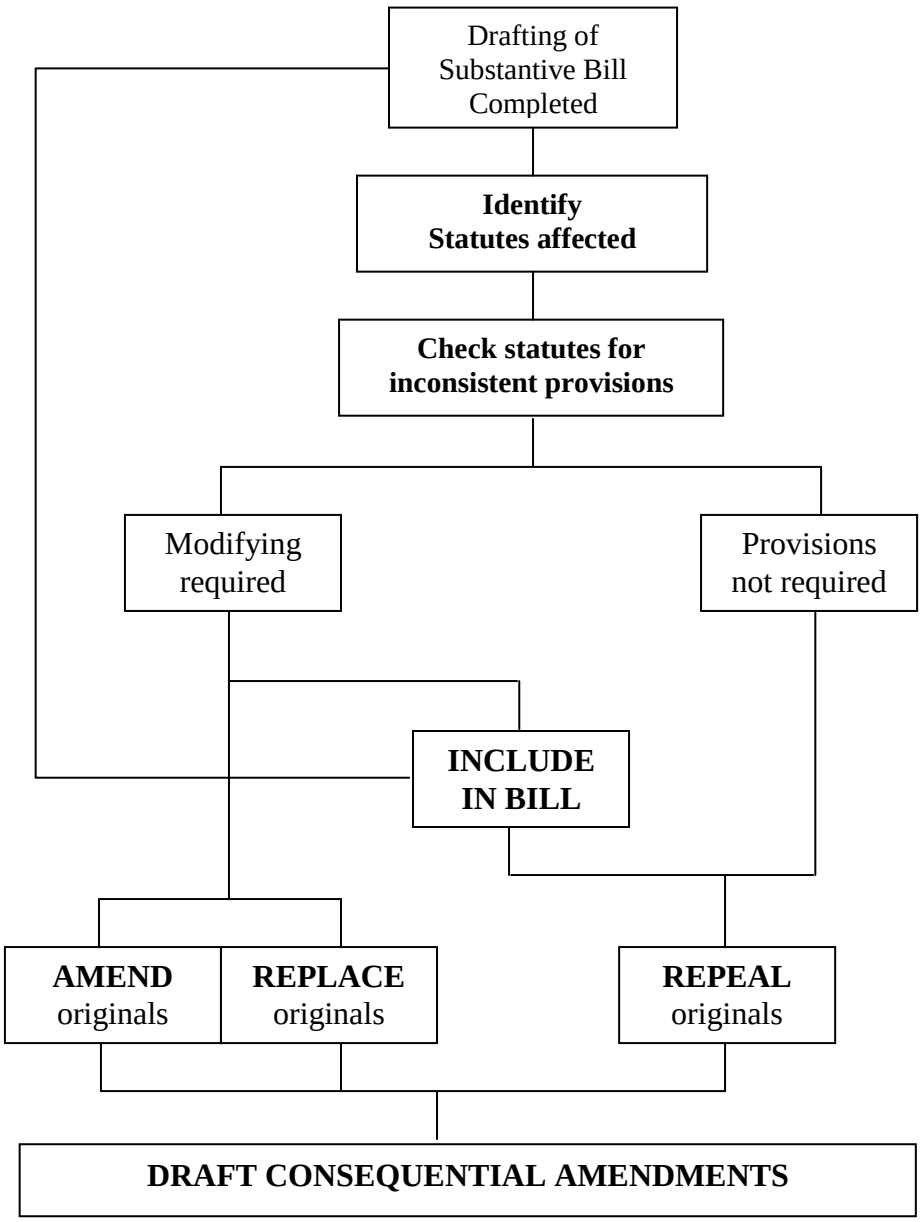
3. If your amendments affect more than one Act, consider whether to:

(i) prepare separate Bills, each dealing with the amendments to a single Act (as in the case where substantial amendments are needed for several Acts);

(ii) deal with the amendments to each Act in separate Parts or Schedules in a single Bill;
(iii) deal with all minor consequential amendments in a Schedule to your Bill.

2. Consequential Amendments

The following are the principal steps when drafting a Bill to make consequential amendments to earlier legislation.



A. Research

1. Before working on consequential amendments, complete the substantive provisions of your Bill that implement the policy proposals. You can establish the exact relationship between those provisions and existing legislation only after you have drafted the new rules.

2. Identify all existing legislation which touches upon the subject-matter of your Bill. This may be spread over more than one Act. Tracing that legislation entails:

(i) examining the substance of your Bill for topics that are likely to be referred to elsewhere in other statutes;
(ii) drawing on your knowledge of your Statute Book:
(iii) using indices and other guides to the content of that legislation;
(iv) if a computerised data base of your laws is available, using the search function to look for provisions with these links.

3. Examine all the legislation traced to decide which provisions are in some way inconsistent with your new body of rules.

B. Planning

1. Consider whether any existing provisions are so closely linked to your new rules that they are more suited, in their present form or in a modified form, to be incorporated with them. If so, add them to your new rules, and repeal the originals.

2. In the case of inconsistent provisions, note down:

(i) those that must be repealed as completely inconsistent or must be replaced with a provision that is consistent;
(ii) those that must be modified in part, by adding, deleting or altering expressions, to reflect the requirements or the terminology of your new rules.

3. Note down also those that must include cross-references to provisions of the new legislation, rather than any that it has replaced.

4. Consider whether you should include any transitional or saving provisions in your Bill with respect to matters covered by the original legislation.

5. Consider whether your Bill should deal with the consequential amendments in separate sections relating to the different Acts or, because there are many, in a Schedule or Schedules to it.

4.0 CONCLUSION

In conclusion, deciding what provisions need to be repealed or amended is best done at the research and design stages, rather than during drafting.

5.0 SUMMARY

In this unit, we considered the contents of repeals and amendments of legislation. You should now be able to decide what provisions need to be repealed or amended.

6.0 TUTOR-MARKED ASSIGNMENT

What are the steps in amending legislation?

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

UNIT 3 DRAFTING REPEAL PROVISIONS

CONTENTS

1.0 INTRODUCTION

Drafting repeals of complete instruments are less common and more straight-forward. They are needed particularly when a new Act or piece of subsidiary legislation is replaced or re-enacted. Repeals of enactments within instruments and of provisions that are merely part of such an enactment are generally treated as amendment, and a regular feature of that process.

In this unit, we concentrate upon repeals of legislative instruments in their entirety and complete legal propositions ("enactments") that comprise a part or portion of such instruments (e.g. a section or Part).

Substituting enactments and striking out *provisions* of an enactment (e.g. a paragraph or an expression in a section or subsection), with or without replacement, are considered below as amendments.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- draft provisions for repealing complete instruments and enactments.

3.0 MAIN CONTENT

3.1 The Objectives in Drafting Repeal Provisions

Keep constantly in mind that repeals should be the result of a deliberate decision; they must not be permitted to happen accidentally. Our earlier

discussion of implied repeal should have suggested four principal objectives to keep in mind when drafting repeal provisions:

1. Make all repeals by *express* provisions;

2. *Identify all* the provisions to be repealed *specifically* in those provisions;

3. Use language indicating *precisely* what is intended;

4. Adopt *consistent repeal expressions* throughout.

3.2 How Repeal Provisions Are Drafted

Let us consider the question by reference to these four objectives.

1. Use Express Provisions

We have already seen the drawbacks of implied repeals. These are avoided by ensuring that all legislation that is no longer required is repealed by express provisions.

2. Identify Specifics

Similarly, avoid drafting repeals in *generalised* terms, i.e. stating merely that earlier inconsistent provisions are repealed. This again leaves users to discover for themselves what those repeals actually are. The following example offers no reasonable guidance as to what is being repealed.

Example Box 1

Any provision of any written law that is inconsistent or in conflict with this Act is repealed.

Users need to understand exactly which provisions in the existing law are no longer in force. From the repeal provisions, they should be able to ascertain the *precise* extent of repeals. Accordingly, indicate the precise provisions to be repealed by providing the complete citation of the statutory provision affected.

3. Use Precise Language

The terms of the repealing provisions should be as simple and direct as possible, although you must have full regard to your house-style. The terms to use may differ according to the type of repeal that you are

engaged upon. In every case state exactly the provisions of the original law that are subject to the repeal.

A. Simple Repeals

A direct statement that a repeal is being effected is typically all that is needed.

Example Box 2

Repeal of an Act:

The Animals Act 1960 is repealed.

Repeal of a Part:

Part IV of the Animals Act 1960 is repealed.

Repeal of a Schedule:

Schedule 2 of the Animals Act 1960 is repealed.

Repeal of a section:

Section 40 of the Animals Act 1960 is repealed.

Repeal of a subsidiary instrument:

The Animals (Cage and Fences) Regulations 1961 are revoked.

SELF ASSESSMENT EXERCISE 1

Drawing on recent legislation, note down the formulae that appear to be typically used in your jurisdiction for the following:

1. Repeal of an Act

2. Repeal of a Part of an Act

3. Repeal of a section

4. Repeal of a subsidiary instrument.

B. Repeal of Amended Legislation

If an Act has been amended, you need not, in repealing the Act or any of its provisions, refer to any earlier legislation that amended it. Just identify the current provisions by reference to their numbering.

Under the doctrine of merger, amending legislation is treated as an integral part of the amended legislation. Accordingly, repeal of the amended legislation embraces the amending legislation too. Interpretation legislation typically contains a rule that leads to the same effect (cp. **section 35** of the **model Interpretation Act 1992**).

Example Box 3

Section 9A of the Captive Animals Act 1960 is repealed.

It is unnecessary to indicate that section 9A was inserted, e.g. by section 45 and Schedule 2 of the Wild Life Protection Act 1992.

C. Repeal with Replacement

A more common case arises where the Bill replaces existing legislation with new and different provisions on the same subject matter:

(i) if you are replacing an *entire* Act or instrument with new legislation, a simple repeal of that Act is all that is required; set it out in the final provisions (as in **Example Box 2**).
(ii) but if you are merely replacing an *enactment within* an Act or instrument, deal with the repeal and replacement together in the *same* provision (as in **Example Box 4**).

Remember that the latter case is treated as an amendment to the original instrument and should be included with other provisions of a Bill making amendments.

Example Box 4

Repeal and replacement of a section:

Repeal and replacement of section 7 of Act 1960-12.
25. Section 7 of the Captive Animals Act 1960 is repealed and replaced by the following section:

"**Protection of animals.**
7. Any person who interferes with a captive animal, or the enclosure in which it is held captive, commits an offence."

Repeal and replacement of a Schedule:

Repeal and replacement of Schedule 2 of Act 1960-12.
26. Schedule 2 of the Captive Animals Act 1960 is repealed and replaced by the Schedule set out in Schedule 3 of this Act.

The replacement Schedule 2, with all the required features of a Schedule, must then be set out in Schedule 3 of the Bill.

Repeal formulae vary from jurisdiction to jurisdiction. For example, "is replaced" is increasingly used instead of "repealed and replaced". But you should not find it necessary to use more elaborate formulae than those in **Example Box 4**. In particular:

(i) the much cherished word "*hereby* [repealed]" is superfluous; leave it out.
(ii) the simple present tense "is repealed" (declaring a consequence of enactment) is preferable to "shall be repealed" (which is a command about future behaviour).

4. Use Repeal Provisions Consistently

If you use simple and direct formulae in every case, there is little possibility of inconsistency. A variety of terms are used in the Commonwealth as alternatives to "repeal". Follow the house-style, but make sure that you use the same terms for the same purposes throughout your draft.

Example Box 5

26. Section 4 of the Captive Animals Act 1960 *ceases to have effect*.

31. Section 14 of the Captive Animals Act 1960 is *deleted*.

32. Regulation 12 of the Captive Animals (Cages and Fences) Regulations 1961 is *rescinded*.

Some drafters recommend that "repeal" should be used in every circumstance, whether for repeals of Acts or for repeals of provisions of Acts and "revoke" in relation to those affecting subsidiary legislation. Again, your choice should be dictated by the house-style. Similarly, use terms consistently when repealing and replacing.

Example Box 6

The following are in common use:

20. Section 3 of the Captive Animals Act is *replaced* by the following section: .....

20. Section 3 of the Captive Animals Act is *omitted* and the following section is *substituted*: .....

20. Section 3 of the Captive Animals Act is *deleted* and the following section is *inserted in its place*: .....

But be guided by the house-style. Only one form should be used for the same type of case in the same instrument.

To the same end, place repeal provisions in your draft in consistent ways:

(a) Put Repeals in One Place in the Bill

Gather the repeal provisions in the same place in the repealing legislation; do not scatter them around it;

(b) Use a Separate Section for Repeals

Devote a separate section just to repeals, with its own section note.

Example Box 7

Repeal of Act 12 of 1960.
31. The Captive Animals Act 1960 is repealed.

(c) Place all the repeals to an Act in order

If several provisions of an Act are to be repealed, set these out, separately paragraphed, in the same section, in the order in which they affect that Act.

Example Box 8

20.-(1) The Captive Animals Act 1960 is amended by repealing:
(a) section 12;
(b) Part IV;
(c) in Schedule 1, paragraphs 5 to 8.

(d) Place Repeals to Several Acts in Order

If several Acts are to be affected, set these out in one section in a series of subsections, in the order in which they appear in the latest revised Edition or otherwise in their chronological order.

(e) Use a Schedule for Numerous Repeals

You can conveniently gather a substantial number of repeals into a Schedule; that must be authorised by an "inducing" section in the final provisions.

Example Box 9

Consequential repeals.
25. The enactments listed in column 1 of Schedule 2 are repealed to the extent specified in column 2 of that Schedule.

SCHEDULE 2 (section 25)
Repeals

Enactment	**Extent of Repeal**
Captive Animals Act, Cap.300	The whole Act
Dangerous Wild Animals Act, Cap.301	Part 2
Zoos Licensing Act, Cap.302	The whole Act
Protected Species Act 1980, No.21 of 1980	Sections 23, 27 & 29.

SELF ASSESSMENT EXERCISE 2

Check for recent examples from your Laws of the following:

1. A section repealing an Act.

2. A single section repealing several provisions of an Act.

3. A section repealing and replacing a provision of an Act.

4. A section authorising repeals to be set out in a Schedule (showing the inducing words).

5. A Schedule of repeals.

3.3 Are There any Special Features for Re-Enacting and Replacement Bills?

Users need to know:

(i) if the legislation is merely a repetition of existing law in a new form; or
(ii) whether they should be on the look out for statutory changes.

The courts, too, in interpreting legislation, have to know if the Legislature has merely re-enacted the legislation, since existing case law on the replaced Act still applies under the new statute, as the law has not been altered.

In these cases, make clear the purpose of your Bill.

A. Re-Enacting Legislation

The following ways draw attention to a re-enactment Bill:

(i) the *long title* states explicitly that the legislation is to "consolidate" or "re-enact" the legislation on the subject in question. If that legislation is largely a re-enactment, but also includes some significant changes, add "with amendments" after "consolidate" or "re-enact".
(ii) the *short title* is the same or similar to that of the original, except for the year.
(iii) a *table*, in the **Explanatory Memorandum**, shows the derivations of the new provisions by reference to the original legislation.

B. Replacement Legislation

The following ways draw attention to a replacement Bill:

Complete Replacement

If you are drafting a new Act that makes major changes to the law, consider:

(i) including in *the long title* some such terms as "to make fresh [*or* new *or* better] provision for...." the matter;
(ii) using a *short title* that is essentially the same as that of the original legislation that your draft replaces.

Partial Replacement

Replacement of enactments within an Act is typically carried out by an amendment Bill. We look at amendments in the following units.

4.0 CONCLUSION

The terms of the repealing provisions should be as simple and as direct as possible. Where an Act has been amended, you need not, in repealing the Act, refer to any earlier legislation that amended it.

5.0 SUMMARY

In this unit, we considered drafting of repeal provisions. You should now be able to draft repeal provisions effectively.

6.0 TUTOR-MARKED ASSIGNMENT

Draft a provision to repeal an Act that came into force on 1st October 1960.

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

UNIT 4 DRAFTING AMENDMENTS - PART I

CONTENTS

1.0 INTRODUCTION

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

We concentrate upon the forms to be used in making amendments, both substantive and consequential. We consider:

- the addition of new provisions;
- partial replacements, i.e. the replacement or modification of enactments or parts of enactments (e.g. paragraphs, or words, phrases or expressions);
- the deletion of parts of these kinds of enactment.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- draft substantive or consequential amendments to earlier legislation in keeping with the practice and house-style in Nigeria.

3.0 MAIN CONTENT

3.1 Methods of Amendment

Two main methods have evolved in Commonwealth drafting, though today one is little used, even in the United Kingdom where it had its greatest vogue.

(a) Textual Amendment

Now widely used, textual amendments give instructions for making changes to the actual text of the Act to be amended in a way that allows the original and the new to be read together as a unified text. This enables the original legislation to be reprinted with the changes incorporated at the appropriate places, producing a single statute containing the complete legislation on the matter.

Example Box 1

Original provision (Zoo Licensing Act 1981, section 10):

(3) Before an inspection of a zoo may be carried out under this section, the local government council, after consulting the operator of the zoo, must give the operator at least 28 days notice of the date upon which it is proposed to carry it out.

Amending clause:

4. Section 10(3) of the Zoo Licensing Act 1981 is amended:
(a) by repealing ", after consulting the operator of the zoo,";
(b) by repealing "28 days" and substituting "14 days";
(c) by adding, after "operator", where the word appears for the second time, "of the zoo".

Consolidated provision:

(3) Before an inspection of a zoo may be carried out under this section, the local government council must give the operator *of the zoo* at least *14 days* notice of the date upon which it is proposed to carry it out.

Note, however, that most drafters would deal with this case by repealing the original subsection and replacing it with the draft in the terms of the consolidated provision, using the approach illustrated in ***Example Box 4*** *of the last unit.*

A textual amendment then:

(i) expressly identifies the provision to be amended;
(ii) directs how and where the amendment is to affect that provision;
(iii) specifies the content of the change (what is repealed, replaced or added).

(b) Non-Textual Amendment

This is found principally in United Kingdom legislation, though not often used today there or elsewhere. It amends the original legislation by indirect means. The amendment is in the form of an enactment that states the *effect* of the new rule that is to operate instead of the old, to the extent that they differ. Although the source of the existing rule is referred to, its text is not expressly amended. The new provision is written so as to be read as operating instead of the original or alongside it, rather than incorporated into its text.

Example Box 2

A non-textual version of the amendment illustrated in **Example Box 1** might be:

A local government council must give to the operator of a zoo notice of at least 14 days of the date upon which it is proposed to carry out an inspection of a zoo under section 10 of the Zoo Licensing Act 1981, but may give the notice without consulting the operator of the zoo.

This technique has the advantage of making clearer, to legislators in particular, the intended effect of the change; a textual amendment is far less explanatory on its face. But non-textual amendment requires the reader to work out the precise nature of the changes that are being made and it makes the printing of a single consolidated text impossible. It results in a series of independent, though overlapping enactments that must be read side-by-side. This may give rise to problems as to the exact extent to which the earlier provisions are displaced.

3.2 Preferred Method of Amendment

The textual amendment is generally to be preferred for the following reasons:

(i) it supports the desirable practice of having a single comprehensive statute on a particular subject-matter;

(ii) it specifies the precise relationship between the text of the amendment and that of the original Act, instead of requiring that to be worked out through statutory construction;
(iii) it enables users to annotate the original text, by cut and paste, to produce for themselves a single up-to-date statute;
(iv) it facilitates the printing of a consolidated text of the amended statute, which then can be stored in its complete form in a computerised data base;
(v) it is easier to draft.

Yet it too has shortcomings. As we have seen, it may be impossible to understand what is intended by looking at the amendment alone. To discover what is proposed or has been enacted can require a comparison of the terms of both the original provision and the amendment, using an intellectual form of cut and paste. Without further aids to understanding, the textual method can be confusing for those using the amending legislation.

The non-textual method has a place in the drafter's tool-kit, although you are unlikely to need it often. Exceptionally, the textual method may not be feasible, e.g. to:

(i) make generalised changes throughout the statute book, so that individual amendments for the number of statutes involved is too demanding a task (e.g. following a change from imperial to metric weights and measures);
(ii) alter all references of a particular kind wherever they occur in any legislation (e.g. references to Ordinances to be replaced by references to Acts, references to former titles of public officials to be construed as references to their new titles). This kind of amendment was much used when dependent territories became independent.

Example Box 3

From the appointed day:
(a) all functions that, immediately before that day, were conferred on, and exercisable by, a local government council under any enactment relating to local government are transferred to and exercisable by the Caretaker Committee for the Local Government;
(b) *in any such enactment a reference to a local government council is to be construed as if it were a reference to the* Caretaker Committee *for the Local Government.*

3.3 The Objectives When Drafting Amendments

As in the case of repeals, keep four objectives in mind:

1) Make all amendments by express provisions;

2) Identify specifically all the provisions to be amended (including those consequential on the substantive amendments);

3) Use terms that indicate precisely how the amendment affects the legislation to be amended;

4) Use consistent amending expressions throughout.

3.4 How to Arrange Amendments

Several different practices for presenting amendments may be found. Let us illustrate four basic methods:

Substantive Amendments

1. Substantive amendments are enacted in separate sections of the amending Bill that follow the ordering of the provisions of the amended Act;

2. Alternatively, the amendments are set out in a Schedule to the amending Bill in the order in which they affect the Act amended; the body of the Bill merely contains the appropriate inducing words authorising the use of the Schedule;

Consequential Amendments

3. Consequential amendments, where few, are set out in the Bill that enacts the new body of law, in final provisions towards the end of the Bill;

4. Alternatively, consequential amendments, particularly if many, are set out in a Schedule or Schedules of the Bill that enacts the new body of law, in their chronological order. Again, appropriate inducing words are needed in the final provisions of the Bill.

More than one of these practices may be used in a jurisdiction, for example, the first and the third. On occasions, more than one may be used in the same Bill, for example, the third may be used for the more important, and the fourth for less important, consequential amendments.

SELF ASSESSMENT EXERCISE 1

1. Check some examples of recent amending Acts from your jurisdiction. Note down which appear to be the preferred methods, and whether any other is in use occasionally.
2. Add to your Study materials one short example of an Act from your jurisdiction that uses a preferred method.

3.5 Drafting Amendments

From your examination of the precedents you will have seen that, to an extent, each approach follows its own drafting conventions, in terms of lay-out, style and terms. However, there are many common elements, which we shall consider by reference to the four objectives mentioned above. In working with the following part, compare what is discussed with the practice and house-style in Nigeria.

1. Use Express Provisions

Make clear that an amendment is being made by using express words. Do not leave it to the courts to decide that later legislation must have been intended to amend some earlier provision. It is the function of the Legislature, not the judges, to modify legislation.

2. Identify Specifics

Direct your amendments to specific provisions identified by citation of the Act and the number of the section (and subsection and paragraph, when relevant). It is only in the rare cases mentioned earlier that generalised amendments not referring to particular legislation can be justified.

In particular:

(i) identify the Act amended;
(ii) identify the provisions (e.g. section, subsection or paragraph) amended;
(iii) identify an expression that is amended.

(i) Identify the Act Amended

In a Bill that makes substantive amendments to an Act, that Act is generally given a shortened definition term, such as "the principal Act" or "the Act". This practice may be supported by the Interpretation Act. If not, authorise its use in the Bill. In most cases, it is unnecessary to do this through a definition *clause*; such a clause is not needed for an

amendment Bill, since the Bill, as distinct from the amendments it makes, is unlikely to require terms calling for definitions. For that reason, the definition is often added in parenthesis after the first citation of the short title of the Act in the body of the Bill.

Example Box 4

Amendment of section 7 of Act 1960, No.12.
2. Section 7 of the Captive Animals Act 1960 ("*the principal Act*") is amended by repealing subsection (3).

SELF ASSESSMENT EXERCISE 2

1. Does your Interpretation Act direct how these references are to be made?
2. Note down how the principal Act is commonly referred to in your amending Acts:

In identifying other legislation, give the full short title and include the number assigned to the Act, either in the section note or as a marginal or footnote, to help users. If the Act referred to has been amended, that need not be indicated, nor any reference made to the amending Acts (cp. **section 4(1)** of the **Interpretation Act**).

(ii) Identify Sections, Subsections and Paragraphs

Include a reference to the precise provision amended by number or letter (as in **Example Box 4**). Drafters today use the minimum number of words to refer to subsections and paragraphs. They put greater reliance on the numbers, which is easier to read.

Example Box 5

The following are preferred:

"section 12(1)" *rather than* "the provisions of subsection (1) of section 12";

"section 12(1)(a) *rather than* "paragraph (a) of subsection (1) of section 12".

(iii) Identify Expressions to be Amended

If particular words or expressions only are affected by an amendment, better practice is to deal with the unit of text that includes the altered expression. This gives a better idea of the nature of the amendment by setting it in its context. Word amendments should be reserved for cases where a particular expression is changed throughout the text.

Example Box 6

Your task may be to include zoo owners in a provision requiring operators of zoos to inspect animal cages. Rather than merely adding in words referring to owners, it is clearer if the original unit of text is rewritten.

Amendment of Act 12 of 1976.

22. The Dangerous Animals Act 1976 is amended by replacing paragraph (b) of section 7(4) with the following paragraph:

"(b) the *owner or* operator of a zoological garden must inspect cages in the garden that house captive animals once each day".

In an exceptional case where your amendment is directed to a particular expression, identify it specifically by quotation marks or, if lengthy, by stating the words with which the phrase begins and those with which it ends, both within quotation marks.

Example Box 7

Consequential amendments to Act 1976, No.12.

22. The Dangerous Animals Act 1976 is amended:

(a) in section 7(4), by repealing the definition of "zoological garden";

(b) by replacing "zoological garden", wherever the expression occurs, with "a zoo within the meaning of the Zoo Licensing Act 1981";

(c) in section 14, by repealing the expression beginning "unless the animal" and ending "zoological garden".

Do not use references to line numbering for these amendments. They can be misleading, since changes occur from one published version to another; line numbers can be difficult to work out too.

3. Use Precise Directions

Give precise directions to the user as to the nature of the amendment, using the minimum number of words for that purpose. In particular:

(i) draft in the present tense, either as a direct command or as a statement of a legal consequence;
(ii) avoid unnecessary or archaic words.

Example Box 8

Archaic form:
Section 12 of the Zoo Licensing Act 1981 *shall be hereby amended by the addition thereto immediately* after *the words* "Licensing Authority" *of the following comma and words* "if no inspection is made that year".

Alternative practice (1):
Section 12 of the Zoo Licensing Act 1981 *is amended by adding*, after "Licensing Authority " ", if no inspection is made that year".

Alternative practice (2):
In section 12 of the Zoo Licensing Act 1981, *insert* ", if no inspection is made that year" after "Licensing Authority".

Alternative practice (3):
In section 12 of the Zoo Licensing Act 1981, for expression “the operator must notify the Licensing Authority” *substitute* "the operator must notify the Licensing Authority, if no inspection is made that year".

Version 3 gives a sense of the amendment.

SELF ASSESSMENT EXERCISE 3

Which of these practices is current in your jurisdiction?

Note down the main variations:

In drafting directions different considerations may arise if the amendment:
(a) adds a new provision;
(b) modifies an existing provision;
(c) repeals and replaces an existing provision.

a) Adding New Provisions

Where to Add a New Provision in the *Principal* Act

In deciding exactly where to place an additional provision, take account of:

(i) the surrounding statutory context in which the new provision will be construed;
(ii) the language, structure and approach of the provisions which it supplements.

Select the position in the Act that the new provision might have occupied had it been included as part of the original scheme. (Guidance on the structuring of an Act was given in **LED: 609**). So:

(i) a provision that is concerned with a concept or idea developed in a particular section (e.g. as indicated by the section note) may be best dealt with by a new subsection or subsections;
(ii) a provision that extends or enlarges upon an idea that has been introduced in a particular section may be best placed in a new section that follows it.

In most cases the appropriate place is obvious, as you read through the principal Act systematically, with the new matter in mind.

How to Number Additional Provisions

Give them the number in the sequence in the principal Act of which they become part. So a subsection added at the end of a section currently with four subsections must be numbered "(5)".

Where new provisions have to be inserted *between* two provisions already numbered in sequence, do not renumber those provisions to accommodate insertions of this kind, since:

(i) users accustomed to the existing numbering are likely to be confused by what seems to be an arbitrary change;
(ii) considerable consequential renumbering of the Act would be needed; that would have to be specifically authorised in the amending clauses and could involve many unnecessary changes;
(iii) all cross-references (both in the principal Act and in other legislation) would have to be checked and where necessary altered by the amending Bill.

Better practice is to give the added provision its own distinctive number that follows the sequence in the principal Act.

However, practice varies as to the choice of numbering. A typical method uses:

for a new section, subsection, Part	select the immediately preceding number in the sequence, followed by

or Schedule	"A" (e.g. "2A"), and so on alphabetically if more than one such insertion is made at that point (e.g. "2B").
for a new paragraph	select the immediately preceding paragraph letter in the sequence repeated (e.g. "(aa)"), and so on alphabetically if more than one such insertion is made at that point (e.g. "(ab)").
for a new sub-paragraph paragraph	select the immediately preceding sub-number in the sequence, followed by "a" (e.g. "(ia)") and so on alphabetically if more than one such insertion is made at that point (e.g. "(ib)").

Example Box 9

Consequential amendments.

25. The Zoo Licensing Act 1981 is amended:

(a) in section 11, by adding, after subsection (2):
"**(2A)** No person is competent to carry out an inspection of a zoo unless authorized by the Licensing Authority to carry out such inspections.";

(b) in section 14(2)(b), by adding, after sub-paragraph (ii):
"(**iia**) to advise on the keeping of animals in zoos;".

SELF ASSESSMENT EXERCISE 4

Note down the ways in which additional provisions are numbered in Nigeria:

new section:

new subsection:

new paragraph:

new sub-paragraph:

However, exceptionally, renumbering may be required. If you add a subsection to a section that has no subsections already, give instructions that the original section be renumbered as a subsection.

Example Box 10

Amendment of section 12 of principal Act.

14. Section 12 of the principal Act is amended by renumbering it as section 12(1) and by adding:

"**(2)** A person aggrieved by a decision of a local authority under subsection (1) may appeal to the Minister."

A similar practice should be followed if you add a new Schedule to an Act that contains a single unnumbered Schedule.

Example Box 11

Addition of Schedule 2 to principal Act.

18. The principal Act is amended:

(a) by renumbering the Schedule as Schedule 1;

(b) by adding Schedule 2 as set out in the Schedule to this Act.

Note the method of setting out the new Schedule in a Schedule to the amending Bill rather than in the body of the Bill. The difference in printing conventionally used for Schedules might otherwise be misleading.

Providing headings and section notes for added provisions

Provide a suitable section note or heading for a new section, Part or Schedule as part of the inserted text, of the kind that it would have carried had it originally been included in the principal Act. Such a section note is independent of the section note that the clause of the *amending* Bill must carry.

Example Box 12

Addition of section 15A to principal Act.

6. The principal Act is amended by adding:

"**Obstruction of inspectors.**

15A. A person commits an offence who intentionally obstructs an inspector when acting under this Act.".

b) Modifying an Existing Provision

How to Make Modifications

Modifications can take the form of additions, substitutions and deletions. Accordingly, your draft must:

(i) specify exactly the provisions and the expressions in them that are to be modified;
(ii) state the nature of the modification.

If you are adding or replacing, check that the amendment, when put in the position you have directed, produces a legal proposition that:

(i) is legally correct;
(ii) is consistent with the language of the surrounding text;
(iii) if it modifies a sentence, fits correctly with the syntax, and punctuation of the sentence of which it becomes part;
(iv) is grammatically correct.

Check too whether a word or expression that is to be modified occurs more than once in the specified provision. If so:

(i) if you intend each case to be amended in the same way, specify all the places that are to be affected by the same modification;
(ii) if the modification is not to affect all the places in the same way, give clear directions as to the place or places where it is to have effect.

How to Indicate the Expressions that are to be Modified or Inserted

If you decide to modify a word or expression only or, better, the unit of which is part, identify it by repeating it in the amending provisions within quotation marks. If the expression to be modified is lengthy, it may be enough to refer to it by its first and last words, each within quotation marks. Legally, the modification affects all the words identified including the stated first and last words specified. The Interpretation Act confirms this practice (see **Section 5(2)** of the **Interpretation Act**). Better practice is to state all the affected words.

Similarly, if the insertions are limited to the exact words or expressions to be inserted, set out the modification (in full, include any punctuation) within quotation marks.

Example Box 13

Amendment to section 14 of principal Act.

12. Section 14 of the principal Act is amended:
(a) by repealing "Minister", wherever the word occurs, and substituting "local government council";
(b) in subsection (4), by adding, after "licence", ", or a copy of the licence,";
(c) in subsection (5), by repealing from "unless the Minister" to the end of the subsection.

c) Repealing and Replacing Provisions

Much the same approach is needed if you conclude that complete propositions (whole Parts, sections, subsections) are to be repealed or replaced. You are already familiar, from the examination of this matter in connection with repeals, with the techniques required.

However, bear two additional points in mind:

(i) do not renumber provisions as a result of repealing others, even if this leaves a gap between numbered provisions in a sequence. The problems mentioned earlier that flows from renumbering are equally relevant here.

(ii) consequential amendments (both to the principal Act and to other legislation) may be needed as a result of the repeal of provisions. Check that provisions relying on or cross-referring to a repealed provision are appropriately amended.

4.0 CONCLUSION

In conclusion, textual amendment is less explanatory on its face. But non-textual amendment requires the reader to work out the precise nature of the changes that are being made. This makes the printing of a single consolidated text impossible. Therefore make clear that an enactment is being made by using express words. It is the function of the Legislature and not the Judges to modify legislation.

5.0 SUMMARY

In this unit, we considered drafting of amendments. You should now be able to draft substantive or consequential amendments to earlier legislation in keeping with the practice and house-style in Nigeria.

6.0 TUTOR-MARKED ASSIGNMENT

Draft a clause to amend all legislation under which magistrates' courts may impose a maximum fine on persons convicted by them of summary offences, to increase the level of every such fine stated in the legislation to double that at present.

7.0 REFERENCES/FURTHER READING

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

UNIT 5 DRAFTING AMENDMENTS - PART II

CONTENTS

1.0 INTRODUCTION

In this unit, we consider the fourth objective of drafting amendments, consistency. We also consider how you may develop a procedure for working out the amendments and repeals that are called for in the particular case, and how they are to be dealt with in your draft.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- draft your amendments consistently with the Act they amend.

3.0 MAIN CONTENT

3.1 Be Consistent

Draft your amendments so that they are completely consistent with the Act they amend and with the legislative method of amendment in use in Nigeria. In particular, look for consistency in the following respects:

a) The content and mode of expression of the principal Act:
b) The syntax and grammar of the provision to be amended;
c) The drafting style used in the original legislation;
d) The amendment directions you use;
e) The conventional structure for amending Bills;
f) The conventional lay-out for amending Bills;
g) Punctuation
h) The conventions on short titles for amending Bills
i) The use of section notes.

3.1.1 Be Consistent with the Content and Mode of Expression of the Principal Act

All amendments must fit with:

(i) the legislative scheme and the legal concepts used in the principal Act;
(ii) the language and terminology of that Act (in particular in using terms that are defined there);
(iii) the mode of expression used in provisions that are modified.

3.1.2 Be Consistent with the Syntax and Grammar of the Provision to be Amended

In adding, modifying, removing or replacing provisions, make sure that the syntax and grammar of the original are fully respected. Your changes must not lead to sentences that are ungrammatical, e.g. because you have taken out too many or too few words or phrases or are ambiguous, e.g. because your alteration has introduced a dangling modifier. Read the original sentence through with the changes you are directing to ensure that it is complete.

3.1.3 Be Consistent with the Drafting Style of the Original Legislation

Textual amendments should fit seamlessly into the original and as neatly as the correct piece fits into a jigsaw. Uncertain meaning can result if, for example, you use a modern drafting style to amend a statute of some antiquity. So follow the drafting style used by the original drafter. Users are entitled to question whether the differences of style are legally significant.

Example Box 1

The amendment as drafted in section 2A sits uncomfortably with the archaic style shown in section 2.

2. Whosoever shall cause or inflict on another person grievous bodily harm shall be guilty of an offence and shall be liable to a term of imprisonment not exceeding fifteen years.

2A. A person commits an offence who wounds or maims another person and is liable to imprisonment for 10 years.

Deviate from the style of the original (e.g. preferring numerals to words to express numbers) only if you are able to draft amendments that affect *all* the provisions in the original Act that use words in a particular way.

Do not make amendments for purely stylistic reasons. This wastes legislative (and drafting) time.

3.1.4 Be Consistent in the Amendment Directions you Use

Use the same directions to make the same types of amendments. If these are simple and direct, there is little chance of misunderstanding. There are differences between jurisdictions in the terms preferred.

Amending action	**Alternative terms**
Adding	"add"; "insert"
Repealing	"repeal"; "delete"; "omit"; "strike out"; "ceases to have effect"
Replacing	“replace”; "repeal ... and replace with"; " for ... substitute"; "for ... insert in its place"; "repeal ... and substitute"; "delete ... and insert"; "delete" ... and add"; "omit ... and add"; "strike out ... and substitute"; "omit ... and substitute".

Thornton (p.417) recommends that "repeal" should be used wherever it is intended that a provision ceases to be current law. It can be argued that the alternatives are more ambiguous. It has also been suggested that, strictly, one cannot *delete* or *omit* a provision and then *substitute* something for it; a substitution can only be made for something that is there. In practice, no significance seems to attach to the variations.

Follow your house-style. But in an amending instrument, use the same direction for the same purpose.

SELF ASSESSMENT EXERCISE 1

Note down the preferred terms in your jurisdiction for each of the following:

Adding a provision:

Repealing a provision:

Replacing a provision:

In giving directions, follow a consistent order in each case. Users are likely to find the following order logical:

first, identify the section (with subsection and paragraph, if relevant) and the Act affected;

second, indicate the type of action required;

third, specify the provision or the words or expression affected;

fourth, if required, set out the provision, words or expressions to be added or substituted.

Example Box 2

Amendment of section 4(2) of principal Act.
3. Section 4(2) of the principal Act [=**1**] is amended by replacing [=**2**] "dangerous animal" [=**3**] with "captive animal" [=**4**].

This order is logical because it replicates the way in which a user can approach the task of annotating a statute: Where › What › How.

3.1.5 Be Consistent with the Conventional Structure of Amending Bills

Each jurisdiction has its own conventions on the way that amendments are organised in the amending Bill. You will be expected to know and follow your house-style in this respect. Different conventions are found for:

(i) Bills making substantive amendments;
(ii) Bills making consequential amendments.

(i) Substantive amendment Bills

In most systems, amendments are set out in the body of the Bill, following the order of the provisions that are amended. However, in some, they are set out, again in that order, in a Schedule to the Bill; the provisions in the body of the Bill merely deal with technical matters such as application, commencement and the inducing provisions. This allows the amendments to be formatted in ways that emphasise the content of the amendments.

Recently, some Australian jurisdictions have begun to group amendments according to common features of their subject-matter, in order to make their collective effect easier to understand. This practice has yet to become widely used.

The following is typical approach:

- if a number of sections are amended, use a *separate* clause of the Bill to set out the amendments for *each* section;

- if several amendments are made to one section, set out *each* amendment in a *separate* paragraph;

- if a single amendment affects several places, deal with that before dealing with amendments that affect one particular place only;

Example Box 3

Amendment of section 5 of the principal Act.
4. Section 5 of the principal Act is amended:
(a) by repealing "or keeper of captive animals" wherever the expression occurs;
(b) in subsection (2), by adding, after "the owner of the zoo", "or keeper of captive animals".

- if you are amending several subsections of a section, use a *separate* subsection for the amendments to *each* subsection;

Example Box 4

Amendment of section 15 of the principal Act.
5.-(1) Section 15 (1) of the principal Act is amended by adding:
"(bb) a menagerie;".
(2) Section 15(2) of the principal Act is amended:
(a) by repealing "or a circus";
(b) by repealing "a zoo keeper" and substituting "a keeper of captive animals".

- if your amendments affect words or short expressions, consider extending your amendment to the unit of text that contains them (unlike **Example Boxes 3** & **4**);

- if you are adding a Part or a Schedule to the principal Act, consider setting it out in a Schedule to the amending Act;

- if you are amending a section or subsection substantially or in several places, consider replacing the entire proposition with one that incorporates all the amendments.

But when structuring provisions in the amending Bill, keep two factors in mind:

- an amendment may be of such importance and interest to legislators that, for debating purposes, it should be contained in its own section or subsection;

- if clauses making amendments are to be brought into force on different days, all the amendments dealt with in any one clause should be capable of being brought into force on the same day.

(ii) Consequential amendments

Here too there are variations in practice. You may find the following techniques useful for organising consequential amendments:

- if only one Act is to be amended, and the amendments are few, set these out in a single clause (with subclauses and paragraphs as necessary) in the order in which they affect the Act;

- if several Acts are to be amended, but collectively the number of amendments are small, deal with each Act in a separate clause placed in the order in which they appear in the Revised Laws or,

if subsequent to those Laws, in their chronological and numerical order;

- if the amendments are many, and in particular if several Acts are affected, consider dealing with them in a Schedule or Schedules of the Bill, adding the necessary inducing clause;
- amendments dealt with in a Schedule can be listed in columns.

Example Box 5

Consequential amendments.
49. The Acts specified in Schedule 4 are amended as set out in that Schedule.

Consequential amendments.
49. The enactments referred to in column 1 in Schedule 4 are amended to the extent specified in column 2 of that Schedule.

But users find it easier to work with a Schedule that sets the amendments out for each Act under a heading giving the statute's citation rather than in columns.

3.1.6 Be Consistent in the Layout of Amending Bills

Each jurisdiction has its own conventions as to the way amending Bills are printed. The complicated form that amending legislation takes means that you must know and comply fully with local practice and that you carefully proof-read it with that in mind.

SELF ASSESSMENT EXERCISE 2

Familiarise yourself with the layout of a local amending Act. In particular check the precise indentation from the left-hand margin of the text of provisions that are to be added to the principal Act. This differs according to whether it is added by a section or by a paragraph.

3.1.7 Be Consistent in Punctuation

In drafting amending provisions, *two* sets of punctuation must be attended to:

(i) the punctuation of the text that is added or substituted;
(ii) the punctuation of the amending provision.

(i) Punctuation of the text added or substituted

Text added or substituted by the amendment must provide all the necessary punctuation, so that the original text, when read with the amendment, is fully and correctly punctuated.
So:

- set out a new section, subsection or paragraph complete with its punctuation, including a final full stop or semi-colon;

- include in expressions that you are adding or replacing all the punctuation that is needed;

- if items are removed, direct the removal of any punctuation linked to them that has become superfluous or incorrect.

Check, by reading the amendment with the original, that the punctuation of the text of the original provision as now amended is as it should be.

(ii) Punctuation of the amending provision

The clause of your Bill that directs the amendment must be as completely punctuated as any other. For example, each clause or sub-clause must have *its own* full stop and its paragraphs end with *their own* semi-colons. These marks are quite independent of the marks provided as part of the text that is added or substituted.

Here too there are conventions about presentation:

- end the words that introduce a block of text that is to be added to the original with a dash or colon as an introducer;

- enclose the text of the original instrument that is identified for the purpose of being amended between quotation marks;

- use quotation marks to enclose text, with any section note or heading or provision number, that is to be added or substituted;

- if a series of provisions (e.g. several sections) are added under the same direction, place the opening quotation marks before the first provision and the closing marks at the end of the last.

Complete Self Assessment Exercise 3 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 3

Mark up the punctuation of both the amending provisions and of the amendments in the following:

Amendment of section 11 of Dangerous Animals Act 1990 No 12

5. Section 11 of the Dangerous Animals Act 1990 is amended

(a) in subsection (1) by repealing horses and substituting wild horses mustangs and zebras

(b) by adding

(2A) If an animal is kept contrary to subsection (2) the local government council in whose area the animal is for the time being kept may seize the animal

(2B) A local government council that seizes an animal under subsection (2A) may either retain the animal in the councils possession or destroy or otherwise dispose of it as the council considers appropriate

SELF ASSESSMENT EXERCISE 4

Compare the amendment in **Answer to Self Assessment Exercise 3** with a recent amending Act from your jurisdiction and note down any differences in the type and placing of punctuation marks.

3.1.8 Be Consistent with the Conventions on the Short Titles of Amending Bills

The short title of a Bill making *substantive* amendments to a principal Act should indicate that this is its main function. This is most effectively done by reproducing the words from the short title of the principal Act followed by "Amendment" (with or without brackets) and the year of enactment. In drafting the short title:

(i) reproduce the essential first words of the short title of the principal Act, rather than construct a new kind of title;
(ii) do not include the word "Act", or the year, from the original short title.

This title does not become part of the principal Act; it performs a technical function with a limited life, which ends when the legislation is consolidated. Positively, this technique ensures that the amending Act will be listed, e.g. in an index, with the principal Act, if both titles begin with the same words. If you follow this practice consistently, users develop the habit of looking for amending legislation titled in this way.

Example Box 6

1. This Act may be cited as the Zoo Licensing (Amendment) Act 2004.

but not:

1. This Act may be cited as the Zoo Licensing *Act 1981* (Amendment) Act 2004.

1. This Act may be cited as the Zoo Licensing *Act* (Amendment) Act 2004.

One exception may be noted to this general approach. A Bill that makes substantive amendments to several Acts cannot carry the short title of just one of them, without misleading as to it scope. In this case, select a new short title that indicates the common features of the Acts amended.

Example Box 7

Short title.
1. This Act may be cited as the Law and Justice Legislation Amendment Act 1992.

Complete Self Assessment Exercise 5 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 5

Provide a suitable short title for a single Bill that makes substantive amendments to the following Acts:

Attendance of Witnesses (Criminal Cases) Act
Costs in Criminal Cases Act
Criminal Procedure Act
Regulation of Reports of Criminal Cases Act.
Trial of Mentally Disordered Persons Act.

3.1.9 Be Consistent in the Use of Section Notes

Your section notes of amending clauses should not suggest the gist of the provision. Instead, indicate the provision that is being amended and the type of amendment. This is the most effective way to provide section notes that follow a consistent pattern. To devise notes that describe the *effect* of the amendment would be both difficult, especially for a clause

making a series of detailed amendments, and superfluous. For the notes to the clauses do not become part of the principal Act. The notes that are relevant to the long term user are those attached to sections of the *principal* Act.

Despite these strong arguments, in some jurisdictions section notes do contain substantive provisions, e.g. by repeating the note from the section that is amended or giving the essence of the amendment. It is unclear how these might be called in aid in interpretation. In the first case, they are merely repetitious; in the second they must give way to the section note attached to the principal section of which the amendment has been made part.

SELF ASSESSMENT EXERCISE 6

Note down (e.g. by giving a typical example) the practice in your jurisdiction with respect to:

1. Short titles:
2. Section notes:

4.0 CONCLUSION

Textual amendments should fit into the original legislation neatly. Deviate from the style of the original only if you are able to draft amendments that affect all the provisions in the original Act that use words in a particular way. However do not make amendments for purely stylistic reasons.

5.0 SUMMARY

In this unit, we considered drafting of amendments. You should now be able to draft amendments consistently with the Act they amend.

ANSWER TO SELF ASSESSMENT EXERCISE 3

The punctuation of the amending provisions and of the amendments is as follows:

↓ ↓ ↓

↓ **Amendment of section 11 of Dangerous Animals Act 1990, No.12.**

5. Section 11 of the Dangerous Animals Act 1990 is amended:←

(a) in subsection (1), by repealing "horses" and substituting "wild horses, mustangs and zebras";← ↑ ↑ ↑ ↑ ↑

(b) by adding:← ↓

→"**(2A)** Where an animal is kept contrary to subsection (2), the local government council in whose area the animal is for the time being kept may seize the animal. ←

(2B) A local government council that seizes an animal under subsection (2A) may either retain the animal in the council**'**s possession, or destroy or otherwise dispose of it, as the council considers appropriate. " . ↑

↑ ↑↑↑

ANSWER TO SELF ASSESSMENT EXERCISE 5

The common element can be criminal proceedings, a slightly more general term than criminal cases or criminal procedure; criminal law is not sufficiently accurate. A reasonable short title might be:

> Criminal Proceedings (Miscellaneous Amendments) Act, or
> Criminal Proceedings Legislation Amendment Act.

6.0 TUTOR-MARKED ASSIGNMENT

Draft a clause to amend all legislation under which magistrates' courts may impose a maximum fine on persons convicted by them of summary offences, to increase the level of every such fine stated in the legislation to double that at present.

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

MODULE 3

UNIT 1 WHAT CAN GO WRONG WHEN DRAFTING AMENDMENTS?

CONTENTS

1.0 INTRODUCTION

In this unit, we introduce you to devices for communicating to the various classes of users the nature and effect of amendments, which are not always apparent on the face of the Bill. In addition, your attention is drawn to the steps that may need to be taken with respect to amendments proposed or made during the legislative process. Drafters assigned to the Legislature are especially likely to be engaged on that task.

You will have already concluded that amending legislation (including repeal provisions) calls for particularly careful and systematic preparation and drafting. As Thornton (p.403) notes, it is easy to treat the task as involving a series of distinct, unrelated technical problems. Rather, amendments must be designed *together* to ensure that the existing legislation on the subject gives effect to the change of policy when amended. In addition, they must fit with the principal Act as a glove should fit the hand: precisely and neatly as if moulded for the particular case.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- avoid the more common errors when drafting repeal and amendment provisions
- describe the principal techniques for adding formal information to a Bill explaining the effects of the amendments made by the Bill
- 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.

3.0 MAIN CONTENT

3.1 Common Mistakes

The most common mistakes arise from inadequate planning or an unsystematic approach, from rushing the task or skimping on the scrutiny of the detail. The following is a check-list of questions to keep in mind at the various stages of the process.

1. Do the amendments cover all aspects of the legislative proposals?

2. Do they go beyond the scope of the principal Act (e.g. as indicated by the long title)? If so, can they be proceeded with by amending the principal Act or is new legislation called for?

3. Are any matters in the proposals already adequately dealt with by existing law?

4. Have you taken all existing amendments to the principal Act into account?

5. Have you identified all enactments that need to be repealed and worked out any saving or transitional provisions that are required in consequence?

6. Have you identified, by a section-by-section examination, all the provisions of the principal Act that need amendment?

7. Do the amendments build fully upon the legislative scheme and the concepts in the principal Act?

8. Have you used language and a style of legislative expression in substantive amendments that are consistent with those in the principal Act?

9. Does each of the provisions, as amended in accordance with the directions given in the amending clauses:

(i) contain a legally sound proposition giving effect to the proposals?
(ii) produce a sentence that is correct in grammar, legislative syntax and punctuation?
(iii) where adding an enactment to the principal Act, include an appropriate section note or heading?

10. Have you made all the amendments to the principal Act that are consequential on the changes in substantive law made by the amending Bill?

11. In particular, have you amended all internal cross-references in the principal Act (e.g. to include new references) to take account of additions to or alteration or repeal of its provisions?

12. Have you made all consequential amendments to other legislation to reflect the legal changes that result from the amending Bill?

13. In particular, have you altered all cross-references to the principal Act in other legislation to take account of those changes?

14. Where you are drafting an amending Bill, does that Bill contain all the necessary features:

    (i) a suitable short title consistent with conventions;
    (ii) commencement provisions, if some or all the amendments are to be brought into force at a date after assent;
    (iii) application provisions, if any limitations are intended;
    (iv) unambiguous directions as to which provisions are amended and the nature of the amendment;
    (v) transitional or savings provisions made necessary by changes or repeal of provisions;
    (vi) the correct lay-out, section notes and punctuation?

3.2 Explaining the Effects of Amendments

Textual amendment enables users to produce an up-to-date text by annotating the original. It facilitates the preparation and publication of a consolidated text. But a common complaint is that the amendments themselves, as they appear in the amending Bill, are for the most part

incomprehensible. To understand their effect, the user must read them with and in the context of the legislation they amend. If the amendments only are presented:

(i) those affected by them have to undertake the process of annotation and analysis to discover how the law is changed;
(ii) legislators must link them to the text of the principal Act in order to work out the aims and detailed nature of the changes in order to debate the legislation.

Non-textual amendment was developed to reduce these problems, particularly for legislators. The amendments are drafted so that their effect can be discovered within the four corners of the amending Bill. Although the legislative context set by the principal Act has to be understood, this method makes it comparatively easy, by reading the amendment itself, to see what is intended.

If textual amendment is used, additional information is needed to show how the amendments fit with the existing law and to explain the changes. A number of devices are in use:

1) Adding explanatory notes;
2) Appending the original provisions to the Bill;
3) Setting out the consolidated provisions in an explanatory memorandum;
4) Printing the original provisions with the changes highlighted;
5) Interleaving explanatory material;
6) Reprinting the principal Act as amended.

1) Adding Explanatory Notes

An indication of the subject-matter of a provision that is being amended may be given by inserting a short descriptive note in the directions. This is typically placed in brackets after the citation of the section to be amended. It can repeat the original side note or it can be composed for the purpose. It should give the gist of the subject-matter. But as the description must be very short, these notes offer only limited aid.

Example Box 1

Amendment of section 16 of the principal Act.

12. Section 16 of the principal Act (*which provides for the contents of zoo licences*) is amended by replacing "the operator is responsible for the administration of the zoo", with "the operator is responsible for the administration and proper conduct of the zoo".

Although the amendment involves the addition of only three words, the device of substituting a unit of text in which the words are now included helps understanding of the change.

2) Appending the Original Provisions to the Bill

Sections or subsections amended by a Bill can be printed, in their existing form and order, at the end of the Bill for information. Legislators in particular are saved the labour of having to search out the original provisions in order to find out the effect of the amendments. This is a simple and easily arranged aid.

3) Setting out the Consolidated Provisions in an Explanatory Memorandum

This method again is principally for the benefit of legislators. The memorandum contains:

(a) a narrative statement of the objects and reasons of the Bill at large;
(b) a detailed explanation of the aims and effect of each set of amendments;
(c) a reprint of the relevant sections in which the amendments are incorporated.

This device reduces the need to work out from two sets of legislative text what is intended. It is particularly valuable where the amendments are numerous and substantial. But in such a case, the memorandum itself is likely to be a large document. Its preparation makes heavy demands:

(i) on Legislative Counsel, who typically have the responsibility for preparing it;
(ii) on the printing resources, as this extra document must be printed and proof-read in the short time between completion of the final version of the Bill and its introduction into the Legislature.

In preparing a memorandum of the kind, Legislative Counsel must ensure that:

(a) the narrative statement objectively states the legal effect of each proposed amendment;
(b) the consolidated provisions correctly incorporate all the proposed amendments, preferably in a form that indicates where changes are being made (e.g. by highlighting them).

This is a time-consuming task that, in some countries, is beyond the drafting resources available. It is one that cannot conveniently be assigned to persons who have not been closely involved with the preparation of the text of the amending Bill. On the other hand, modern word-processing technology allows these tasks to be performed rather more expeditiously than in the past.

Some jurisdictions make a practice of publishing the explanatory memoranda after the Bill becomes law, for the use of those affected by the new Act. But if the memorandum states the position as at the date the Bill was first introduced, there may be important discrepancies from the position under the finally enacted Bill, as a result of Legislative action. To be reliable, the memorandum has to be re-written for general use, an additional task that may be thought to be an uneconomic use of scarce drafting resources.

4) Printing the Original Provisions with the Changes Highlighted

The *complete* section as amended is printed in the amending clause, with the changes and additional provisions marked in the text. Special printing attributes are used to highlight the text that is added or deleted. The user can see immediately how the changes affect each amended section of the principal Act.

Example Box 2

Amendment of section 9 of principal Act.
8. Section 9 of the principal Act is amended to read:

Minister to specify standards.

9.-(1) After consulting *[the National Federation of Zoological Gardens]* **such persons as the Minister considers appropriate**, the Minister may specify **by regulations** standards of modern zoo practice, that is, standards with respect to the management *[and control]* of zoos and the animals in them.

(2) Regulations under subsection (1) must be laid before the Legislature, immediately they are made, and shall cease to have effect if negatived by resolution of the Legislature within 40 days after being laid.

Additions or changes: **bold underline**; repeals: *[italics in brackets]*

The purpose of highlighting is not just to indicate the changes that are proposed; they are intended to confine debate to these items. For under

this process only the highlighted amendments are enacted, not the full section. The Rules of Procedure of the Legislature may need to be amended to bring this about.

The Act too may be published in the same form for the guidance of users. But any changes in the amendments made by the Legislature must be incorporated in this form when it is sent for final printing.

When this method is used:

(i) distinctive printing features must be used for each type of amendment, which are different from any other printing attributes that are used in the statute;
(ii) the conventions relating to these special printing features must be explained in the statute, preferably at the foot of every page.

5) Interleaving Explanatory Material

Explanatory material may be included in the body of the amending Bill itself in such a way that the legislator, in particular, can read the purpose and effects of the amendments in the same place as the amending provisions. This can be done in a number of ways:

(i) the relevant provisions of the principal Act with the amendments incorporated are set out on the page opposite to the amending clause; the narrative explanatory material is contained in a separate memorandum;
(ii) both the consolidated provisions and the specific explanatory material are set out on the page opposite to the amending clause;
(iii) the relevant explanatory material is printed in a different format immediately after the amending clause;
(iv) the amendments are printed as highlighted text in a consolidated version of the provision (as described earlier), and followed by a narrative explanation of their objectives and effect, set in a different format and font from the legislation.

Example Box 3

Amendment of section 9 of principal Act.
8. Section 9 of the principal Act is amended to read:

Minister to specify standards.
9.-(1) After consulting *[the National Federation of Zoological Gardens]* **such persons as the Minister considers appropriate**, the Minister may specify **by regulations** standards of modern zoo practice, that is, standards with respect to the management *[and control]* of zoos and the animals in them.

(2) Regulations under subsection (1) must be laid before the Legislature, immediately they are made, and shall cease to have effect if negatived by resolution of the Legislature within 40 days after being laid.

Additions or changes: **bold underline**; repeals: [*italics in brackets]*

Section 9 gives the Minister power to prescribe standards for modern zoo practice. Under the amendment this is confined to standards of management. The amendments also require the power now to be exercised by making regulations that must be laid before the legislature which may negative them by resolution within 40 days after they are laid. Before making the regulations, the Minister is under a duty to consult. The amendment extends this by allowing the Minister to consult as he thinks appropriate, rather than with the NFZG alone.

This method can make a major contribution in communicating outside the Legislature the impact of amending legislation. But again it must be up-dated before the Act is printed for public use, if it is to be reliable. It also gives rise to legal questions as to the status of the explanations for the purpose of interpretation, which may be resolved in the Interpretation Act. Here too, this method imposes a heavy responsibility on Legislative Counsel and on the printing capacity of the State.

6) Reprinting the Principal Act as Amended

The complete version of the principal Act incorporating the amendments made by the substantive clauses of the Bill can be printed in a Schedule to the amending Bill. This allows users to see the full effects of the amendments in their proper place. It has particular value when the Bill makes a large number of substantial changes to the Act. But several shortcomings in this device may explain why it is not often used:

(i) if the substantive amendments in the Bill are altered during the legislative process, the Schedule must also be altered, by equivalent amendments;
(ii) if any discrepancy is found between an amending clause in the Bill and the text in the Schedule, it may be uncertain which is authoritative;
(iii) when the Bill becomes law, two versions of the same legislation exist - the original Act plus the substantive amendments and the Scheduled text. Which is the authoritative version that should be cited? To which should future amendments be directed?

A typical and useful method is to issue an authoritative consolidation of the statute to replace the principal Act and its amendments. In some jurisdictions, executive power to do this is given to, e.g. the Attorney-General or a Law Revision Commissioner. The power is typically found in the Interpretation Act or the Law Revision Act.

SELF ASSESSMENT EXERCISE 1

Note down (with references) any power in your jurisdiction to issue a consolidated version of individual statutes that becomes authoritative on publication.

You will be expected to follow your house-style in providing explanatory material to support amendment Bills. But you may find it helpful to be familiar with other ways of communicating the effects of amendments, just described.

SELF ASSESSMENT EXERCISE 2

Note down briefly, for your jurisdiction:

1. What arrangements are used for explaining amending provisions.
2. Whether explanations are subsequently published for general use.
3. Whether Legislative Counsel prepare the explanatory material.

7. Drafting Amendments for the Legislature

Members of the Legislature have powers to move amendments to most Bills that are introduced into their Chamber, as long as they are within the scope of the Bill and in other respects meet requirements set by Rules of Procedure.

SELF ASSESSMENT EXERCISE 3

Note down for your jurisdiction:

1. At what stages of the legislative process members may move detailed amendments to a Bill.
2. References to those Rules of Procedure of the Legislature that regulate the moving of such amendments.

Legislative Counsel typically are assigned duties with respect to amendments of this kind. Although those duties may differ from place to place, Legislative Counsel working in the service of the Government are typically responsible for:

(i) drafting amendments that Government may wish to move (e.g. in response to issues raised during the first stages of the legislative process or because of second thoughts);
(ii) monitoring and advising the client Ministry on amendments moved by members of the Legislature, in particular as to their impact upon the legislative scheme and their consistency with the Bill.

In some jurisdictions, however, drafters may also have responsibilities with respect to the preparation of members' amendments, especially those who hold an office in the Legislature's Secretariat, for matters such as:

(a) advising members or committees on amendments they may wish to move and assisting in or undertaking their drafting;
(b) monitoring and advising on the acceptability of draft amendments, in particular on their compliance with:

(i) the Constitution and other legal constraints;
(ii) in a federal system, the limits on the competence of the Legislature;
(iii) in a bicameral system, the limits on the competence of the Chamber;
(iv) the scope of the Bill (e.g. as set by the long title).

In some systems, drafting amendments for members does not fall within the formal responsibility of any official drafters. Members are left to their own resources. This may have an adverse effect on the legislative performance of the Legislature.

SELF ASSESSMENT EXERCISE 4

Note down which of the functions just described (if any) are within the responsibilities of your Office or of the Secretariat of the Legislature.

Amendments to a Bill made by the Legislature may impact heavily upon the structure and integrity of the Bill. Successful amendments to any Bill, however made, must be completely consistent with it. That is not always a first consideration for their movers. Some are moved to provide vehicles for a debate on policy, rather than with any expectation of success. They may be devised to give the opposition an opportunity to oppose an important element of the Bill, as in the case of "wrecking amendments" which propose a contradictory policy. The political purpose of these amendments is generally obvious and they are likely to be voted down by Government supporters, since they place the legislative policy itself in jeopardy. In these cases, meticulous drafting of such amendments is less important than providing their proponents with the opportunity to press their chosen lines of argument.

Other amendments, however, are aimed at altering particular provisions, perhaps to take account of some factor that the movers consider to be deserving. They may be genuine attempts to improve the legislative scheme or to take account of considerations that have been overlooked or understated or are differently perceived. Government may be prepared to accept some of these in principle; others will be opposed as undesirable modifications to the scheme.

Any amendments moved in the Legislature that have the likelihood of success must be drafted to the same standards as are applied to drafting amending Bills. They should:

(i) be completely consistent with the legislative policy and scheme as expressed in the remainder of the Bill;
(ii) be consistent with the language, terminology and style of the other provisions;
(iii) fit with the syntax, grammar and punctuation of the provisions they amend;
(iv) include any consequential amendments to other parts of the Bill that their adoption makes necessary.

In some jurisdictions, responsibility for protecting the integrity of the original Bill falls on the Legislative Counsel who drafted it. They insist that all proposed amendments are vetted by them so that:

(i) the responsible Minister can be advised whether an amendment should be opposed in its present form because of its adverse effect on the Bill;
(ii) if the Government accepts the principle of the original amendment, they can prepare, if necessary, an alternative version that is wholly consistent with the Bill.

A major reason for the attendance of Legislative Counsel in the Chamber or committee is to advise the Minister as to the acceptability of detailed amendments moved during the debate on the Bill.

In some jurisdictions, Legislative Counsel may be asked to review the Bill as passed by the Legislature before it goes to the President for assent, if the Constitution allows the assent to be refused and the Bill referred back to the Legislature. This provides an opportunity for major contradictions, identified by Government, to be re-examined by the Legislature.

SELF ASSESSMENT EXERCISE 5

Check and note down, for your jurisdiction, whether Government drafters:

1. Monitor and advise on members' amendments in this way.
2. Attend at debates on their Bills in the Legislature.

In other jurisdictions, the responsibility for non-Government amendments rests in the main with drafters attached to the Secretariat of the Legislature and may include:

(i) drafting amendments for members or for the committee to which a Bill has been referred;
(ii) attending at debates on the Bill in the Chamber or in a committee, for the purpose of advising on matters concerned with draft amendments.

These officers are typically officers of the Legislature; the Government is not their client. They have no immediate responsibility for the overall Bill. Yet the original drafters may no longer have authority to protect the integrity of the Bill since it has passed out of the control of Government into that of the Legislature. In such a case, a residual responsibility falls upon the Legislature's drafters, when drafting or advising on amendments, to take steps to prevent the adoption of amendments that contradict or are inconsistent with other provisions of the Bill, and to offer alternatives.

SELF ASSESSMENT EXERCISE 6

If, in your jurisdiction, drafters are assigned to the Legislature, note down whether formal or informal consultation takes place between the drafter of the Bill and the Legislature's drafters in relation to the non-Government amendments.

4.0 CONCLUSION

When drafting amendments, the most common mistakes arise from inadequate planning or an unsystematic approach from rushing the task or skimping on the scrutiny of the detail. Textual amendment enables users to produce an up-to-date text by annotating the original. It facilitates the preparation and publication of a consolidated text.

5.0 SUMMARY

In this unit, we have considered what can go wrong when drafting amendments, the effects of amendments and drafting amendments for the legislature. You should now be able to:

(i) Avoid the more common errors when drafting repeal and amendment provisions;
(ii) Explain the effects of amendments;
(iii) Draft amendments for the Legislature.

6.0 TUTOR-MARKED ASSIGNMENT

Redraft the following Bill making as many improvements as you consider necessary.

Short title

1. This Act may be cited as the Supply Division (Amendment) Act 2004.

Interpretation

2. In this Act, "Supply Division" means the department of Government responsible for the procurement, provision and maintenance of Government supplies.

Extension of Special Fund

3. The Special Fund (Government Supplies) Act 2003 is hereby amended in section 4 by the addition at the end of section 4, of a new subsection (2) as follows:

"**(2)** Without prejudice to the provisions of subsection (1) hereof:
(a) any moneys in the possession of the Supply Division and being applied for the procurement, provision and maintenance of Government supplies immediately prior to the commencement of this Act; and
"(b) any assets or properties in the possession of the Supply Division immediately prior to the commencement of this Act,
shall be deemed to be part of the Special Fund".

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*. Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

UNIT 2 WHEN DO WE NEED TRANSITIONAL AND SAVING PROVISIONS?

CONTENTS

1.0 INTRODUCTION

In this unit, we are concerned with matters that are often vital for the coherent introduction of new legal arrangements, since they determine how circumstances that have already arisen under existing law are to be treated after that law is repealed or amended, and especially when you are replacing it with new legal arrangements. Matters of these kinds require the drafter to exercise careful judgments as to when they are needed and what they should contain.

We focus particularly on those final provisions which drafters may need to ensure that the relationship between existing law and the new legislation, and the transition from one to the other, are properly regulated.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- decide when to provide necessary saving and transitional provisions.

Your aim in this unit is to make yourself familiar with the way in which transitional and saving provisions are dealt with in legislations and to develop approaches that are appropriate to enable you to decide when

such provisions are needed; and the kind of matters that should be covered by these provisions.

3.0 MAIN CONTENT

3.1 The Function of Transitional and Saving Provisions

These types of provisions may become important when the legislation you are drafting alters existing legislation, by repeal or by amendment. Such alterations have legal consequences; the former law is no longer as it was. Accordingly, the status of activities or transactions conducted or begun under that law has to be legally certain. It can be important for those who have relied upon a law to know exactly where they stand after its repeal or amendment. In the main, such matters are governed by a body of rules typically contained in the Interpretation Act. However, where those rules do not cover, in the way required, existing circumstances upon which your Bill will impact, you must provide additional rules that state the legal effect of the change of the law upon them.

Cases also arise when it is impractical to move directly from the replaced law to the new regime established by your Bill. In such cases, you may need to provide some temporary rules to enable the transition to be made efficiently.

3.2 The Difference between Saving and Transitional Provisions

A saving provision is one that preserves in force some law or legal provision, or a right or power, which, without the saving, might cease to have legal effect. This can happen when an existing law is repealed, repealed and replaced, or amended. The saving is needed to prevent the change in the law altering the law or right.

Example Box 1

1. The repeal of an Act automatically brings about the revocation of subsidiary legislation made under the Act. If this is not to happen, the subsidiary legislation must be expressly saved.

2. Legislation may create a new licensing scheme to replace an existing one. What is to happen to licences already granted? If they are to continue to be effective under the new scheme, a saving provision is needed.

Transitional provisions contain rules to enable a smooth transition to be made from reliance upon existing law to operating under new law that repeals, amends or replaces it. They may be used to:

(i) determine how activities or circumstances that began under the earlier law are to be dealt with when the new Act is in force;
(ii) set out the ways whereby those working under the earlier law can adapt their current activities to meet the new legal conditions.

Transitional provisions, then, have much in common with saving provisions. In some instances, there is little material difference in effect between them. The saving of existing law, but modified to bring it into line with the new rules, may produce the same result as a transitional provision which applies a modified version of the new law to existing cases. Both are typically put together in the same group of final provisions.

Both are the consequence of the general law on the legal effect of repeals and amendments. In the principle, the need to provide them can arise whenever your Bill alters a provision of an existing law. However, they are most likely to be called for when you are making major changes to substantive rules, in particular changes that involve repeal. However, in some cases the matter may already be satisfactorily provided for under the general law. We look at how the general law operates in this respect in the next unit.

3.3 What Purposes Do These Provisions Serve?

Saving provisions are necessary to *maintain a legal position* arrived at under the existing law, after a change has been made to that law by repeal or amendment. That legal position may, e.g.:

(i) comprise a statutory provision or a common law rule;
(ii) be an acquired right or privilege;
(iii) be a duty or liability imposed by or under that law.

Savings do not institute *change*s to a legal position. They essentially *preserve* something that already has legal existence. Use them to prevent:

(i) repeal of existing statutory provisions or common law rules that could be construed as, but are not intended to be, inconsistent with the new legislation;

(ii) undesired or unintended alteration of rights, privileges, duties or liabilities derived under existing law that could follow from the repeal or amendment of that law.

In particular, use them to ensure that the courts cannot construe the new legislation as repealing a legal rule when that is not your intention. In those cases, savings are inserted "out of an abundance of caution", to put the matter beyond doubt.

Example Box 2

1. A disqualification under section 12(4) of the repealed Act and in effect at the commencement of this Act continues to have effect and is to be treated as if it had been made under section 16(5) of this Act.

   This saves a liability that might otherwise have died with repealed Act. Further, it equates the disqualification with those imposed under the new Act, so that legally all can be treated in the same way in future.

2. In an Act authorising a statutory body to carry out certain works affecting public highways, doubts may exist as to its liability under earlier legislation for loss or damage occasioned by their work.

   Nothing in this Act relieves the Authority from liability to compensate under the Workers' Compensation Act in respect of loss or damage arising from the execution of works under this Act.

One principal case is to prevent the courts applying the doctrine of *implied repeal* (which we examined earlier on).

Preservation of existing statutory rules

If rules in the new Act overlap with existing rules on the same matter, the courts may construe the later as repealing the earlier, in whole or in part. A provision saving the earlier law prevents a question arising that the implied repeal has occurred.

Preservation of Common Law Rules

Although the courts presume in the absence of a clear intention, that legislation does not alter common law rules, they may still conclude, where statutory rules overlap them, that this was intended in the particular case. So, if your draft may be construed as conflicting with a common law rule that is not to be disturbed, put the matter beyond doubt with a provision that expressly saves that rule.

Transitional provisions determine whether:

(i) the new enactment is to apply to classes of cases, or to activities, that came into existence or were begun under the repealed law;
(ii) the enactment applies to such existing matters in the form that it applies to prospective ones, or only with stated modifications;
(iii) any special interim arrangements are to be followed in the transition from the old to the new legal regime.

If a body of law has been in force for some time, giving full and immediate effect to a substantial change to it, and especially to its replacement, may not be straight-forward:

(i) it may be too much to ask people who have started an activity under one law to arrange their affairs so as to comply with the new regime immediately, or to discontinue their activity and start again under the new law;
(ii) complex changes may need to be phased in, and existing arrangements phased out, over a period of time and in orderly fashion;
(iii) it may be impracticable to give effect to all parts of the new Act from the first moment it comes into force.

Postponing commencement of the new law may not meet the case, since your client may require:

(a) the new regime to have prompt application to *new* cases;
(b) preliminary steps to be taken under the new Act promptly, in order to make the new legal regime fully operational at the earliest moment.

So, transitional provisions may be needed to:

(i) state precise steps for bringing the new body of law into *full operation*. (This is a different question from when the Act is to come into force, which we looked at when considering *Preliminary provisions* in **LED: 602**);

(ii) modify some of the effects of the new law, in a transition period, especially in the interests of those who have begun, but not completed, transactions on the basis of the replaced law;

(iii) make interim arrangements that are to have effect between the ending of the old rules and the full implementation of the new ones.

3.4 Importance of These Provisions

For persons affected by a new Act, these provisions may initially be just as important as those that are to regulate their future activities. They want to know whether that Act has, or has not, altered the legal position they have *already* acquired under the law that is being changed or repealed, and how the new arrangements are to be phased in.

Client Ministries, when planning new legislation, have their sights set on the new arrangements; their principal objective is to put the new policy objectives into effect. It is only too easy to overlook the legal steps needed to move from the present legal position to the new. Drafters have a particular responsibility to prevent these matters from being neglected. Ensure that the client considers these issues and, where necessary, gives you the necessary instructions.

3.5 Are These Provisions Required in all Bills?

When an Act alters existing law, the position of those who have taken action in reliance on that law can come into question. As you will see from the next unit, most of those cases are already dealt with by the general rules on the effects of repeals in the Interpretation legislation. For those cases, savings are not strictly required.

However, dangers lurk in one-size-fits-all provisions of this kind. Savings and transitional provisions relate to circumstances arising under the legislation in preparation. Dealing with all of them there makes it more likely that they will be suitable and that future problems from applying more generalised rules are avoided. Consider carefully whether users of the legislation will be helped by dealing with these matters in your draft rather than relying on the Interpretation legislation.

In some jurisdictions, it is the practice to authorise these provisions to be made by regulations. This may be useful for cases where complicated and lengthy provisions are needed. But there are disadvantages:

(i) saving provisions are best worked out as a part of the legislative scheme, and can be done most satisfactorily by the drafter concerned with that task;

(ii) where major issues are involved, as e.g. the dissolution of a statutory corporation, the Legislature is likely to have a sufficient interest in the legal consequences to merit dealing with the matter in the Bill;
(iii) the more complex the matter, the more likely it is that these provisions will modify the working of the new Act for a period of time after it comes into force. Again, Legislative approval may be appropriate for that.

3.6 When Should Drafters Work On These Provisions?

You may decide that some provision is needed in the very early planning stage, e.g. because from the start, you are aware of existing legal rules or certain activities that need to continue. But often these matters cannot be accurately determined until you have completed the new substantive rules. It is only then that you can work out the precise impact of the new scheme upon existing circumstances.

So, prepare these provisions only when the Bill has reached an advanced stage. They are best dealt with at the same time as repeals are worked out.

In establishing your work programme for preparing legislation, allocate time to enable you to:

(i) work out which are the matters on which savings and transitional provisions seem likely to be required;
(ii) consult with your instructing officer as to their purpose and content;
(iii) draft the provisions according to those instructions.

3.7 How to Determine Whether these Provisions are Needed

In particular:

(i) assess the effects of the rules on the provisions that are to be repealed; and
(ii) if those rules lead to results that are unacceptable or fail to cover cases that are likely to arise, work out how to deal with the matter appropriately and *expressly*.

4.0 CONCLUSION

Saving and transitional provisions become necessary when the legislation you are drafting alters an existing legislation, by repeal or amendment. These provisions are important to regulate the present state of affairs, before the legislation to regulate future affairs come into force.

5.0 SUMMARY

In this unit, we considered transitional and saving provisions. You should now be able to determine when these provisions are needed.

6.0 TUTOR-MARKED ASSIGNMENT

Explain the difference between saving and transitional provisions using appropriate examples.

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

UNIT 3 LEGAL EFFECTS OF REPEALS AND THE CONTENT OF SAVING AND TRANSITIONAL PROVISIONS

CONTENTS

1.0 INTRODUCTION

This unit deals with the consequences that follow from the repeal or amendment of existing law and the content of saving and transitional provisions. You are invited to examine closely how the sections of your Interpretation Act dealing with the legal effects of repeals affect the treatment of these provisions. The importance of saving and transitional provisions is often overlooked and their preparation can be difficult for those unfamiliar with their use.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- explain the legal consequences of a repeal
- express saving and transitional provisions.

3.0 MAIN CONTENT

3.1 The Legal Consequences of Repeal

The common law evolved rules to govern the legal effect of repeals (and amendments that displace a statutory provision), some of which have been modified by general legislation, typically the Interpretation Act. But the legal effects are not the same for all types of repeals:

(i) one that merely repeals (**simple repeal**) changes the law without putting new provisions in its place;
(ii) one that **repeals and re-enacts** aims to produce legal continuity; the law does not change;
(iii) one that **repeals and replaces** (which may include some cases of amendment) brings an enactment to an end but substitutes new arrangements that must take up immediately where the repealed enactment left off.

In this part, therefore, we look at the following:

(a) the common law rules.
(b) the statutory modifications to those rules in respect of:

(i) simple repeal;
(ii) repeal and re-enactment;
(iii) repeal and replacement.

When you are preparing an instrument that requires repeal, be clear which of these cases applies.

3.1.1 The Common Law Rules on the Effects of Repeals

At common law, an Act or subsidiary instrument that is repealed is deprived of any present or continuing legal effect. Therefore, on the repeal:

(i) all institutions or offices established by or under the legislation cease to exist;
(ii) regulations made under the legislation are no longer law;
(iii) offences committed before the repeal cannot be prosecuted or penalties imposed;
(iv) proceedings commenced under the terms of the repealed legislation must be stayed;
(v) legal rules (including common law rules) previously repealed by the legislation are revived for future application.

At the same time, the common law recognises the need to protect rights and benefits that have been acquired, and penalties and liabilities that have already accrued, *before* the repeal took place. So, at common law:

(i) all transactions carried out and *completed* under the enactment whilst it was in force, and the rights and benefits acquired from them, remain valid;
(ii) all penalties already imposed or liabilities that have accrued are unaffected.

3.1.2 Modifications Made by the Interpretation Act

Interpretation legislation contains provisions that confirm some, and reverse others, of these common law rules. These differ, to an extent, according to the nature of the repeal. (There are small, but sometimes significant, variations between jurisdictions on these provisions.) Their general effect is to set standard rules, which in large part constitute general saving or transitional provisions.

1. Simple Repeal

Interpretation legislation now contains rules on most of the matters originally covered by the common law. These take effect automatically by operation of law when an enactment is repealed.

SELF ASSESSMENT EXERCISE 1

Check the provisions of the Interpretation Act dealing with the legal effect of repeals.

By adding the section reference in the appropriate place below, indicate whether the common law rule on the item specified (as described in the Course) is confirmed or modified.

If your Act is silent on any item, the common law rule is impliedly confirmed.

Type of repeal	**Confirmed**		**Modified**
	Express	**Imply**	
Abolition of institutions and offices			
Regulations			
Offences			
Proceedings already instituted			
Rules previously repealed			
Completed transactions			
Penalties imposed and liabilities accruing			

Since the Interpretation Act contains general rules on the effects of simple repeals:

(i) express provision to reverse the effects of the common law rules on those matters are not necessary; the Act does that for you;
(ii) this reduces the number of matters on which you need to make transitional provisions consequent upon a repeal.

These modifications apply equally to the repeal of an *enactment* (i.e. a particular section or subsection) *within* an Act or subsidiary instrument, as they do to the repeal of the Act or instrument itself. To that extent they apply to amendments.

2. Repeal and Re-Enactment

Where legislation consolidates and re-enacts earlier provisions, rather different considerations have to be applied to the repeal of those provisions. The essential objectives in making a repeal in this case are:

(i) there must be no break in the continuity between the replaced and the replacing legislation;
(ii) the law is to remain the same, although it is now found in a different instrument;
(iii) the replacing legislation must be treated as supporting the same institutions as were created by the original;
(iv) the replacing legislation must be interpreted in the same way as its predecessor.

For these reasons, the repeal of the original legislation cannot be accompanied by a *change* in the law, except in the formal sense of

clearing from the statute book an instrument that is no longer the source of that law. The provisions in the Interpretation Act on *simple* repeals do not go far enough for this purpose; other common law rules must also be set aside.

This is usually provided for in a separate section in the Interpretation legislation.

SELF ASSESSMENT EXERCISE 2

Check the provisions of the Interpretation Act dealing with the effects of repeal and re-enactment.

By adding the section reference in the appropriate place below, indicate whether the common law rule on the item specified (as described in the Course) is confirmed or modified.

Type of repeal	**Confirmed**		**Modified**
	Express	**Imply**	
Abolition of institutions and offices			
Regulations			
Offences			
Proceedings already instituted			
Rules previously repealed			
Completed transactions			
Penalties imposed and liabilities Accruing			

The Act typically contains other provisions to maintain the continuity of re-enacted legislation through the transition:

(i) the repealed enactment remains in force until the re-enactment comes into force (cp. **Section 4(2)(a)** of the **Interpretation Act**);
(ii) references to the repealed enactment in other written laws are to be construed as references to the equivalent provision of the re-enacting legislation (cp. the **model Act, section 38(a)**). See also **Section 4(2)(b)** of the **Interpretation Act.**

These provisions apply equally to the re-enactment both of an entire instrument and of an enactment (i.e. a section or subsection) within such an instrument.

The provisions on re-enactment are usually stated to apply also to legislation which re-enacts provisions "*with modifications*". This term covers only those changes that make minor corrections or clarify the original provisions or are presentational (i.e. only where the substance remains essentially the same). They do not extend to cases of *substantive* changes in the law, e.g. to rights and liabilities. So, they do *not* apply to repeal and replacement legislation.

3. Repeal and Replacement

Repeal in this case is incidental to replacing the earlier law. Yet the repeal functions in the same way as a simple repeal; it is intended to bring the existing law to an end. So, the common law rules, as modified by the Interpretation Act's general rules on simple repeal, apply.

But those rules may not be suitable for some matters. The new law is enacted to take the place of the old, yet:

(i) there must be continuity between the old law and its replacement, despite the change in the rules;
(ii) at the same time, arrangements instituted under the old law may need to be adjusted to enable them to be continued under the new, changed law.

Few Interpretation Acts are directed to this case, probably because the varied circumstances that can arise do not lend themselves to generalised rules. Only one provision is typically found. This ensures that there is no time gap between the end of the old and the commencement of the new (cp. **Section 4(2)(a)** of the **Interpretation Act**).

In the absence of any general rules, and when it is necessary to avoid the application of the simple repeal rules, you, as the drafter, must deal in the replacement Bill with the change of legal regime by including specific provisions, in the form of saving and transitional provisions. Indeed, it is in this case that transitional matters need your closest attention.

3.1.3 How the Interpretation Act should be Used

Keep the provisions on the consequences of repeals constantly in mind. Whenever drafting legislation that repeals or replaces an enactment, take account of these general rules. In particular:

(i) never take for granted that Interpretation Act covers a particular case;
(ii) if in doubt, provide for the matter expressly;
(iii) verify that the Act extends to a matter under consideration before deciding to rely upon it;

(iv) if the Act covers all the necessary cases in the way required, additional provisions are not strictly necessary, but consider whether in any particular case users might be helped by including express provisions;
(v) if the Interpretation Act does not cover a necessary case, or covers it in a way that is not appropriate, make the necessary provision.

SELF ASSESSMENT EXERCISE 3

The reference to this unit contains a copy of section 46 of the Interpretation Act, c.I-21 (Canada). This provides explicitly for **repeal and replacement**. So it contains useful precedents when you are concerned with any of the matters with which the section deals. For future reference, note down in the spaces provided the matters dealt with in the section.

1.
2.
3.
4.
5.
6.
7.
8.

3.2 The Content of Saving and Transitional Provisions

3.2.1 Matters likely to require these Provisions

Each legislative project has its own distinctive requirements. But in general terms, these provisions are concerned with the future status of circumstances or activities that have arisen or been undertaken under enactments that no longer contain present law.

Here is a check list of the kinds of existing cases that regularly call for consideration when working out saving and transitional provisions:

1. Institutions or offices established under the repealed law and appointments to them;

2. Legal proceedings already commenced, but not completed;

3. Rights of appeals in respect of proceedings instituted under the repealed law;

4. Powers to impose or enforce a penalty or punishment in relation to offences committed before the repeal;

5. Licences issued and still in force;

6. Duties or liabilities subsisting at the time of the change;

7. Rights (such as pensions), or financial benefits or allowances, subsisting at the time of the change;

8. Subsidiary legislation and statutory orders made under the repealed law;

9. Forms and other documentation having effect at the time of the change;

10. References in current law to replaced enactments;

11. Action taken as legally required, prior to the change, as a preliminary to some administrative decision not yet made;

12. Taking account of a period of time already accrued under a scheme in the repealed law for the purposes of the scheme under the new law;

13. Disposal of assets, liabilities and functions of bodies dissolved by the new law;

14. Interim arrangements to phase in new regulatory arrangements.

With the exception of the last two cases (which are likely to call for a body of temporary rules), your task is to determine in relation to matters of these kinds whether to:

(i) save them as they were provided for under the repealed law;

(ii) save them but subject them to modified regulation under the new legislation;
(iii) subject them to a different body of rules.

When matters are saved but subjected to new rules, they are very little different in effect from transitional rules that deal with past circumstances.

3.2.2 How to Express Unqualified Saving Provisions

You can find precedents for savings matters as they are regulated under the repealed law in the provisions on repeal in **Section 6** of the **Interpretation Act**.

Simple saving clauses

Example Box 3

Saving.
27. The repeal of the Judgment Enforcement Act does not affect the institution or continuation of proceedings for giving effect to a final judgment of a court obtained before the coming into force of this Act; such proceedings may be instituted or continued as if the Judgment Enforcement Act had not been repealed.

Saving of titles acquired under Cap. 202.
36. The repeal of the Land Use Act does not affect a title to property acquired for value under that Act before the coming into force of this Act.

Preservation of existing rights

One special use of savings is to prevent *new* rules having a wider effect than is intended. A saving clause can ensure that legal consequences that normally apply under existing law in particular circumstances are, or are not, attracted to such cases when they arise under the new legislation.

Example Box 4

The criminal law is to be amended to impose specified obligations on persons making certain kinds of contracts and to provide for the penalties for non-compliance. At common law, certain forms of illegality may affect the validity of the contract. Such a rule might apply to this case. If this is not to be so, a saving clause puts the matter beyond doubt. Thus:

(3) Nothing in this section affects the validity of a contract that is entered into in breach of this Act.

Dissolution of Statutory Bodies

One common case requires careful attention, as it can affect the interests of many people is where the Bill is to provide for an existing statutory body to be dissolved.

Example Box 5

On dissolution of a statutory corporation where no other body is set up or designated to replace it, it may be necessary, for a limited period:

1. to save those parts of the existing law that establish redundancy and pension rights of the corporation's employees, and provide for legal proceedings in that connection (on that latter, see the **model Interpretation Act, section 39(1)(e)** and **Section 6(1)(e)** of our **Interpretation Act**);

2. to keep its funds in existence for a time to provide for the settlement and payment of claims against the dissolved body;

3. to preserve the rights of existing claimants against the dissolved body to bring proceedings.

Transitional provisions are also likely to be needed to make additional rules for these and similar matters.

3.2.3 How to Express Transitional Provisions Affecting Past Matters

Most transitional provisions are concerned with subjecting matters that arose under a repealed law to different rules, typically those created by the repealing law. In one sense the provisions guarantee the continuation of past matters, so saving them, but they require those matters to be treated in a different way legally. The following are illustrations of this treatment.

1. To Continue Current Legal Proceedings

Legal proceedings, prosecutions, or legal processes commenced under the replaced legislation are commonly required to be completed in accordance with the procedures created by the new Act, rather than under the replaced law.

Example Box 6

10. All legal proceedings instituted under the [repealed] Act before the commencement of this Act are to be tried and determined in accordance with this Act.

25. An action for damages in connection with a decision of the Minister under section 17 of the [repealed] Act, if instituted before the commencement of this Act, is to be treated as having been instituted under section 16 of this Act.

The effect of section 25 is that the new legislation governs the way in which the action is conducted and concluded.

2. To Give Continued Effect to Action Already Taken

It is common practice to equate action initiated under a replaced law with similar action under its replacement, to enable its completion, e.g. by enforcement or appeals, in accordance with the provisions of the new Act.

Example Box 7

29. Anything done under the [repealed] Act has effect as if done under the corresponding provision of this Act, to the extent that it could be done under that provision.

The effect of section 29 is that any further action required in respect of some thing done under the repealed law must be carried out in the way stated in the new legislation. The final phrase excludes matters no longer within the contemplation of the new legislation.

3. To Apply New Procedures to Existing Cases

If your Bill contains new legal procedures for dealing with the kinds of matters mentioned in the repealed legislation, these may be appropriate for those matters begun under that legislation that is yet to be completed.

Example Box 8

31. A right of appeal to the Minister, in respect of the valuation of any land, that was subsisting under the [repealed] Act immediately before the commencement of this Act may be exercised, and is to be heard and determined, as if it were a right of appeal under this Act.

The effect of section 32 is that the way appeals are dealt with under the new legislation must be followed in cases where a right of appeal has arisen under the repealed law.

4. To Take Account of a Period of Time that has Already Accrued

An accrued period of time that counted towards an entitlement under the replaced law is commonly treated as counting towards an equivalent benefit under the new Act.

Example Box 9

35. In calculating the period of 2 years for the purposes of section 12, a period of time that had accrued under section 7 of the [repealed] Act immediately before the commencement of this Act is to be taken into account.

5. To Continue Existing Subsidiary Instruments

Subsidiary legislation or executive orders made under the replaced legislation commonly must be made to continue to have effect for the purposes of the new regime, until fresh instruments are made under the new Act.

Example Box 10

37. The regulations made under section 25 of the [repealed] Act that are in force at the commencement of this Act continue in force as if made under section 36 of this Act, so far as they are consistent with this Act.

Treating the regulations as made under the new Act ensures that, e.g. their replacement or amendment is carried out as the new Act requires. It is unnecessary to save the earlier legislative power. The final phrase is often needed to take account of formal differences in the new legislation, e.g. arising from changes in official bodies or terminology.

The Interpretation Act may state this rule for re-enacted legislation in generalised terms (cp. **model Interpretation Act, section 38**). In some jurisdictions, the practice is to remake, rather than continue, existing subsidiary legislation under the replacement Act.

6. To Continue Existing Documentation

Non-legislative instruments or documents connected with statutory procedural steps (e.g. applications) that were issued or submitted under the replaced legislation may need to continue and to be treated as valid for the purposes of the new law. Otherwise, the procedures would have to be started again under the new scheme from the beginning.

Example Box 11

45. Every permit, order, direction, notice or other document issued or made under the [repealed] Act that was valid and in force at the commencement of this Act is to be given effect as if issued or made under this Act.

A reference to validity at the time of commencement is essential; otherwise invalid documents might be given validity by this provision.

3.2.4 How to Express Provisions Instituting Transition Arrangements

Transitional provisions are sometimes required to govern the transition from the repealed law to the legal regime that follows. These are typically prospective rules, though usually of temporary duration. The following are examples.

1. Transfer of Assets and Liabilities, Functions, Officers, etc, of a Dissolved Body

Where a statutory body is dissolved, provision must be made to determine the extent to which another body is its legal successor, and in particular how far it is to take over physical items and legal matters from it. Specific provision for the disposal of assets, etc is essential whenever a statutory body is dissolved, whether it is replaced or not.

Example Box 12

42. All the assets and liabilities of the Import and Export Corporation dissolved by this Act are transferred to the Marketing Corporation on the day that this Act comes into force, and the Marketing Corporation has all the powers necessary to take possession of, recover and deal with, those assets and to discharge those liabilities.

2. Phasing-In New Regulatory Arrangements

Persons already engaged in an activity before new legislation comes into force may need a specified period of time, in order to adapt their activity to the new requirements. To that extent the new legislation is temporarily modified as far as these persons are concerned.

Example Box 13

39. Despite section 4, a person who was a dealer in second-hand goods immediately before the commencement of this Act may continue to deal in second-hand goods without a license during the 3 months next following.

Section 4 makes a license mandatory for second-hand dealers. But it may take some time after the new Act comes into force before all such dealers can be provided with their license or can restructure their business in line with the Act.

3. Interim Arrangements

A temporary regime may be called for to operate, on the principles of the new legislation, during an interim period when the new arrangements are still being put in place.

Example Box 14

Transitional arrangements.

125.-(1) Until the number of members of the National Assembly is fixed by Act of the Assembly under section 37 of this Constitution, the number of members is 90.

(2) A person who immediately before this Constitution comes into force is a member of Parliament on that day becomes a member of the National Assembly and holds the seat in the National Assembly in accordance with this Constitution.

(3) For the purpose of the first determination after this Constitution comes into force of the period of 4 years referred to in section 48 of this Constitution, that period is to be treated as having commenced on the day of the first sitting of the Parliament after the last general election preceding the coming into force of this Constitution.

(4) Any business commenced before the Parliament may be continued before the National Assembly, on and after the coming into force of this Constitution, as if it had been commenced and proceeded with to that time in the National Assembly.

4. Replacing References to Repealed Legislation

References to the repealed legislation are often to be found in other legislation or official documents. Where the legislation is re-enacted or replaced, provision can be made so that those references have to be read as references to the equivalent provisions of the new Act. However, as a rule, it is better practice to correct *statutory* references by express amendments, even where there is a generalised rule to that effect (cp. **section 38(a) of the model Interpretation Act**).

Example Box 15

17. A reference to a provision of the [repealed] Act in an instrument made under an enactment in force at the commencement of this Act, is to be construed as a reference to the corresponding provision of this Act, so far as is consistent with this Act.

4.0 CONCLUSION

In conclusion, though the Common Law evolved rules to govern the legal effects of repeal, the legal effects are not the same for all types of repeal.

5.0 SUMMARY

In this unit, we have considered the legal effects of repeals and the content of saving and transitional provisions. You should now be able to explain and express them accordingly.

6.0 TUTOR-MARKED ASSIGNMENT

How are provisions instituting transition arrangements expressed? Use appropriate examples.

7.0 REFERENCES/FURTHER READING

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Model Interpretation Act 1992 (See LED: 602).

Below is the provision of Sections 44 to 47 of the Interpretation Act of Canada to be used for Self Assessment Exercise 3.

REPEAL AND AMENDMENT

Power of repeal or amendment reserved

44. (1) Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or advantage thereby vested in or granted to any person.

Amendment or repeal at same session

(2) An Act may be amended or repealed by an Act passed in the same session of Parliament.

Amendment part of enactment

(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

Effect of repeal

45. Where an enactment is repealed in whole or in part, the repeal does not

(*a*) revive any enactment or anything not in force or existing at the time when the repeal takes effect;

(*b*) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;

(*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;

(*d*) affect any offence committed against or a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred under the enactment so repealed; or

(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in paragraph (*e*) may be instituted, continued or enforced, and the penalty, forfeiture or punishment may be imposed as if the enactment had not been so repealed.

Repeal and substitution

46. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,

(*a*) every person acting under the former enactment shall continue to act, as if appointed under the new enactment, until another is appointed in his stead;

(*b*) every bond and security given by a person appointed under the former enactment remains in force, and all books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal so far as they are consistent with the new enactment;

(*c*) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

(*d*) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal;

(*e*) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(*g*) all regulations made under the repealed enactment remain in force and shall be deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(*h*) any reference in an unrepealed enactment to the former enactment shall, as regards a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject-matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject-matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

Repeal does not imply enactment was in force

7. (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that such enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been previously in force.

Amendment does not imply change in law

(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under such enactment was or was considered by Parliament or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended.

Repeal does not declare previous law

(3) The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

Judicial construction not adopted

(4) A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language.

UNIT 4 DRAFTING SAVING AND TRANSITIONAL PROVISIONS

CONTENTS

1.0 INTRODUCTION

This unit is designed to encourage you to find out local practice on these matters, and also to introduce you to techniques which will enable you to prepare sound final provisions for these purposes.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- draft saving and transitional provisions.

Your aim in this unit is to make yourself familiar with the way in which transitional and saving provisions are dealt with in your legislation and to develop approaches that are appropriate to enable you to decide how they can best be drafted.

3.0 MAIN CONTENT

3.1 How the Presumption against Retrospective Legislation Relate to these Provisions

Saving and transitional provisions commonly apply retrospectively, that is, they have to deal with past matters or events that have arisen in circumstances covered by earlier legislation but are or may be caught by the terms of a new law. In dealing with such matters or events in express

terms, they explicitly displace the common law presumption against retrospective operation of legislation.

Bear in mind that your new legislation will be presumed not to govern cases that arose prior to its enactment, in the absence of clear indications to the contrary. Common law courts:

(i) take the view that the Legislature does not alter the legal basis upon which people have already entered into lawful activities, without good reason;
(ii) presume, therefore, that statutes are not intended to change the law to cause the legal position of parties to be different in the future from what it was when they initiated their activity in reliance on the then current law.

This presumption applies wherever legislation can be construed as applying to cases that arose before, as well to those that arise after, it comes into force. It has its major impact in relation to *replacement* legislation that regulates activities previously regulated under a repealed law. Under the presumption, the new legislation is taken to apply only to those prospective activities that begin after it comes into force. Transitional provisions are necessary to displace that presumption if rules in the new legislation are to apply to matters already in existence. Careful preparation and drafting are necessary to establish the cases that may have arisen while the replaced legislation was in force and to provide explicitly how they are to be continued or completed after the replacement legislation comes into operation.

As Bennion writes (*Statutory Interpretation*, p.451):

> Doubt as to whether or not the enactment is intended to be given retrospective effect is almost invariably due to the failure by the draftsman to provide adequate commencement and transitional provisions.

A decision to save existing arrangements without more confirms that your draft is not applicable to them. Accordingly, in those circumstances there is no place for the presumption.

3.2 How to Decide Which Matters require to be Saved

This issue arise most commonly where you are replacing, or substantially amending, existing law. Savings are most likely to be needed for matters on which your Bill makes different provision from existing law. Keep a fully open and receptive mind about what matters may need to be covered by such a provision.

Once the substantive features of the Bill are finalised, you may find it helpful to follow this process:

1. make sure that you are conversant with the coverage, administration and procedures in your new legislative scheme;

2. compare these with the equivalent arrangements in the existing law;

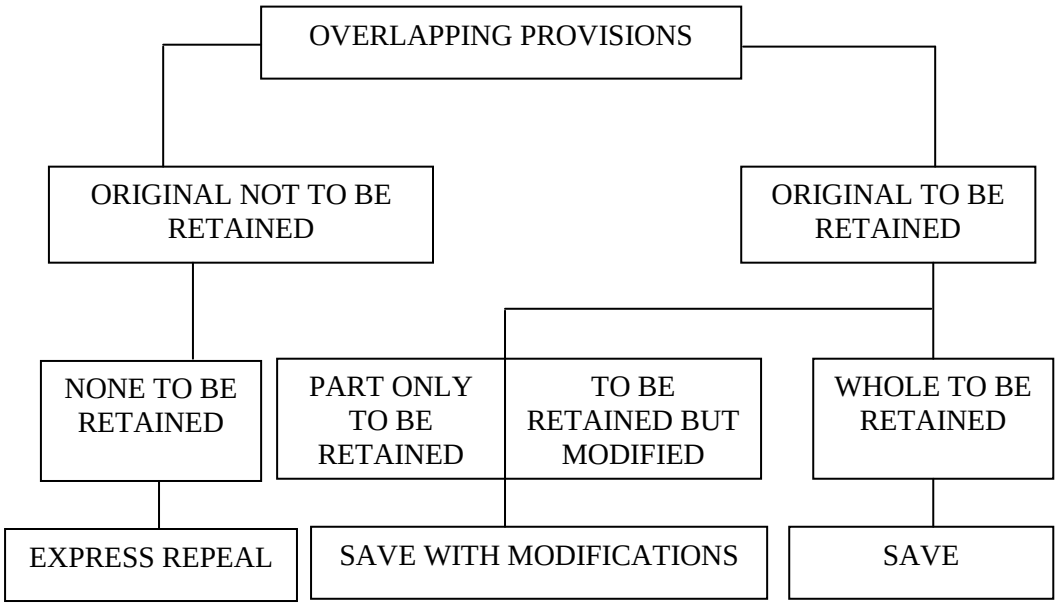
3. establish whether anything in the existing law, or anything that could have been done under it, is to continue when the Bill becomes law;

4. if so, identify any of those matters that cannot be adequately or suitably provided for by relying on the Interpretation Act rules;

5. in that case, work out the extent to which the existing legal arrangements are to continue or whether they need to be modified to be effective;

6. if modifications are required with respect to saved matters, work out how they are to have effect and prescribe them in the saving provisions.

This can be illustrated by the following flow-chart:



3.3 What Forms May Saving Provisions Take?

The form of the draft is dictated in part by the purpose for which the saving is needed. But in every case, use the most direct language you can.

A. Simple Repeals

Legislation that repeals without replacing typically saves the repealed law in some specified aspect or for a specified purpose only. Be precise as to the extent of the saving.

Example Box 1

10. A right of appeal subsisting under the Immigration Act before the commencement of this Act continues and may be pursued *as if the Immigration Act had not been repealed*.

B. Replacement Legislation

In this case, a new legal regime will replace that which you are repealing. Where features of the old are to be preserved, the savings should be designed to give guidance on the relationship between the old and the new. You can save these matters by a variety of techniques.

Save the Existing Law

This can be done in two principal ways, by stating that:

(i) nothing in your Bill alters the earlier law as it affects the matters specified; or
(ii) specified matters are to be dealt with as if the law under which they were originally done continues to have force of law for that purpose (even though it is repealed).

Example Box 2

20. Nothing in this Act affects the operation of section 39 of the Treatment of Offenders Act 1956 in relation to persons placed on probation before the commencement of this Act.

23. Sections 12 to 14 do not apply in relation to persons committed to prison, or detained under section 35 of the Prisons Act, before the commencement of this Act.

25. A licence issued under the Second-Hand Dealers Act authorising a person to deal in second-hand goods, and current when this Act commences, remains in force until the end of the period for which it was issued.

Here too ensure that the saving provision states with precision:

(i) the enactment to be saved or to remain unaffected by the new legislation;
(ii) the matters that are to continue to be governed by that enactment or are unaffected by the new arrangements.

Save Under the New Law

A more positive method of saving is to state that the existing matters are to be dealt with *as if they had been done or initiated under the provisions of the new law* (despite being started under the repealed law). Although expressed as a saving, the effect is little different from that of a transitional provision.

Use this device wherever possible. Since existing cases are brought entirely within the ambit of the new law, additional substantive provisions solely for those cases are not necessary.

Example Box 3

19. An order made under section 14 of the Immigration Act, and in force immediately before this Act commences, continues in force as if made under section 27 of this Act.

If cases are to be "treated as if made under" the new legislation, the full force of that legislation applies to them, in place of the old law. But this device cannot be used if only *some* of the provisions of your Bill are to apply. In that case, apply the exact provisions specifically and expressly to the existing cases.

This approach, of course, is only feasible if the Bill:

(i) provides a framework within which the original arrangements can operate;
(ii) contains provisions that accommodate the existing cases.

This is, therefore, principally used in repeal and replacement legislation. It has no place for simple repeal or if your Bill introduces rules substantially at variance with the earlier legislation.

Save Under the New Law, with Modifications

Sometimes, you wish to save a matter "as if done" under the Bill, but the different rules in the Bill do not permit the matter to be continued without modification. Your saving provision then must recognise the inconsistency between the old and the new, and instruct the user how to respond. The next example is a simple illustration.

Example Box 4

15. Regulations made under the Immigration Act and in force immediately before the commencement of this Act continue in force as if made under this Act, *so far as they are not inconsistent with the provisions of this Act*.

Note also that this formula enables the power in the *new* Act to make subsidiary legislation to be used to amend or revoke these regulations, since they are to be treated as if made under that Act.

C. Prevention of Doubt

Savings may be used to prevent provisions in a new Act having a wider than intended effect on existing law. To avoid the new Act being construed as displacing features of the existing law, your saving can provide that:

(i) the new Act is to be treated as supplementing the existing law; or
(ii) the existing law continues unaffected by the new Act.

The usual formula states that the Bill does not "affect or derogate from" the existing law.

Example Box 5

20. *Nothing* in this Act *is to be construed as affecting* the rules of the common law relating to the liability of innkeepers.

21. *Nothing* in this Act *affects or derogates* from the Bankruptcy Act.

22. *Nothing* in this Act *is to be treated as limiting* the powers of arrest of a police officer under the Criminal Procedure Code.

23. The powers of arrest of a police officer under this Act are *in addition to, and do not derogate from*, the powers of a police officer under the Criminal Procedure Code.

Complete Self Assessment Exercise 1 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 1

Draft a short saving clause, in the space provided, for each of the following purposes:

1. Clause 10 of a new Bill requires parents or guardians of children accused of offences to attend the court proceedings. A saving provision is needed to ensure that the clause applies to parents and guardians of future offenders only.

2. The Legal Practitioners Bill makes it an offence to discriminate against women in providing pupillages or tenancies in Law chambers (clause 12). It is proposed that this should apply only to future applications for positions.

3.4 How to Approach the Drafting of Transitional Provisions

In dealing with cases that began under legal arrangements covered by legislation that your Bill repeals or amends, your approach should be much as we have just considered with respect to savings.

However, if you need to provide for phasing in the legal regime created by your Bill or for the transition from earlier law, you are likely to be engaged with substantive rules that will have a temporary life. Those matters need careful planning and should be the subject of specific consultations with the client Ministry.

In summary your approach to transitional provisions should move through the following stages:

1. Identify Cases

Decide which classes of cases and activities that were regulated and started under the earlier law should be completed or continued after the new Act comes into force.

2. Apply the New Law

Decide which of these matters should continue or be completed in accordance with the new legislation rather than the old law.

3. Consider the Interpretation Act

Determine whether any of these matters are already adequately and suitably provided for under the Interpretation Act.

4. Rebut the Presumption against Retrospectivity

Decide how the provisions bringing the existing matters under the new legislation should be drafted to rebut the presumption against retrospectivity.

5. Cover any Transition

Decide whether any *additional* provisions are needed in order to phase in the new legislation, or to phase out the old arrangements, by stages.

3.5 Forms Transitional Provisions May Take

In drafting transitional provisions that apply your new legislation to past cases, two alternative approaches may be possible.

1. Focus upon the Prior Cases Expressly

Identify the precise past cases to be covered by your draft.

Use expressions that indicate that they came into existence "before the commencement of this Act" (or equivalent terms).

Then indicate how the new legislation is to apply to them.

Example Box 6

1. **Family Provisions Act** (replacing a Married Women's Maintenance Act)

71.-(1) A District Court has jurisdiction to enforce under the provisions of this Part an order providing for the making of periodical payments that was made by a magistrate's court *before the commencement of this Act*.

2. **Family Law Act** (providing for greater recognition of foreign divorces)

62.-(1) Either party to a marriage may apply to the court in the prescribed manner for financial relief under this Part if:

(a) the marriage was dissolved by means of judicial or other proceedings in a foreign jurisdiction *before the coming into operation of this Act*; and

(b) the dissolution is entitled to be recognised as valid under Part I.

2. Apply the New Law to a Current Class

There is nothing retrospective in a law that, *at the time the new law operates*:

(i) regulates activities that are of a continuing nature or that have continuing legal effect, even though they started before the new law came into effect;

(ii) applies to a class of persons or objects that have a specified status, characteristics or propensities, even though those were acquired before the new law came into effect.

What the legislation is regulating, in these cases, is a *present state of affairs* and not a past one. The circumstances that activate the new legal rules are not prior events, but the presence of current ones.

Example Box 7

1. A Bill that introduces a new requirement that dealers in second-hand goods are to hold a license applies to those already in the business, as well as to those who start one after the Bill comes into force.

2. A Bill that imposes tax burdens in the coming year upon all married persons is not retrospective in relation to those who entered marriage before the legislation came into force.

In both cases, the statute is providing prospective rules for persons who currently fulfill prescribed conditions or hold a prescribed status. It does not change the law as to the acquisition, or the past consequences, of those conditions or that status.

In drafting the new Bill, you may be able to avoid providing explicit transitional rules by making substantive provisions apply to cases described in such a way as to cover past and future cases as a single category. The Act will then apply to all cases that currently satisfy the description regardless of when that came about. The Act does not operate retrospectively since it deals with a state of affairs that is current at the time it is applied, even if, in some cases, the circumstances leading up to it occurred in the past.

Example Box 8

A Bill is to include new rules about property rights in marriage; these are to apply retrospectively, i.e. to marriages already in being, as well as prospectively.

An express retrospective rule might begin:

A person who is a party to a marriage, *whether contracted before or after the commencement of this Act*, ...

But it may be possible to state this rule more simply:

A *married person* who ..... .

The second version describes a *status* that must exist when the rule is invoked; it does not matter whether that status was acquired before or after the Act came into force.

By using this device, you can cover retrospective and prospective cases together. It has the advantage of dealing with the matter as part of the substantive rules, instead of tucking the retrospective cases away in transitional provisions. It is, of course, unsuitable where the law applying to retrospective cases is to be different from that for prospective ones.

If you choose this approach, avoid words that relate to *taking some action* to describe the state of affairs. That merely re-introduces the retrospective question: does the Act apply to the action if it took place before the Act comes into force? An example from Driedger (***Composition of Legislation***, p.116) illustrates the point.

Example Box 9

Where *a person who is declared bankrupt* applies for a license, the Minister may require that person to furnish a bond.

> This immediately raises the question whether the rule applies where declarations have been made before the Act came into force. The presumption against retrospectivity probably precludes that meaning.

This is avoided in the following:

Where *a bankrupt person* applies for a license, the Minister may require that person to furnish a bond.

> The section applies regardless of whether a person became bankrupt in the past or becomes bankrupt in the future.

To make clear that only prospective application is intended, the following could be used:

The Minister may require a person who *is declared bankrupt and applies* for a license to furnish a bond.

> Coupling the two verbs in this way means that they both operate in the same way. As the section is clearly concerned only with future applications, it must also be limited to declarations made after the legislation comes into force. But if in doubt, add “after the commencement of this Act” after “a person who”.

Example Box 9 serves to remind us of two important considerations:

(i) if provisions are to apply prospectively only, you can produce that result by indicating that the rules require some future action to be taken:
(ii) do not resolve the problem of retrospectivity merely by using different *tenses* for verbs.

You may find it necessary to state some activity in a past tense to establish that it must have occurred before something that is expressed in the present tense. But that does not tell us whether that it relates to cases arising before the new statute comes into force.

Example Box 10

Where a person who *has been declared bankrupt applies* for a license, the Minister may require that person to furnish a bond.

The difference in the tenses only indicates that the declaration must precede the application. It does not settle whether declarations made *before the enactment came into force* are included.

3.6 Practical Points to Bear in Mind

In drafting savings and transitional provisions, bear the following in mind:

1. Although savings may be covered by the generalised rules in your Interpretation Act, consider whether provisions focused on the precise cases to which your draft give rise are preferable. Remember that in most jurisdictions, the Interpretation Act contains no rules for repeal and replacement, and that many of its provisions on simple repeals are not suited for cases where statutory continuity is called for.

2. Identify the classes of case that you are saving with precision *using the terminology of the existing law*.

3. Extend transitional provisions in your Bill to existing matters in express and precise terms, *using the terminology of the former law to describe the matters*.

4. *Distinguish retrospective and prospective cases*, in your drafts, by indicating whether they arose before or arise after the commencement of the new legislation.

5. Cover each distinct category of saving or transitional matter in a *separate enactment* in the final provisions (e.g. a section, subsection or a paragraph in a Schedule).

6. Set out any time limits for the operation of transitional provisions with precision and by reference to the commencement of the new legislation. Time limits should not be selected in an arbitrary way. Fix them by assessing the time needed to carry out what has to be done in this period of transition.

7. Make sure that your transitional provisions are seen to produce that effect. Do not leave users to decide whether they can ignore provisions because they do not seem to be suitable or relevant.

8. Ensure that the saving and transitional provisions come into force at the same time as the provisions of the Bill with which they are connected. Typically, a single date is set for the commencement of the Act. But some Acts may be brought into force by stages, with different dates for different provisions (as we saw in **LED: 602**). In that case:

(i) determine which saving or transitional provisions are linked with which substantive rules;
(ii) make sure that these provisions and the rules can be brought into force at the same time, and separately from other provisions and rules that might be brought into force at another time.

The responsibility for bringing such linked sections into force together falls upon the drafter of the commencement order. But you, as the drafter of the *Bill*, should place these provisions in distinct clauses so that they can be readily specified, with the substantive provisions to which they are linked, in the commencement order.

9. Always check that the operation of transitional provisions will provide a smooth passage for users from the old law to the new.

4.0 CONCLUSION

Saving and transitional provisions commonly apply retrospectively. They explicitly displace the common law presumption against retrospective operation of legislation.

5.0 SUMMARY

In this unit, we considered how to draft saving and transitional provisions. You should now be able to draft them accordingly.

ANSWER TO SELF ASSESSMENT EXERCISE 1

1. Section 10 does not apply in relation to offences committed before the commencement of that section.

It is not necessary to include a reference to either the children or the parents or guardians. It is the commission of an offence that triggers off the section.

If you think that this draft clause is not very explicit, we could add, after "Section 10", the following: "(which requires the attendance of parents or guardians at court hearings)".

2. Section 12 does not apply in relation to a refusal to grant a pupilage or tenancy made before the date on which that section comes into force.

This clause must be drafted in a way that takes account of *refusals*, rather than grants, of tenancies or pupilages that were made before the legislation came into force. Applications made before, but refused after the Act comes into force, fall within section 12, as the decision is taken when the law is in effect.

6.0 TUTOR-MARKED ASSIGNMENT

Draft transitional provisions to deal with the following:

1. In a Bill dealing with prisons, Part 2 introduces a system of parole for persons undergoing a prison sentence. This is *also* to apply, in precisely the same way, to persons who have *already* been sent to prison as a result of having been convicted of a criminal offence, or for contempt of court, or for non-payment of a fine.

2. Under section 6(1) of the Limitation Act, certain actions for personal injury must be brought within 3 years after the injury. But (as provided by section 6(4)), in computing that time, no account is to be taken of any period when the injured person is a minor (i.e. under 21).

You are drafting a Bill to lower the age of majority to 18. Provide any transitional provisions that may be needed in connection with these provisions of the Limitation Act.

3. The Divorce Act is to be amended to provide that persons who have been granted a divorce and then remarry cannot apply for a financial order under section 5 of the Act against their former spouse. Draft the provision making it apply retrospectively.

7.0 REFERENCES/FURTHER READING

Bennion FAR, (1997). *Statutory Interpretation*, (3rd ed.). London: Butterworths.

Driedger E. A., (1976). *The Composition of Legislation,* Ottawa: Dept of Justice.

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

UNIT 5 DRAFTING SCHEDULES

CONTENTS

1.0 INTRODUCTION

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

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- decide when to use Schedules and how to write and format them.

This unit is quite straight-forward and should be quickly completed. Your aim is to make yourself familiar, by working the Self Assessment Exercises, with the way in which Schedules are dealt with in your legislation, and to develop an approach that enables you to decide when a Schedule should be used and how they should best be drafted.

3.0 MAIN CONTENT

3.1 General Considerations

Schedules form part of the Act or subsidiary instrument to which they are attached. They are a convenient device for separating provisions that could have been included in the body of the Act, but are lengthy and detailed and may obscure the more important provisions that have to be there.

The drafting convention is to provide in the Act itself a section or a provision in a section that authorises the inclusion of the material in the Schedule. This authority is said to be contained in "***inducing words***".

SELF ASSESSMENT EXERCISE 1

1. For your collection of documents, obtain a copy of a Schedule from a recent Act of your jurisdiction.
2. Examine the house-style followed in that Schedule and compare with the **document attached to the reference to the unit**.

You will be asked some questions on this in **Self Assessment Exercise 2.**

3.1.1 When a Schedule Might be Used

A principal reason for moving legislative text to a Schedule is to make the instrument easier to use. The objectives are:

(i) to make that material contained in the Schedule easier to find and use;
(ii) by removing secondary material there, to make more important provisions in the body of the instrument more manageable.

But appending the text at the end of the instrument gives the impression that the material in it is rather less important. So, the Schedules should:

(i) only contain material that is ancillary to the main provisions in the body of the statute;

(ii) not need to be read in order to understand the essentials and the structure of the legislative scheme.

These general observations suggest the following guidelines on the use of Schedules:

(i) matters of principle or central to the legislative scheme are not suitable for Schedules;
(ii) incidental, secondary or ancillary elements of the legislative scheme should be considered for inclusion;
(iii) matters of detail, procedure or of a consequential or supportive nature are often appropriate;
(iv) matters that will have a limited life or be spent after coming into force are particularly suited to inclusion in Schedules (e.g. detailed amendments and a lengthy set of repeal provisions);
(v) some common element in the materials should justify their inclusion *together* in a particular Schedule.

In the past, Schedules have often been used for matters that are better dealt with by subsidiary legislation, e.g.:

- rules or regulations;
- forms;
- fees.

These matters are likely to need replacement or amendment from time to time, yet securing the quick passage through the Legislature of the necessary amending Act may be difficult. So, if Schedules are used for such matters as these, they should be such that frequent amendment is unlikely, e.g. setting out rules governing the composition or functioning of a body set up by the legislation. In most case, such matters are better dealt with by subsidiary legislation.

3.1.2 Kinds of Matters typically included in Schedules

Schedules are often put to use for the following:

1. Savings and transitional provisions (especially where numerous)

2. Repeals and amendments (especially where numerous)

3. Interpretation provisions (especially where numerous)

4. The constitution and procedure of a body established by the statute

5. Tenure and terms of office of holders of principal posts created by the statute

6. Lists of items or persons or places to which the statute applies or does not apply

7. Descriptions of a technical nature, or specifications, of items within the terms of the statute

8. Supplementary rules elaborating upon principles contained in the body of the statute

9. Tables setting out benefits, allowances or rates of taxes or duties (these are more commonly found in Schedules to subsidiary instruments.)

10. A document or instrument (e.g. international treaty) that is incorporated into the statute, or provided by way of reference or explanation.

SELF ASSESSMENT EXERCISE 2

Look through a volume of recent Acts of your jurisdiction. In the spaces provided, list 6 different types of matter for which Schedules have been used. Note down why you think a Schedule was preferred for dealing with the matter.

1.
2.
3.
4.
5.
6.

3.2 How Schedules should be written

a. Provide Inducing Words for every Schedule

Inducing words direct that the Schedule is to be given effect. They may be simple where the function to be performed by the Schedule is apparent. But in other cases, you may need to make clear in what way the Schedule is to have effect. This is particularly important for matters such as treaties, since their exact status in domestic law will have to be stated (i.e. are they printed for information or guidance or are they to be given force of domestic law?).

Example Box 1

Simple inducing words:

Schedule 1 (which contains minor and consequential amendments) has effect.

Inducing words that indicate the function of the Schedule:

Schedule 1 contains further provisions about the Agency for Police Training.

Inducing words with purpose:

Schedule 2 has effect with respect to the constitution and procedure of the Board.

Incorporation of a treaty:

The Genocide Convention set out in the Schedule has the force of law in Nigeria.

Treaty as reference:

> "Convention" means the Genocide Convention, a copy of the English text of which is set out in the Schedule.

In the last example, the inducing words indicate that the document is set out in the Schedule merely for information; it is given no status as part of the local law, in contrast with the form used in the preceding example.

Separate inducing words are necessary for each Schedule. In each case, they must indicate precisely the status of the Schedule contents. So, in writing inducing words:

(i) include them, where possible, in a separate section or subsection (or in a definition, as in last example in **Example Box 1**);
(ii) place the section at the point in the legislation where you are dealing with the subject to which the Schedule relates.

The Schedule is to be treated as an extension of the inducing words and, therefore, to be read into the statute where those words are found. In consequence, do *not* include the inducing provisions with the other final provisions in the Bill, unless Schedules contain repeals, amendments or transitional or saving provisions.

SELF ASSESSMENT EXERCISE 3

1. Note down the inducing words most frequently used in your jurisdiction for this purpose.
2. Note too other significant variations that are in common use.

b. Set out the Schedules at the end of the instrument

Place the Schedules immediately after the last section of the Act or legislative instrument (and before any official authentications or signatures). They are part of the Act or instrument. If you are providing more than one, place them according to the order in which you have included their inducing words in the instrument.

c. Number the Schedules

For ease of reference, number Schedules serially. Follow the conventional practice in your jurisdiction. (The simplest form is arabic

numbering -" Schedule 4", rather than roman -"Schedule IV", or a word - "FOURTH SCHEDULE").

(i) if you are providing more than one Schedule, number each in the order in which you have included the inducing provisions in the Act;

(ii) if there is only one, it may be designated as "the Schedule". But some drafters recommend that a single Schedule should be designated as "Schedule 1", in case others are added later.

d. Provide headings

An indication of subject matter is helpful to users. So:

(i) give each Schedule its own heading that states, in addition to the number, an accurate indication of its subject matter;
(ii) follow the house-style for the form in which headings are printed;
(iii) incorporate the number of the section which contains the inducing words.

e. Draft the contents in the same way as other legislative provisions

In writing the contents of Schedules:

(i) follow standard drafting practices and the same conventions you are using for the text of substantive provisions;
(ii) use the same numbering system for paragraphs of a Schedule as for sections of a Bill;.
(iii) divide long Schedules into Parts; give those and groups of paragraphs appropriate headings;
(iv) consider providing section notes for the individual paragraphs (if that is the house-style).

f. Choose a format that best communicates the information

The actual format of each Schedule must be dictated by its content. But that content may offer greater freedom of choice in this respect than for provisions that are part of the body of the Act. So:

(i) if it comprises a treaty or other official document, it can be printed in the style of the original;
(ii) if it contains lists of items or rates, set the entries out in a table with columns.

g. Use the terminology usual for Schedules

Different terminology from other parts of an Act tends to be used in relation to Schedules. It is usual to refer to:

(i) a Schedule *to* an Act (in contrast with "a section *of* an Act");

(ii) "paragraphs" and "subparagraphs", instead of "sections" and "subsections";
(iii) "heads" and "subheads" within paragraphs and subparagraphs, in place of "paragraphs" and "subparagraphs" within a section or subsection;
(iv) "entries" for the items included in a table.

h. Adopt the appropriate type face and font size

Many jurisdictions use a smaller font size for the printing of Schedules. This helps to differentiate Schedules from the body of the legislation. But if, as in some jurisdictions, it is very small, it gets in the way of easy access and communication. A useful precedent, containing three Schedules is provided in **the reference** to this unit.

SELF ASSESSMENT EXERCISE 4

Check recent legislation in your jurisdiction and note, in the space provided below, how the following are dealt with in Schedules:

1. How are individual propositions referred to ("sections" or "paragraphs")?

2. How are paragraphs within individual propositions referred to ("subparagraphs" or "heads")?

3. When individual propositions are numbered, how does the style compare with that used in the body of the Act?

4. Are section notes used for individual provisions?

5. Does the font type and size used for Schedules typically differ from the rest of the Act?

6. How are Schedules numbered (e.g. "FIRST SCHEDULE" or "SCHEDULE 1")?

7. How are Schedule Headings printed (e.g. in capitals or using lower case)

4.0 CONCLUSION

Schedules form part of the Act or subsidiary instrument to which they are attached. Details are banished to the schedule to make Statutes easier to read and understand.

5.0 SUMMARY

In this unit, you have been working out how Schedules may be used, and the techniques for ensuring that they perform their functions. You should now be able to decide when to use Schedules and how to write and format them.

If you feel unsure about the function of Schedules or any of the other matters raised, or how the matters discussed are dealt with in your jurisdiction, try to identify the particular features that are causing you difficulty and re-work them.

6.0 TUTOR-MARKED ASSIGNMENT

What purposes do schedules serve in legislation?

7.0 REFERENCES/FURTHER READING

Soetan, Olusiji A. (1997). *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996). *Legislative Drafting* (4th ed.). London: Butterworths.

Below is a precedent Schedule

Royal Botanic Gardens Act 1991
Act No. 87/1991

2. ***Commencement***

This Act comes into operation on a day to be proclaimed.

3. ***Definitions***

(1) In this Act—

"Board" means the Royal Botanic Gardens Board established under Part 2;

"botanic gardens" means Crown lands for the time being described in Schedule 1;

10. ***Membership and procedure***

(1) Schedule 2 contains provisions about the membership of the Board.

(2) Schedule 3 contains provisions about the procedure of the Board.

SCHEDULES

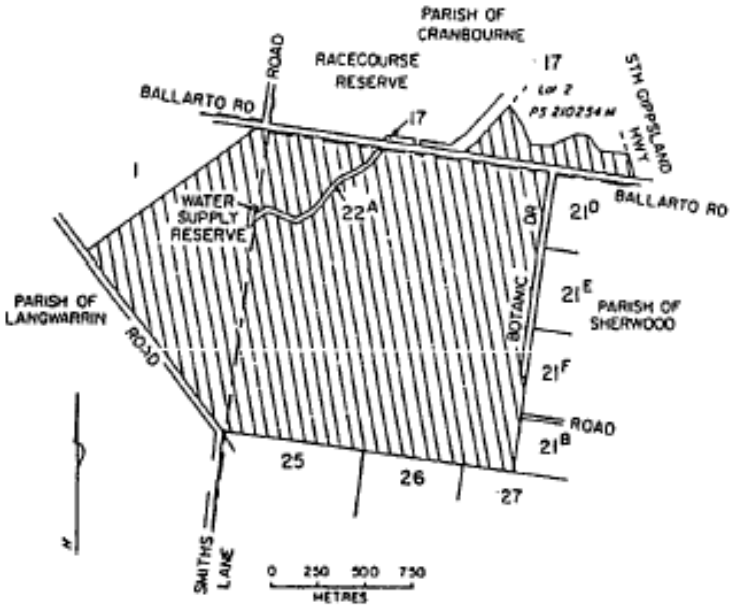
SCHEDULE 1 (s. 3(1))

BOTANIC GARDENS

PART 1—ROYAL BOTANIC GARDENS, MELBOURNE

The area shown bordered red on the plan bearing the identifying reference LEGL/91–46 and lodged in the Central Plan Office.

PART 2—CRANBOURNE GARDENS



SCHEDULE 2 (s. 10 (1))

MEMBERSHIP OF THE BOARD

1. *Members*

(1) The Board consists of 7 members appointed by the Governor in Council on the recommendation of the Minister.

(2) Of the members of the Board—

(*a*) 1 must be the Director-General or his or her nominee; and

(*b*) 6 must be people who, in the Minister's opinion, have knowledge or expertise in one or more of the following fields—

(i) botany or horticulture;

(ii) business management, financial management or public administration;

(iii) recreation provision, education or tourism;

(iv) nature conservation;

(3) A person cannot be appointed a member of the Board if he or she—

(*a*) is the Director; or

(*b*) is 72 years old or more.

2. *Term of office*

(1) A member of the Board holds office for a term, which must not exceed 4 years, specified in the instrument of his or her appointment.

(2) A member of the Board is eligible for re-appointment.

3. *Chairperson and Deputy Chairperson*

(1) From among the members of the Board appointed under clause 1 (2) (*b*), there must be appointed a Chairperson and Deputy Chairperson.

(2) The Chairperson and Deputy Chairperson must be appointed by the Governor in Council on the recommendation of the Minister.

(3) A person appointed as Chairperson or Deputy Chairperson holds that office for 2 years from the date of his or her appointment and is eligible for re-appointment.

(4) A person appointed as Chairperson or Deputy Chairperson ceases to hold that office on ceasing to be a member of the Board.

4. *Terms and conditions of office*

In the instrument of appointment of the Chairperson, the Deputy Chairperson or a member of the Board, the Governor in Council may specify terms and conditions of appointment not inconsistent with this Schedule.

5. ***Resignation***

The Chairperson, Deputy Chairperson or a member of the Board may resign that office by letter addressed and delivered to the Minister.

6. ***Removal from office***

The Governor in Council may at any time remove from office the Chairperson, the Deputy Chairperson or a member of the Board.

7. ***Vacancies***

The office of a member of the Board becomes vacant if the member—

(*a*) attains the age of 72; or

(*b*) is absent from 3 consecutive meetings of the Board without the permission of—

(i) the Minister, in the case of the Chairperson; or

(ii) the Chairperson, in the case of any other member; or

(*c*) is appointed as Director.

8. ***Member not subject to Public Service Act***

The Chairperson, the Deputy Chairperson or a member of the Board is not, in respect of that office, subject to the Public Service Act 1974.

9. ***Remuneration and allowances***

(1) The Chairperson, the Deputy Chairperson or a member of the Board is entitled to receive—

(*a*) the remuneration from time to time fixed by the Governor in Council in respect of that office; and

(*b*) the travelling or other allowances and expenses from time to time fixed by the Governor in Council in respect of that office.

(2) Remuneration, allowances and expenses may be fixed by reference to any award applying to officers or employees in the public service.

10. ***Committees***

(1) The Board may—

(*a*) establish any committees it considers necessary and define the constitution and functions of each committee so established;

(*b*) determine the procedure of each committee;

(*c*) change the constitution or functions of a committee;

(*d*) dissolve a committee.

(2) A person may be a member of a committee established by the Board even though he or she is not a member of the Board.

(3) The Director is an ex-officio member of each committee established by the Board.

(4) A member of a committee established by the Board is entitled to receive any travelling or other expenses determined by the Board.

SCHEDULE 3 (s. 10(2))

PROCEDURE OF THE BOARD

1. *Quorum*

(1) A quorum of the Board is four members.

(2) At a meeting at which a quorum of the Board is present, the decision of the majority of the members present and voting at the meeting is the decision of the Board.

2. *Who presides?*

(1) The person who is to preside at a meeting of the Board is—

(*a*) the Chairperson, if he or she is present;

(*b*) the Deputy Chairperson, if the Chairperson is absent;

(*c*) a member elected by the members present at the meeting, if the Chairperson and Deputy Chairperson are absent.

(2) The person presiding at a meeting of the Board has a casting as well as a deliberative vote.

3. *General procedure*

Subject to this Schedule the procedure of the Board is in its discretion.

4. *Validity of decisions*

A decision of the Board is not invalid only because of—

(*a*) a vacancy in its membership; or

(*b*) a defect or irregularity in the appointment of the Chairperson, the Deputy Chairperson or a member.

5. *Declaration of interest*

(1) A member of the Board who has a direct or pecuniary interest in a contract or other matter being dealt with by the Board must declare the nature of the interest at a meeting of the Board, as soon as possible after becoming aware of the interest.

(2) A member of the Board who holds an office or possesses property as a result of which, directly or indirectly, duties or interests may be created in conflict with the member's duties as member must declare that fact at a meeting of the Board as soon as possible after becoming aware of the potential conflict.

(3) The person presiding at a meeting at which a declaration under this clause is made must cause it to be recorded in the minutes of the meeting.

(4) A person who has made a declaration under this clause must not take any further part in the discussion of or vote on, the contract or matter to which the declaration relates.