NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF POSTGRADUATE STUDIES

FACULTY OF LAW

COURSE CODE: LED706

COURSE CODE: PARTICULAR CASES IN DRAFTING

NATIONAL OPEN UNIVERSITY OF NIGERIA

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COURSE INFORMATION

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COURSE TITLE: **PARTICULAR CASES IN DRAFTING**

ADAPTED FROM: **Commonwealth of Learning**

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This course deals with two particular legislative provisions that Legislative Counsel are frequently called upon to draft. Many Bills and legislative instruments include provisions for their enforcement by creating criminal offences and penalties. This topic is dealt with in Module 1. The course also deals, in Module 2, with drafting subsidiary legislation, often the first task that trainee drafters are instructed to undertake. Although much of what you have learned about drafting Bills in general applies equally to subsidiary legislation, the drafting of legislative instruments has distinctive features, which justify its separate consideration.

Course Aim

The aim of this course is to enable students become familiar with penal provisions and subsidiary legislation and be able to draft them accordingly.

Learning Outcomes

By the end of this course, in keeping with the practice and house-style in Nigeria, you should be able to:

(i) Draft penal provisions to create substantive criminal law or to enforce requirements of the legislative scheme established by a Bill;

(ii) Prepare and draft the main types of subsidiary legislation and treaties.

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 12 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

This Course consists of 7 study units divided into 2 modules as follows:

Module 1

Unit 1 Penal Provisions
Unit 2 Settling Penal Provisions
Unit 3 Drafting Penal Provisions - I
Unit 4 Drafting Penal Provisions - II

Module 2

Unit 1 How do we Draft Subsidiary Legislation?
Unit 2 Drafting Subsidiary Legislation
Unit 3 Drafting Executive Instruments and Treaties

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 Self-Assessment 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.

Self-Assessment exercise

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.

Final Examination and Grading

The duration of the final examination for LED 654 – Particular cases in drafting, 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 Score Distribution

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

Assessment	Marks
Assignments 1-3 (assignments submitted) Attachment	Three assignments, marked out of 15 Marks 15 Marks =Totaling 30 Marks
Final examination	70% of overall course score
Total	**100% of course score**

Course Overview and Presentation Schedule

Unit	**Title of Work**	**Week's Activity**	**Self-Assessment**
	Course Guide	1	
	Module 1		

1	Penal Provisions	1	Self assessment 1
2	Settling Penal Provisions	2	Assignment 2
3	Drafting Penal Provisions - I	1	Assignment 3
4	Drafting Penal Provisions - II	1	Assignment 4
	Module 2		
1	How do we Draft Subsidiary Legislation?	1	Assignment 5
2	Drafting Subsidiary Legislation	1	Assignment 6
3	Drafting Executive Instruments and Treaties	2	Assignment 7
	Revision	1	
	Examination	1	
	Total	**12**	

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.

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

Each of these Modules is a distinct topic, and each should be completed before you start on another. Although you will already have met some of the matters examined in this course, each Module is designed to provide both a method of approach in dealing with the provisions in question and a framework within which to build your existing and a good deal of new knowledge. As drafting these provisions is a task that you are likely to be given in the immediate future, you have much to gain in professional terms from these units. They also provide an opportunity to reinforce matters you have come across earlier. We suggest that you do not rush them, despite getting towards the end of the programme.

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

This course deals with two particular legislative provisions that Legislative drafters are frequently called upon to draft. Many Bills and legislative instruments include provisions for their enforcement by creating criminal offences and penalties. The course also deals with drafting subsidiary legislation, often the first task that trainee drafters are instructed to undertake. Although much of what you have learned about drafting Bills in general applies equally to subsidiary legislation, the drafting of legislative instruments has distinctive features, which justify its separate consideration.

The aim of this course is to enable students become familiar with penal provisions and subsidiary legislation and be able to draft them accordingly.

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MODULE 1

UNIT 1 PENAL PROVISIONS

1.1 INTRODUCTION

Many statutes have to be provided with penal provisions. The criminal law is the principal mechanism used to prevent or control anti-social behaviour and unacceptable activities. It is also widely used to enforce duties imposed by regulatory legislation. Since individual liberty is affected, drafters have to take particular care to produce drafts that clearly state the circumstances in which the provisions may be applied and the limits upon the use of the penal powers. But drafters should be prepared to consider the range of alternative methods to secure compliance that are described in this unit, some of which may be equally as effective as criminal law, without its expense and repercussions.

1.2 LEARNING OUTCOMES

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

i. describe the main alternatives to penal provisions.

ii. This is a short introductory unit that you should be able to complete quickly.
iii.You will have a good grasp of the basic concepts of the criminal law.

1.3 GENERAL CONSIDERATIONS

Countries in seeking to address issues of compliance and enforcement as part of the process of making regulations. The Directives on Legislation, which go back to 1972, and the Ministry of Justice framework for securing. Legal quality before a proposal can be submitted to cabinet or National Assembly for approval require regulators to ensure, before adopting a regulation, that they will be able to adequately" enforce it. The directives require rule makers to consider explicitly whether enforcement under administrative, civil or criminal law would be most appropriate. Explanatory notes specify general legislative drafting principles for improving enforceability, including minimising scope for different interpretations, minimizing exceptions, directing rules at "situations which are visible or which can be objectively established and ensuring practicability for both enforcers and the regulated. One of the six criteria which make up the legal quality framework explicitly addresses feasibility and enforceability. To further underline that compliance and enforcement needs early attention in the rule making process, a practicability and enforcement Assessment.

The threat of conviction and of the imposition of a penalty by the convicting court is the most common method used in legislation to secure compliance with its provisions:

1. penal sanctions are the foremost means for making legislation work; a substantial number of the duties that are provided in legislative schemes are enforced through criminal process;

2. Criminal law is also a primary way of controlling socially unacceptable behaviour; punishments imposed under it are conventionally used to deter offenders and to bring them to retribution.

Drafters then can expect to be regularly concerned with preparing penal provisions for one or other of these purposes. But instructions often do not specifically require drafters to introduce penal provisions into their drafts. The choice is often made by the drafter, and endorsed by the policy maker. Yet it should not be made automatically but after considering alternative ways of enforcing the statutory requirements or of securing compliance. In some respects, prosecution is a crude and unsuccessful method of enforcement:

(a) the decision to use it is typically made by the State, not by the persons adversely affected (even when private prosecutions are possible);

(b) it offers no immediate remedy to those persons;

(c) it may involve a costly process; the expense of prosecution is usually borne entirely by the State, but defendants too may have to bear heavy costs for their defence and can suffer long-term damage to their reputations;

(d) the benefits that may flow from enforcement, or the penalties that are likely to be ordered, may not be justified by the costs involved in securing a conviction;

(e) the deterrence value is uncertain, particularly if the persons most likely to be prosecuted are without resources or standing;

(f) successful prosecutions require very high standards of proof to be met;

(g) if in practice the offence is unlikely to be prosecuted frequently (as is the case for some regulatory offences), it may become merely paper law that is widely disregarded.

Do not assume that merely because legislation designates a contravention to be an offence that the possibility of wide-scale contravention is diminished. Always ask yourself whether criminal proceedings and sanctions are likely to produce positive results.

1.3.1 Types Of Compliance Of Penal Provisions

Academic literature in the areas of social psychology, sociology and criminology, supplemented by a Ministry's practical experiences and viewpoints on law enforcement.

i.Spontaneous compliance dimensions. These are factors that affect the incidence of voluntary compliance - that is, compliance which would occur in the absence of enforcement. They include the level of knowledge and understanding of the rules, the benefits and costs of complying, the level of acceptance of the reasonableness of the regulations, general attitudes to compliance by the target group and informal control, and the possibility of non-compliance being sanctioned by non- government actors.

ii. Control dimensions. This group of factors determines the probability of detection of non complying behaviour. The probability of detection is directly related to the level of compliance. The factors considered are the probability of third parties revealing non-compliance, the probability of inspection by government officials, the probability of inspection actually uncovering non compliance and the ability of inspection authorities to target inspections effectively.

iii. Sanctions dimensions. The third group of factors determines the expected value of sanctions for non-compliance, that is, the probability of a sanction being imposed where non-compliance is detected and the severity and type of likely sanctions.

STEPS TO ENSURE COMPLIANCE IN

Stay on track with changing laws and regulations

Compliant is not something your organization just is. It’s a continuous process of scanning for changing laws and regulation, identifying the areas in which it impacts your organization, changing policy and implementing policy change, and monitoring. Make sure to identify which laws and regulations apply to your organization and stay on top of changes. When you’re prepared for upcoming changes, you don’t risk being overwhelmed when new legislation starts being enforced.

Involve specialists

Especially small and growing organizations may unintentionally break laws. To prevent this, ensure that the organization is transparent in its operations. Furthermore, it is advisable to hire specialists or involve consultants to be sure that everything is in order. This allows owners and employees to ask for advice when needed, to ensure actions and procedures are compliant.

Ensure employees follow procedures

Company policy is not worth anything if it is not followed by employees. Especially changes in policy may not always be adapted by the workforce with ease, and employees may be reluctant to change practices in their everyday workflows. It’s key to involve HR in this process.

Most importantly, make sure to communicate company policy and procedures well. Part of this is to ensure they are well documented and readily available; both digitally and physically. Furthermore, make sure that employees understand why policy and procedures are the way they are, or why they have changed. It may also be necessary to implement employee training on how to properly adapt procedures. And lastly, you may want to think about implementing a reward system for employees who comply and develop sanctions in case of violations.

Schedule regular internal audits

Regular internal audits are a great tool to uncover inadequate and ineffective procedures that lead to not being compliant. Internal audits may focus on the financial, operational, technological or regulatory aspects of the organization. It is of importance that an internal auditor is independent when reviewing compliance, as well as implements generally accepted auditing standards

Use the right software

Ensuring compliance without the right tools makes the job much more complex. Organizations who have the right compliance software in place are more likely to operate in accordance to the law and reduce the risks of human errors. Furthermore, good compliance software often has built-in tools for organizing documents and automatically generate audit trails to easily prove compliance.

1.4 CASES WHERE PENAL PROVISIONS ARE LIKELY TO BE USEFUL

In the course of their career, drafters tend to discover the kinds of penal provisions that are likely to be effective and those that may not secure their intended objective of compliance. The

following are cases where positive results may be looked for from using criminal processes to support a legislative scheme or to control anti-social behaviour:

(i) a monitoring or regulatory agency is charged with the function of securing compliance and has the authority and resources to prosecute or make documented complaints to the prosecuting authority;
(ii) the misbehaviour is likely to take place in public settings or other circumstances in which the police are likely to be active;
(iii) contraventions are likely to be readily apparent and evidence can be easily assembled and proved;
(iv) the conviction can lead to other consequences (e.g. loss of an entitlement or acquiring a disqualification), which may increase its deterrent value;
(v) the misconduct is such that it can carry a penalty heavy enough to indicate that the offence is to be taken as serious (since a light penalty may create the impression that the offence is too trivial to take notice of or too "expensive" to prosecute);
(vi) the misconduct is widely regarded as unacceptable or the general public or sections of it have some interest or concern in seeing it enforced.

1.5 ALTERNATIVES TO PENAL PROVISIONS

The range of alternatives is widest when the legislation is directed to legal entities or persons performing functions under a license or with a standing recognised or regulated by law or with financial resources. Compliance may be more readily achieved against such persons since they have a clear self-interest to safeguard. Where the legislation prohibits behaviour of the public at large, alternative enforcement methods tend to founder on the absence of such a special interest or lack of resources to which they may be directed. So, such procedures may not be worth using where it is probable that any member of the public could breach the legislation. Alternative methods of enforcement have a more specific focus and for that reason may lead to less discriminatory treatment.

The following are some of the alternatives to Penal provision you should consider in appropriate cases:

i. Invalidation of Action

Failure to carry out a prescribed procedure or to perform a statutory duty in the course of, e.g. acquiring a benefit provided or protected by law can be dealt with by denying access to the benefit.

ii. Cancellation or Disqualification

Misconduct in the course of an activity regulated or licensed by law can be dealt with by authorising the regulating or licensing body to remove the authority to undertake the activity or to disqualify the person from the activity in future, or to order the person to cease trading or performing the particular activity at once.

iii. Compliance Orders

If a body charged, e.g. with performing functions for the benefit of the public fails to act as required by law, it can be ordered to act as required by a court, if needs be by a summary procedure; this process can be supported by a threat of contempt of court.

iv. Orders to Make Good

A public body or corporation that is responsible for a default that causes continuing inconvenience or threat to the public can be required by court order to remedy the default (under threat of contempt of court). If a nuisance is caused by a member of the public, some public body can be authorised to remove it, with an entitlement to recover the costs of the intervention.

v. Orders to Refund

If a benefit has been wrongfully gained, especially from public funds, the offender can be required, by court order, to make good the loss.

vi. Injunctions

A person or body responsible for some continuing unlawful act or who is engaging in conduct which is an imminent threat to others can be required by court order to discontinue the activity. This is likely to achieve more immediate results than a threat of a financial penalty in some subsequent prosecution.

vii. Forfeiture

If the unlawful conduct involves the use of a particular class of item, authority may be given to seize and dispose of the item, especially if the item itself is causing a threat to the public (e.g. unwholesome food).

viii. Compensation Claims

Those who have suffered loss as a result of prohibited behaviour can be given the right to claim compensation or financial remedy from the offender (or from the State). But likely defendants in the particular matter must ordinarily be in a position to meet the claim and the victims in a position to prove it.

ix. Fixed or on-the-Spot Penalties

For minor transgressions not involving difficult legal issues, power can be conferred to offer an offender the choice of paying a small financial penalty either on the spot or by a designated date, or of being prosecuted in court (where the costs and penalty will be greater).

Many of the alternatives just listed are to be seen as alternatives to typical penal *punishments*, rather than as alternative *processes* to the criminal proceedings.

1.5.1 Factors to Bear in Mind when using an Alternative

Exercise judgment in choosing any of these alternatives. In particular, keep in mind the following when preparing legislation that incorporates any such alternative:

(a) Ensure that your draft does not fall foul of the Fundamental Rights provisions, especially those provisions that:
(i) guarantee a right to a fair hearing before a court where the individual's rights is at issue;
(ii) restrict compulsory acquisition by the State of the property of an individual.
(b) When granting enforcement powers, make sure that:

(i) their extent and limits are clearly and unambiguously stated, and they are no wider than necessary for the purpose;
(ii) the legislation includes provision for proving non-compliance with its requirements, e.g. before a court or before an administrative body with a right of further recourse to a court;
(iii) appropriate review and redress procedures for those affected by their exercise are included.

SELF ASSESSMENT EXERCISE. Analyses 3 alternatives to penal provisions.

1.6 . SUMMARY

In conclusion, the threat of conviction and of imposition of penalty is the most common method used in legislation to secure compliance. In this unit, we have considered generally the kinds of cases where penal provisions are likely to be useful, alternatives to penal provisions and factors to bear in mind when using these alternatives. You should now be able to describe the main alternatives to penal provisions.

SELF ASSESSMENT EXERCISE: Analyze the alternatives to penal provisions in curtailing crimes in Nigeria.

1.7 REFERENCES/FURTHER READING/Web Resources

Driedger E.A. (1976). *The Composition of Legislation.* Ottawa: Dept of Justice.

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

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

1.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE:

Invalidation of Action

Failure to carry out a prescribed procedure or to perform a statutory duty in the course of, e.g. acquiring a benefit provided or protected by law can be dealt with by denying access to the benefit.

Cancellation or Disqualification

Misconduct in the course of an activity regulated or licensed by law can be dealt with by authorising the regulating or licensing body to remove the authority to undertake the activity or to disqualify the person from the activity in future, or to order the person to cease trading or performing the particular activity at once.

Compliance Orders

If a body charged, e.g. with performing functions for the benefit of the public fails to act as required by law, it can be ordered to act as required by a court, if needs be by a summary procedure; this process can be supported by a threat of contempt of court.

UNIT 2 SETTLING PENAL PROVISIONS

2.1 INTRODUCTION

This unit is concerned with penal provisions. We work out the steps that might be followed in settling the contents of penal provisions. It suggests a systematic approach for deciding on the contents of penal provisions. Consider extracting the chart at the beginning of the unit as a checklist to which you can refer until you have developed an approach that suits your style of working.

2.2 LEARNING OUTCOMES

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

- adopt a systematic approach for determining the contents of penal provisions.

2.3 General Factors to Keep in Mind

Drafting penal provisions has to be undertaken in the context of the existing law and practice relating to crime, criminal procedure and punishments. Legislative Counsel, therefore, must be fully informed not only about these arrangements in their jurisdiction, but also about the general trends in their criminal law and practice. These include:

i. Judicial Attitudes

The rule formerly enunciated, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful, the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences." per Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at 339.

Judicial approaches to criminal statutes were considered in **LED: 605** (W*orking with the rules of interpretation*).

ii. General Principles of Criminal Law

It is presumed that the Legislature intends these general principles to apply unless explicit provision is made to different effect. These are to be found typically in the common law and a Penal or Criminal Code. However, drafters are rarely concerned directly with those instruments. Most penal provisions that you will draft are contained in other statutes. But bear in mind in drafting those, that it is unnecessary to enact provisions that deal with matters already covered by these general rules. At the same time you must construct those provisions consistently with those rules.

Typically, the following matters are provided for in the Code.

(a) the classification of crimes and offences;

(b) principles relating to criminal responsibility and general defences (youth; intoxication; insanity; duress; self-defence; ignorance of the law; mistake of fact; involuntariness; claim of right; etc);

(c) principles relating to parties (principal offenders; aiding, abetting, etc; accessories after the fact, etc);

(d) inchoate crimes (attempts; conspiracies).

2.4 General Principles Relating to Criminal Procedure, Evidence and Jurisdiction

Similarly, only exceptionally do you need to include provisions relating to the prosecution process and related procedural matters or to evidence in criminal proceedings or conferring jurisdiction upon particular levels of court. These matters too are governed by general rules, typically contained in a Criminal Procedure Code and legislation on evidence. But again, your drafts that rely upon those provisions must be consistent with them, for example in referring to concepts or terminology.

Human Rights Provisions

Penal provisions often touch upon matters that are subject to constitutionally guaranteed rights. Drafting e.g. strict or absolute liability offence or provisions that shift the burden of proof requires careful consideration of the constraints imposed by the rights to personal liberty and the protection of the law and due process.

Reference to these considerations was made in **LED: 705** (*Working with Fundamental Freedoms provisions).*

2.5 Determining the Content of Penal Provisions

The word 'penalty' means punishment under the law, i.e., such punishment as is provided in penal laws. It also means the sum payable as a punishment for a default. Persons involved in smuggling and other

modus operandi of imports and exports, in violation of prohibitions/ restrictions in vogue or with intent to evade duties or fraudulently claim export incentives are liable to serious penal action under the Customs Act. The offending goods can be confiscated and heavy fines and penalties imposed. There are also provisions for arrests and prosecution to deter them from smuggling and commercial frauds-which seriously affect the economy and even society at large when it comes to sensitive goods like drugs, arms and ammunition. The following indicate the provisions in law for seizure, confiscation of goods, imposition of penalties by adjudication.

As with other topics, you will develop your own approach for settling the contents of penal provisions as your experience grows. But the following are decisions that are typically called for, whether or not you reach them by following this systematic scheme. The issues involved are discussed in more detail in the following pages.

Step 1	**are penal provisions required?**
Step 2	**is the same activity already subject to penal provisions under existing law?**
Step 3	**whose and what precise conduct is to be prohibited?**
Step 4	**should express provisions determining the mental element be included?**
Step 5	**at what level of court is the offence to be triable?**
Step 6	**what is the maximum penalty to be attached to the offence?**
Step 7	**should any special defence be included?**
Step 8	**should any limitations on prosecutions be included?**

Step 1: Are penal provisions required?

Your instructions may expressly indicate the activities that you are required to prohibit or restrict through penal provisions. This is likely when the principal purpose of a new policy is to forbid activities that to that time have been lawful, perhaps to take account of changed social attitudes, or some misuse of technological innovations or prevalent behaviour that is considered to be anti-social or economically damaging. A particular case is legislation giving effect to international treaties that are aimed against transnational crimes (e.g. drug trafficking, terrorism, interference with international transport or communications systems).

But more frequently, it falls to you to identify cases in which you consider that penal provisions are needed as the appropriate way to enforce the legislation you are drafting. Typically, such provisions are incidental to the main purpose of legislation establishing a new regulatory scheme and only particular features of the scheme are likely to call for penal sanctions. These commonly take two forms:

(i) sanctions upon those whose activities are being regulated for failure to carry out properly the duties imposed upon them;
(ii) sanctions in respect of other activities or behaviour that are likely to obstruct the working of the scheme.

These should emerge in the course of your analysis of the instructions and design of the legislative plan. They may also occur to you as you are actually drafting particular features of the scheme. At all these stages, bear in mind the question of enforcement, and specifically consider which of the provisions need to be reinforced by penal sanctions.

Accordingly:

(i) whenever you create a duty, decide whether it is to be enforced through prosecution.

But bear in mind that, typically, penal provisions need not be attached to duties imposed upon public functionaries. Enforcement through judicial review is generally more appropriate; their misconduct as such can usually be dealt with by disciplinary processes or under the general criminal law.

(ii) give thought also to the behaviour likely to occur, in the particular area being regulated, that can interfere with the working of the scheme.

Such behaviour may be that of the persons whose activities are regulated; but it may also be that of persons who have dealings with them or are likely to be concerned in their activities or affected by those activities.

Example Box 1

A Bill establishing a system for licensing gold dealers should include provisions penalising those who deal in gold without a licence or who hold themselves out to be licensed gold dealers. It should also create offences if licensed gold dealers fail to carry out duties created by the Bill, e.g. to keep registers of their transactions.
But the Bill may also penalise those who knowingly buy gold from, or sell it to, persons who are not licensed gold dealers or who provide false statements to dealers when registering a transaction, e.g. as to the person's identity or the origins of the gold.

Step 2: is the same activity already subject to penal provisions under existing law?

If conduct is already penalised, for example under the Criminal Code, it is both unnecessary and a possible source of confusion (for example if the penalties are different) to deal with the matter again. This is particularly the case with respect to inchoate offences (such as attempt or conspiracy) in which the general provisions of the Criminal Code are usually wide enough. Similarly, for example, making a false statement or dishonestly preparing or using documents to obtain some benefit may be governed satisfactorily by the general law.

However, it may be sensible to create a specific offence in the context of your Bill that overlaps with a general offence e.g. in the Criminal Code:

(i) if the offence under the existing law is triable in a senior court and carries a heavy maximum penalty, a specific offence, drafted for the purposes of your Bill, with a lighter penalty, and triable at a lower level, will be cheaper to prosecute;
(ii) if the existing law is complex (perhaps because of the surrounding case law) and difficult to prosecute, a simple and more specific offence may be easier to prosecute;
(iii) an offence that focuses upon particular elements relevant to the new scheme may be easier to prove and prosecute than an existing offence that may be expressed in broader ranging terms;
(iv) if a special defence is needed in the circumstances of the new scheme, it may be sensible to tie this in with a new offence, appropriately drafted.

Most countries provide legal safeguards against prosecutions for both offences where the provisions overlap. This rule against **double jeopardy** is typically found in the Interpretation legislation (cp. **section 25** of the **Interpretation Act**) and in the Constitution too. It is also found in Section 221 of the Criminal Procedure Act.

SELF ASSESSMENT EXERCISE 1

Note down, with references, any safeguards against double jeopardy in the Constitution.

Step 3: whose and what precise conduct is to be prohibited?

When providing a penal provision to enforce a specific duty prescribed in the Bill, it is generally enough to state, in essence, that the offence occurs if the particular person required to comply with the duty fails to do so.

But you may want penal provisions for a wider purpose than merely to support a duty imposed to make the legislative scheme work, for example, to prohibit behaviour that is causing a social problem. In that case, the persons who may be prosecuted and the behaviour to be prohibited need to be expressly stated in the offence provision. Any doubt or uncertainty about the ambit or application of the offence in a particular case may be resolved in favour of the accused by the trial court. So take care that these matters are identified with precision.

Example Box 2

Gold dealers' licences
3.-(1) No person shall buy or sell gold unless:

(a) the buyer or the seller holds a gold dealer's licence; and
(b) the sale is effected at the registered place of business of the gold dealer and under the gold dealer's personal supervision.

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of ₦1,000,000 and to imprisonment for 2 years.

Unlicensed dealers
20. A person, not being a licensed dealer, commits an offence if he advertises himself as a dealer in gold or in any way invites a person, or persons generally, to deal with him in the purchase or sale of gold, and is liable to a fine of ₦200,000 or to imprisonment for 6 months.

Persons can be made subject to prosecution for breach of a statutory duty not only for their own conduct but also *vicariously* for the conduct of another person to whom they have delegated performance of the duty. The most common case where you should consider this is that of the employer whose employees' acts or omissions will occasion the breach. This may be needed too for contractors, in respect of those with whom they contract, for parents, in respect of their children, or for owners or occupiers of property, in respect of persons using that property, because they are in a position to use their authority to ensure that the duty is complied with.

In drafting such provisions as these, make clear that the offence is committed by the specified person despite not being the person whose conduct actually breaches the duty. Plain words are needed; the courts are reluctant to imply vicarious liability.

Example Box 3

1. A parent, or person in charge, of a child under the age of 16 commits an offence under section 12 who *knowingly permits the child* to commit an offence under that section.
2. *Where oil is discharged or escapes from a vessel or a place on land*, whether directly or indirectly, into waters to which this Act applies, the owner of the vessel or the occupier of the land, as the case may be, commits an offence.
3. The owner of a motor vehicle *in respect of which a parking offence is committed* commits that offence.
In the last two cases, the passive tense is deliberately used to express the prohibited conduct, but without requiring the designated persons actually to have done the forbidden act. The offences are drafted also as *strict liability* offences, to which special defences are typically added to excuse an accused person who has exercised due diligence.

Step 4: should express provisions determining the mental element be included?

1. A first consideration is whether the offence is to be one of strict liability or absolute liability, that is, requires no proof by the prosecution of any mental element in relation to an accused's conduct, or whether proof of some *mens rea* is necessary. The former terms are not used consistently, but for our purposes:

Strict liability offences:

These require the prosecution to prove only that the accused did what is forbidden, although it is open to the accused to prove a limited range of defences (e.g. a reasonable mistake of fact), even if they are not stated in the legislation.

Absolute liability offences:

These similarly require no prosecution proof of a mental element, but here the only defences are those expressly provided in the legislation, if any.

If either of these kinds of offence is to be created, use terms that make your intention clear. Otherwise, the courts are likely to read mental elements into the provisions (e.g. intention, recklessness or negligence), despite their absence in the text.

When might these offences be created? Punishment of persons merely for their conduct without regard to their mental state contradicts a basic common law value. Indeed, the courts may presume for that reason that a mental element is intended. So, typically, divergence from this underlying value is justifiable only in exceptional circumstances, e.g.:

(a) the offence is one aimed at securing the public welfare or is of a regulatory nature;

(b) the prohibited conduct is likely to have adverse effects upon the public at large when they can do little to protect themselves, as in matters of public health (e.g. food and drugs), public safety (e.g. poisons and building construction requirements) or environmental protection (e.g. spillage and dumping of noxious matters);

(c) the accused is in the best position to take the necessary steps to prevent the harm that is a consequence of the prohibited conduct
(as in the case of vicarious liability);

(d) the prosecution may have difficulty in proving a mental element, as the accused is likely to be the only person, or at least to be far better placed, to know how the harm actually occurred;

(e) the penalty is likely to be a fine and the maximum to be comparatively light.

Unless specifically instructed to do so, do not include strict or absolute liability offences in a Bill without first clearing the matter with your client.

2. If *mens rea* is to be an essential component of the offence, a second consideration is whether to include words specifically to indicate the required mental element. In the past, inclusion of terms such as "willfully", "maliciously", "intentionally" was more common than today. Today, many legislative provisions are silent in this respect, as the drafter is confident that the courts will read in a requirement at least of intentional conduct.

However, consider whether to provide expressly for the mental elements of the offence in the following cases:

(i) where the conduct is to be prohibited only if done with a specific intention or for a specific purpose;
(ii) where the conduct is to be punishable if done recklessly or negligently, as well as, and particularly rather than, intentionally;
(iii) where knowledge of any element of the prohibited conduct must be proved.

Here, as elsewhere, this Course works on the assumption that you are familiar with the meanings of the concepts used to describe mental elements, and generally with the law as to the mental element (the *mens rea*) of crimes in Nigeria.

Example Box 4

1. A person commits the crime of burglary who enters a building, *knowing* that he has no authority to do so, *with the intent* to commit a crime in that building.
2. A person commits an offence if he injures another person either *intending* to injure that person or *reckless* as to whether that person would be injured.
3. A person commits an offence who makes a statement *knowing* that it is false or misleading in a material particular when furnishing information concerning an insurance claim to the person against whom the claim is made or to that person's insurer.

Step 5: at what level of court is the offence to be triable?

Is the offence to be tried at the lowest level of court, or at an intermediate or the highest level? This step may be linked with the decision on the next: the penalty, as the jurisdiction of lower courts is typically limited to offences carrying prescribed maximum penalties.

Factors to be considered are:

(i) how serious is the offence considered to be?
(ii) is prosecution of the offence likely to give rise to lengthy hearings or complex questions of law or evidence that are best suited to higher level courts?
(iii) can the offence be proceeded with more expeditiously by lower levels of court, since it is one that is usually decided on easily gathered and presented factual evidence?
(iv) does the offence embody a range of misconduct from the serious to the trivial, and so may need to be dealt with at more than one level of the court system?
(v) where are similar offences triable?

Here too you must be fully conversant with the jurisdictional limits of your criminal courts and the methods used for assigning categories of offences to them.

SELF ASSESSMENT EXERCISE 2

1. Under your legislation, if the penal provision does not specify the trial court, is the particular level of court to have jurisdiction to hear an offence determined by reference to the prescribed maximum penalties? Make note (with references) of the upper limits to the jurisdiction of the criminal courts in your system.
2. Consult your Criminal Procedure legislation and your Interpretation legislation and indicate whether the following terms are used for the stated purposes. If not, note down other terms that are used for similar purposes.

indictable offence: an offence triable before a superior criminal court.

summary offence: an offence triable by a court of summary jurisdiction.

offence triable both ways: an offence that may be tried either summarily or on information.

Step 6: what is the maximum penalty to be attached to the offence?

The client Ministry may propose the penalty they consider appropriate for an offence. Be prepared to proffer your own recommendation if you consider their proposal to be inconsistent with penalties assigned to similar offences, or if none has been proposed. You are in a position to compare penalties across the statute book. Ministries are likely to have more limited information and on matters of pressing concern, an inclination to suggest heavier penalties than may be required.

In particular, give careful consideration to suggested restrictions on judicial discretion (e.g. by setting mandatory sentences and minimum levels). In some jurisdictions, these may be open to constitutional challenge. In any case, there is little evidence that they achieve the hoped for results; rather they can result in difficulty in securing a conviction because the courts may take an unduly technical approach to a case to be able to acquit, or find reasons to convict of an alternative lesser offence, when they consider that individual cases do not merit the mandatory level of punishment.

In common law practice, it is usually necessary only to prescribe the maximum penalty or penalties for the offence. Courts are typically authorised by general law to select alternative punishments or to make orders of lesser seriousness (such as fines, probation or conditional discharge). There is no need to include any reference to these in particular offence provisions. Other legislation may also provide general rules stipulating the level of imprisonment that may be imposed if a fine is not paid.

SELF ASSESSMENT EXERCISE 3

Note down the references to provisions in your law that permit a court to order any of the following:

1. A lesser term of imprisonment than that stated in an offence section:

2. A fine instead of the term of imprisonment stated in an offence section:

3. A lesser fine than that stated in the offence section:

4. Suspension of imprisonment:

5. Probation as an alternative to the penalties stated in the offence section:

6. A discharge instead of a penalty stated in the offence section:

7. Compensation in addition to or instead of penalties stated in the offence section:

Take care not to provide for a penalty that is in excess of the jurisdictional limits for the intended trial court.

The penalty for a serious indictable offence is usually a maximum term of imprisonment. Penalties for lesser offences, particularly summary offences, are typically stated as a fine, or as a fine or a term of imprisonment, or as a fine or imprisonment or both. If providing for a fine and imprisonment, work out some approximation between the level of fine and the level of imprisonment. A low fine is taken to indicate that the offence is not considered to be particularly serious; so, the maximum for imprisonment should reflect the same factor. A very high fine may be justified if the offence involves financial loss to public revenues or the offence is typically committed by corporate bodies.

In principle, this relationship between the maximum levels of fine and of imprisonment should be consistent with that in earlier legislation. Unfortunately, the effect of inflation upon monetary values makes past prescriptions of fines a poor guide on which to base new provisions. In some systems, designation of precise fines, commonly for summary offences, has been replaced by a system of numbered bands or levels, in an ascending order of value. The penalty for an offence is stipulated by reference to a specified band that sets the maximum that can be ordered for offences in that band. The actual fine levels of each band are prescribed by law and may be increased, typically, by a Ministerial order, when necessary to take account of the change in the value of money.

SELF ASSESSMENT EXERCISE 4

1. Note down, with the references, whether a system of banding of fine levels is in use in your jurisdiction and for the type of offences to which it relates.
2. Note too the procedure for increasing the levels in the bands (cp. the **model Interpretation Act 1992, section 53(4)**).

Alternative ways of expressing penalties can be considered in the following cases:

(i) Prescribing a heavier penalty for *a second or subsequent offence*, especially where a first conviction might be met with mitigation on the grounds of inadvertence or ignorance of the law (that could not be made subsequently);

(ii) When the offence can be tried *either on indictment or summarily*, prescribing a heavier penalty if the offence is tried on indictment;

(iii) Prescribing that the level of fine should reflect the value of the subject-matter of the offence (e.g. for breach of Customs offences or unauthorised dealing in property, the value of which can be readily ascertained, such as gold or shares);

(iv) Prescribing a daily penalty if the offence is of a *continuing nature* (e.g. failure to remove a dangerous or noxious item when required).

Example Box 5

13. A person who advertises a tobacco product contrary to section 12 commits an offence and is liable:

(a) on a first offence, to a fine of ₦200,000;

(b) on a second or subsequent offence, to a fine of ₦500,000 or to imprisonment for 6 months or to both.

4. A person over the age of 16 having the charge or care of a child under the age of 16 who willfully assaults, ill-treats or neglects that child commits an offence and is liable:

(a) on conviction on indictment, to a fine of ₦500,000 or to imprisonment for 2 years or to both;

(b) on summary conviction, to a fine of ₦50,000 or to imprisonment for 3 months or to both.

27. A person who fails to declare goods to the Customs commits an offence and is liable to pay, in addition to the duty payable on the goods, a fine not exceeding the value of the goods as assessed under section 28.

107. A person who fails to submit a return as provided in section 106 commits an offence and is liable to a fine of ₦50,000, and if the failure continues for more than 30 days after the last day for submission under that section, to a further fine of ₦15,000 for every day or part of a day during which the offence continues.

In drafting a penalty for a continuing offence, be aware that the daily penalty can only be imposed up to the date of conviction (or such earlier day that you may specify). An offender can be punished for continuing breaches *after* conviction only if convicted of a *further offence*. To avoid challenges on the ground of double jeopardy or *autrefois convict*, provide that such breaches constitute a new offence if continuation appears likely in the particular case.

Example Box 6

(2) A person who fails to submit the return after conviction of an offence under subsection (1) commits a further offence and is liable to a fine not exceeding ₦25,000 for every day or part day during which the offence is continued.

When determining penalty levels, consider too whether the offence is one that is typically committed by a corporate body. Fine levels appropriate for individuals may prove to be far too low where the defendant is a corporation. Again, if imprisonment is the only penalty assigned, a corporation cannot, at common law, be convicted of the offence. Some jurisdictions have enacted general provisions which cover some of these matters:

(i) the term "person" is defined to include corporate bodies, so that in appropriate circumstances, offence provisions catch those cases (cp. the **model Interpretation Act 1992, section 29**);
(ii) corporate bodies are made subject to prosecution in the same way as individuals (cp. the **model Act, section 53(1)**);
(iii) general fine levels are set for cases where a corporate body is convicted of an offence that is punishable only by imprisonment (cp. the **model Act, section 53(3)**);
(iv) those concerned in the management of the corporation are made liable to prosecution, as well as the corporate body itself, but they have a defence of no knowledge or reasonable diligence (cp. the **model Act, section 53(2)**).

SELF ASSESSMENT EXERCISE 5

Note down, with references, any provisions in general legislation in your jurisdiction with respect to:

1. The definition of "person" to include corporate bodies:

2. Liability of corporations for offences punishable by imprisonment only:

3. Fine levels for corporate bodies convicted of imprisonable offences:

4. Liability of a corporation's managers where the corporation is convicted:

In cases of this kind, consider whether also to include a suitably increased level of fine in the provisions in respect of convicted corporations. This is useful for regulatory offences when the regulated activities are in the main undertaken by corporate bodies (e.g. in connection with industrial or commercial processes).

Step 7: should any special defence be included?

Unless you provide otherwise, the general principles of criminal responsibility automatically apply in relation to every offence created by a Bill. Here too, you are expected to be conversant with the circumstances in your system of law in which an accused can be found not to be criminally responsible. You need not provide for these defences, unless the standard rule must be modified in some way.

SELF ASSESSMENT EXERCISE 6

Note down the references to the provisions of your law which determine criminal responsibility in the following:

The age when the criminal responsibility of children starts):

Mentally impaired persons:

Intoxicated persons:

Mistake of fact:

Mistake of law:

Claim of right:

Intervening acts:

Duress:

Self-defence:

In most instances, you will have no occasion either to vary or exclude any of the defences or to add any.

However, it is otherwise when drafting offences of strict, vicarious or absolute liability. In these cases, give particular attention to the defences. For these offences can work harshly if persons whose activities or actions have led to harm can be punished no matter what steps they may have taken to prevent it. Consider whether to include any of the following special defences:

(i) having taken reasonable care and exercised due diligence to avoid the harm;
(ii) the harm was occasioned by the acts or default of a third party or some other cause beyond the accused's control;
(iii) in the case of the liability of an executive of a corporation, absence of consent or knowledge and exercise of due diligence.

Example Box 7

1.-(1) The owner of a wild animal commits an offence if he fails to keep it confined in a suitable enclosure at all times when the animal is not in the charge of some person who is accompanying the animal in such a manner as to have reasonable control over it.
(2) It is a defence to a charge under subsection (1) for the owner to prove that he took all reasonable steps to ensure that, at the time relevant to the charge:
(a) the animal was confined as required by subsection (1); or (b) the animal was in the charge of a person as stated in subsection (1).

2. Where an offence under this Act is committed by a body corporate, every individual who is concerned in the management of its affairs also commits that offence, unless the individual proves that:

(a) the act constituting the offence took place without the individual's knowledge or consent; and

(b) the individual took reasonable steps to prevent the commission of the offence.

3. The owner of a shop charged with an offence under this Act is entitled to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if, after the commission of the offence is proved, the owner shows to the satisfaction of the court that:

(a) he used due diligence to enforce compliance with this Act; and

(b) the other person committed the offence without his knowledge, consent or connivance, that other person is to be convicted of the offence and the owner exempted from any fine.

The last example is useful in the case of offences of vicarious liability.

Step 8: should any limitations on prosecutions be included?

The general law may present time limits after the commission of the offence for instituting prosecutions, but typically these are confined to offences triable by a summary court. For serious offences, no standard period within which such prosecutions must be started is usual.

SELF ASSESSMENT EXERCISE 7

Note down, with references, any standard time limits to the instituting of criminal proceedings in:

cases triable before a superior court (i.e. indictable offences):

cases triable before a court of summary jurisdiction (i.e. summary offences):

But consider time limits in two particular circumstances:

1. for offences triable before superior courts, whether a time limit should be introduced if none is provided for under general law;

2. for summary offences, whether the standard time limit should be altered (usually by extending the typically short standard period, e.g. 6 months).

Example Box 8

(2) No proceedings for an offence under this section are to be commenced after the expiry of 12 months from the date on which the acts constituting the offence were done.

25. Despite section 204 of the Criminal Procedure Code (*which provides a general time limit on prosecutions*), summary proceedings for an offence under this Act may be instituted at any time within 12 months after the date on which the offence was committed.

Precedents drawn from existing offences may be helpful and contribute towards consistency in practice. But factors that may have to be considered in deciding whether provisions of this kind are called for include:

(i) the difficulty or hardship in prosecuting the particular offence after a long period has elapsed;
(ii) whether a limitation period will contribute to concealment of the crime and discourage confessions of guilty;
(iii) the likelihood of the offence being discovered after the limitation period has expired (e.g. cases involving dishonesty or concealment).

A variant requires that a prosecution can be commenced after a particular time only with the consent of the head of the prosecution service (the DPP or Attorney-General, as the case may be). In consequence, an assessment can be made as to whether the public interest lies in prosecuting in the particular circumstances.

This consent may be introduced as a general limitation, e.g. where prosecutions for a particular offence are likely to give rise to issues affecting the public interest or to have implications beyond the immediate concerns of the victim or the accused, e.g.:

(i) offences likely to involve foreign nationals or to be committed abroad or in international jurisdictions (e.g. air space), since these may affect relations between states;
(ii) offences so widely drawn that they could be prosecuted vexatiously or in controversial or inflammatory circumstances (e.g. offences against racial hatred);
(iii) regulatory offences in which the harm is caused to the general public rather than specific individuals, or where this is just one of the methods of enforcement available;
(iv) serious offences by officials in public administration, who are subject to disciplinary processes (e.g. bribery, corruption).

Example Box 9

25.-(1) No prosecution for an offence under this Act may be instituted without the consent in writing of the Director of Public Prosecutions.
(2) Subsection (1) does not prevent the arrest, or the issue of a warrant for the arrest, of a person for the offence, or the remand in custody or on bail of a person charged with the offence.

Without subsection (2), necessary preliminary steps might not be possible in the period during which the DPP is considering whether or not to consent.

1.6 SUMMARY

Drafting penal provisions has to be undertaken in the context of the existing law and practice relating to crime, criminal procedure and punishments. Take care not to provide for a penalty that is in excess of the jurisdictional limits for the intended trial court. In this unit, we have considered the steps to be followed in settling the contents of penal provisions. You should now be able to decide what should be in particular penal provisions.

SELF ASSESSMENT EXERCISE

Draft a sub-clause that requires the Director of Public Prosecutions, to give consent if proceedings for a criminal offence under that clause of the Bill are to be commenced, when 12 months or more have elapsed since its commission.

1.7 REFERENCES/FURTHER READING

Driedger E.A, (1976). *The Composition of Legislation.* Ottawa: Dept of Justice.

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

Model Interpretation Act, 1992.

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

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

1.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE:

The prevalent over-crowding in prisons shows that we have not explored the possibility of having systems alternative to imprisonment. The Supreme Court had also recently condemned the appeal of the Uttar Pradesh state who argued against the release of three prisoners citing socioeconomic reasons.

The possible alternatives to sentences of imprisonment, including verbal sanctions, conditional discharge, status penalties, economic sanctions, confiscation orders, restitution to the victim, suspended or deferred sentences, probation and judicial supervision, a community service order, referral to an attendance centre, house arrest, other non-institutional measures or a combination of any listed earlier.

UNIT 3 DRAFTING PENAL PROVISIONS – PART I

3.1 INTRODUCTION

This unit is concerned with the way in which penal provisions are drafted. It contains the principal matter and should command most of the time spent on this Module. The unit contains a considerable number of Example and Self Assessment Exercises. These are designed to bring out points in the practice in your own jurisdiction that call for particular attention, and to provide an opportunity for you to try your hand at them. You may need to look carefully at the Example Boxes to gain a clear insight into the techniques under consideration. You may find that some of these use more direct forms than are conventional in your system. Try them out as part of your studies. But be sure that they are suitable for your system, and acceptable, before you put them into practice in your work. You must comply with the house-style here as elsewhere.

3.2 LEARNING OUTCOMES

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

i. Draft penal provisions, in keeping with the practice and housestyle in Nigeria, to:

ii. create substantive criminal law;
ii. Enforce requirements of the legislative scheme established by a Bill.

3.3 How to Draft Penal Provisions

Common law systems tend to use similar ways of expressing penal provisions, though variations are found in different house styles. But whatever form is used, it should contain three elements:

A statement of, or a reference to, the prohibited conduct;
A statement that doing the prohibited conduct constitutes an offence;
The sanction or punishment.

It is not enough that a particular sanction is imposed for acting or failing to act in a particular way. Courts are reluctant to presume that new offences are being created. Use express words stating that contravention constitutes a crime or an offence.

SELF ASSESSMENT EXERCISE 1

1. Note down whether in your jurisdiction the following terms are used and, if both are, the distinction between them or in their use.

crime:

offence:

2. Note too whether any other terms are used to describe offence, and the distinction from the other terms in the use (e.g, "**felony**"; "**misdemeanour**"):

3.4 How Offence Provisions may be Expressed

There are three main ways in which penal provisions may be expressed. These may be called: the declaratory, the conditional and the mandatory.

Example Box 1

declaratory A person who assaults or obstructs a police officer acting in the execution of his duty commits a summary offence and is liable to a fine of ₦10,000 or to imprisonment for 3 months.
conditional If [Where] a person assaults or obstructs a police officer acting in the execution of his duty, that person commits a summary offence and is liable to a fine of ₦10,000 or to imprisonment for 3 months.
mandatory
(1) No person shall assault or obstruct a police officer acting in the execution of his duty. **(2)** A person who contravenes subsection (1) commits a summary offence and is liable to a fine of ₦10,000 or to imprisonment for 3 months.

3.4.1 When to Use these Different Forms

To an extent, your choice will be influenced by local practice and house style.

SELF ASSESSMENT EXERCISE 2

Check recent legislation, and note down whether any of these forms are in more or less common use than others.

In **Example Box 1**, the same offence is expressed in three different forms. But when drafting the particular offence illustrated, many drafters would be likely to use the **declaratory form**; its function is to prescribe the constituents of the crime and the consequential penalty in a single sentence. This form is useful to list in the same sentence a series of prohibited actions that may be committed by the same person, or class of persons, in a particular context. However, the **mandatory** form can be used for the same purpose with less complexity, though at greater length.

Example Box 2

Declaratory:
A person commits a summary offence who:
(a) assaults or obstructs a police officer; or
(b) incites another person to assault or obstruct a police officer; or
(c) uses abusive or insulting language to a police officer,
when that police officer is acting in the execution of his duty, and is liable to a fine of ₦100,000 and to imprisonment for 3 months.

Mandatory:
(1) No person shall:
(a) assault or obstruct a police officer; or
(b) incite another person to assault or obstruct a police officer; or
(c) use abusive or insulting language to a police officer, when that police officer is acting in the execution of his duty.
(2) A person who contravenes subsection (1) commits a summary offence and is liable to a fine of ₦100,000 and to imprisonment for 3 months.

The **conditional form** too can be used for a similar purpose, but there is little to be said for preferring it to the other forms. The purpose of the provision is to stipulate what and when conduct constitutes a crime, rather than to make criminality conditional upon specific conduct. But the conditional form can be used to penalise a person when performing a permitted activity *if* the person does so in an unacceptable way.

Example Box 3

A person who is required by this Act to answer questions put by a police officer commits an offence if he refuses to answer or does not answer a question truly.

A conditional clause is also useful for those cases when the provision needs to state an event that has to precede the prohibited conduct or the context in which is has to take place.

Example Box 4

When a customs officer has entered and is searching premises under a search warrant issued under this Act, a person commits an offence who:
(a) assaults or obstructs the customs officer; or
(b) incites another person to assault or obstruct the customs officer; or
(c) uses abusive or insulting language to the customs officer, and is liable to a fine of ₦100,000 and to imprisonment for 3 months.

The **mandatory** form is particularly useful if you want to stipulate that specified acts must be done or must not be done in order to make the administrative scheme created by the Bill work. The penal provisions are added, usually in a separate sentence, to indicate how that conduct is to be enforced. It is a convenient form too for listing a series of commands about behaviour required of people in the particular setting that the legislation is regulating.

Example Box 5

(1) No person shall: (a) import into Nigeria, or (b) export from Nigeria, ammunition for a revolver, rifle or automatic weapon unless that person holds a licence issued by the Minister for the purpose. **(2)** A person who contravenes subsection (1) commits an offence and is liable to a fine of ₦200,000 and to imprisonment for 6 months.

When using this form, always state expressly that breach of the mandated requirements constitutes an offence, and then prescribe the penalty. Otherwise it is a bare prohibition that may have to be enforced by other means. You can do this, as in **Example Box 5**, in a subsection following the prohibition. If you have imposed a series of positive duties and prohibitions in the Bill, and the penalty for breach is to be the same for all, consider dealing with them together in a single penalty provision.

Example Box 6

A person who contravenes any of the provisions of section 5(1), 6(1) and 12(1) commits an offence and is liable to a fine of ₦100,000.00

But take care, in using a general penalty clause of this kind:

(i) that it is prominent and easy to find in the Bill;
(ii) to identify specifically the provisions that provide the basis of the offences.

Example Box 7

The following penalty provision may have unexpected consequences.
A person who contravenes any of the provisions of this Act for which no penalty is specifically provided commits an offence and is liable to a fine of ₦25,000.00.
This can be applied to *any* provision of the Act that creates a mandatory duty. In principle it can apply to duties imposed on the administering or enforcing authorities or even judges! Avoid this open-ended form. Specify the sections in which contain the duties that are to be enforced through the criminal law.

Note the use of "contravene" in **Example Boxes 6** & **7**. This term generally extends both to acting positively in breach of a duty or merely failing (e.g. by omission) to comply with the duty. Its use may be authorised by your Interpretation legislation. If not, you may need to use "acts in contravention of" or "violates" where a prohibition on particular actions is imposed and "fails to comply with" where a positive duty to act is created (or both if both types of duty are required).

SELF ASSESSMENT EXERCISE 3

Note down any equivalent in your Interpretation legislation to the definition of "contravene" in **section 29 of the model Interpretation Act 1992.**

3.5 Can the Style of Offence Provisions be Improved?

You may find a number of differences in style between the examples given and those in your own legislation. Of course, you must follow your house style on these matters.

SELF ASSESSMENT EXERCISE 4

Using recent examples of your legislation, compare how the standard terms in each of the following are written in your jurisdiction with **Example Boxes 3** to **6**. Make a note of any striking differences.
declaratory provisions:
conditional provisions:
mandatory provisions:

Let us consider the justifications used for the more common differences.

i."*A* person who" is preferred to:

- "*any* person who" or "*every* person who", as there is no reason to emphasise the universality of the rule.

- "*whoever*" or "*whosoever*", as these archaic forms are no longer in general use.

- "*it is an offence to*" or "*it is unlawful to*", as these do not make explicit the persons whose behaviour is prohibited (although they should be given universal application).

ii.The present tense is used to state the elements of the offence e.g.: "*who assaults*", "*contravenes subsection (1)*", "*commits an offence*", "*is liable*", rather than incorporating "*shall*". That form is a future

tense and is not suited to legislation that is always speaking. However, by contrast, mandatory provisions must include the element of command when describing the duty to be enforced by the criminal sanction.

iii."*commits* an offence" is preferred to:

- "*is guilty of* an offence", since findings of guilt are for the court to make; the Legislature stipulates the components of the offence; - merely stating that a person "*is liable on conviction*", as that phrase does not explicitly establish an offence.

iv. "*commits a summary offence*" is preferred to "*is liable on conviction by a court of summary jurisdiction*". Under the general law, a penalty cannot be imposed for an offence unless there is a conviction, so a reference to convicting is superfluous.

v. The use of *numbers*, instead of words, to express the scale or length of penalties is preferred, as easier to pick out in the text.

vi. In relation to the penalty, "*is liable to*" is preferred where the selection of the penalty is discretionary, to stating that "*the penalty for the offence is....*". That phrase leaves in doubt whether the penalty is intended to be fixed (i.e. excludes all alternatives) or to be discretionary and merely sets the maximum.

vii."*liable to a fine of ..... or imprisonment for .....*" is preferred to "*liable to a term of imprisonment for a period not exceeding ..... or a fine not exceeding .....*", since it is less wordy. Since the preferred form states liability, the specified penalty can only be the maximum penalty. Conventionally, references to fines precede references to imprisonment.

The last practice is frequently supported by Interpretation legislation. It is one of several provisions that are found in recent Interpretation Acts that can shorten the way penal provisions are written.

SELF ASSESSMENT EXERCISE 5

Examine the following subsections of the **model Interpretation Act 1992** and make a note of the way in which they might be used in drafting penal provisions.
Note also any equivalents in the Interpretation Act.

Provision	**Possible use**	**Equivalent**
section 54(1):		
section 54(2):		
section 54(3):		

The value of provisions such as those listed in **Self Assessment Exercise 5** is illustrated by the examples in the following **Example Box 8**. Penal provisions can be set out more simply and in a shorter form, without loss of precision.

Example Box 8

sections 54(1) & (2) enable the following forms to be used:
..... is liable to a fine *of* ₦100,000 *and* to imprisonment *for* 3 months
This allows a court to order both or either penalty to the maximum prescribed, without the need to add:
or both such fine and imprisonment.
Substituting "or" for "and" in the new form makes the penalties alternative only.
section 54(3) enables the following to be drafted:
3. No person shall import ammunition for a rifle, revolver or automatic weapon unless that person holds a licence issued by the Minister for the purpose. **Maximum penalty: a fine of ₦100,000.00 and imprisonment for 3 months.**

1.6 SUMMARY

In conclusion, Common Law systems use similar ways of expressing penal provisions, though variations are found in different house-styles. In this unit, we considered drafting penal provisions. You should now be able to draft penal provisions effectively in keeping with the practice and house-style in Nigeria. Draft a provision making it an offence during an inquiry under the Bill to refuse to take an oath or to answer questions or to be untruthful in answering. The penalty is to be a fine of ₦100,000. Compose this in the suggested alternative forms.

declaratory: conditional: mandatory:

3.7 REFERENCES/FURTHER READING /WEB RESOURCES

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

Model Interpretation Act, 1992.

3.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE:

The definition of "contravene" in **section 29 of the model Interpretation Act 1992.**

An Act to provide for the construction and interpretation of Acts of the National Assembly and certain other instruments; and for purposes connected therewith. 1. This Act shall apply to the provisions of any enactment except in so far as the contrary intention appears in this Act or the enactment in question.

Contradiction, Violation, Infringement, *breach*, infraction, transgression, trespass, dispute etc

to go or act contrary to : violate contravene a law or to oppose in argument : contradict contravene a proposition.

Contravention" as used in this Commercial Offer and its Acceptance, means an act or omission would "contravene" or constitute a "contravention" of something if, as the context requires (i) the act or omission would conflict with it, violate it, result in a breach or violation of or failure to comply with it, or constitute a default under it, or (ii) the act or omission would give any Governmental Body or other Person the right to challenge, revoke, withdraw, suspend, cancel, terminate, or modify it, to exercise any remedy or obtain any relief under it, or to declare a default or accelerate the maturity of any obligation under it;

UNIT 4: DRAFTING PENAL PROVISIONS – PART II

4.1 INTRODUCTION

This unit continues with the way in which penal provisions are drafted. It also contains the principal matter and should command most of the time spent on this Module. The unit contains a considerable number of Example and Self-Assessment Exercises. These are designed to bring out points in the practice in your own jurisdiction that call for particular attention, and to provide an opportunity for you to try your hand at them. You may need to look carefully at the Example Boxes to gain a clear insight into the techniques under consideration. You may find that some of these use more direct forms than are conventional in your system. Try them out as part of your studies. But be sure that they are suitable for your system, and acceptable, before you put them into practice in your work. You must comply with the house-style here as elsewhere.

4.2 LEARNING OUTCOMES

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

i. Draft penal provisions, in keeping with the practice and house style in Nigeria, to:

ii. Create substantive criminal law;

iii. Enforce requirements of the legislative scheme established by a Bill.

4.3 Particular Points to Look Out For

i. Describing the Offender

Identify clearly those whose behaviour is to be affected. In many cases, it is sufficient to apply the rule universally, i.e. to everyone who acts as described, and so to concentrate on the conduct, rather than describing the offender, who can, therefore, be referred to merely as "a person".

But in legislation regulating a particular sector of activity, you may need to restrict the criminal provisions to a specific class or category of person. For this, consider suitably modifying the grammatical subject of the sentence or providing an appropriate class term.

Example Box 1

A pharmacist commits an offence who fails, when requested by a police officer, to produce the register of poisons to be kept under this Act, and is liable to a fine of ₦150,000.00.
A person, lawfully sworn as a witness in proceedings before the Tribunal, commits the offence of perjury if he or she intentionally makes a statement that is material to those proceedings knowing it to be false or not believing it to be true.
The owner of a boat commits an offence if it is proved to the satisfaction of the magistrate that the boat was used in fishing or in attempting to fish in the prohibited zone.

Bear in mind that the expression "person" is generally given an extended meaning by the Interpretation Act, to include non-natural legal persons. In most instances, this presents no difficulties. Many offences involve physical actions that cannot be done by, e.g. companies. There, obviously, the context indicates that they are not subject to the provisions. But in others (e.g. regulatory offences), the term can have its wider meaning. If that is not the policy of the Bill, use more specific terms to indicate that the extended meaning is not intended (e.g.
"individual", "corporate body" or "association of persons").

SELF ASSESSMENT EXERCISE 1

Note down, with the reference, any general definition of "person" in your Interpretation legislation.

One limitation of the declaratory form needs to be borne in mind in this context. It uses a relative clause (beginning "who....") to describe the prohibited behaviour. It is very easy to use a relative clause also to modify the subject. The presence of two such clauses, performing different functions in the sentence can be confusing.

Example Box 2

A person who does not hold a licence under this Act who sells intoxicating liquor commits an offence.

Avoid using two relative clauses for these two different purposes. The clause modifying the subject may obscure the clause that describes the forbidden conduct. In **Example Box 2**, it is not intended that the person is to be forbidden from holding a licence. This can be overcome, e.g. by finding a different class term for the subject or by rearranging the sentence components.

Complete Self-Assessment Exercise 2 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 2

Redraft the example in **Example Box 2** to avoid using two relative clauses.

Consider whether the offenders are to include persons who do not normally fall within the jurisdictional competence of your courts (e.g. because the conduct was done extra-territorially). Difficulties of this kind may be overcome by using application provisions (as we saw in **LED: 602**).

Penal provisions rarely need to deal with the matter of secondary parties (e.g. those who aid or abet or counsel or procure the commission of an offence). General provisions, typically in the Penal Code, automatically bring these persons within the category of persons who can be prosecuted.

SELF ASSESSMENT EXERCISE 3

Note down references to any general provisions in your legislation that lay down that secondary parties are to be treated as principal parties for the purposes of the application of criminal offences.

4.4 Prescribing the Conduct

In stating the prohibited conduct, avoid terms that are imprecise or overbroad, and so present problems of evidence and proof. Equally, avoid words that have an emotive content or may lead to widely different interpretation (e.g. "proper", "decent", "immoral", "offensive"). Your aim must be to envisage the range of actions that lead to the harm or mischief that is to be stopped, and to express those with as much certainty as the language permits. So use words, where possible, that commonly indicate misconduct. Terms in common use include:

Alter	fail	obstruct
conceal	falsify	permit
damage	impede	procure
deface	induce	refuse
delay	interfere with	remove
destroy	neglect	resist

Give particular consideration to the circumstances in which, and the places where, the activities are to be controlled. Conduct may be appropriately prohibited when it occurs in a public place, but it may be neither appropriate nor feasible to enforce it if committed in private. But if conduct is punishable only if occurring in a specified place, consider carefully whether the entire action and its effects or only the effects have to occur in that place.

Example Box 3

A Bill is to create the offence of using, in a public place, words that are intended or likely to stir up racial hatred. Is this to extend to persons in neighbouring buildings who shout loudly so that their abuse can be heard in a street? If the provision is written so that the *person* must be proved to be in the public place, this case will not be caught. It must make clear that the *effects* of the conduct must be experienced in the public place, no matter where the offender is placed.

Complete Self-Assessment Exercise 4 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 4

Read the following:

A person commits an offence who

(a) uses threatening, abusive or insulting words or behaviour; or
(b) displays written material, that is likely to occasion or stir up racial hatred.

Indicate where the words "in a public place" should be inserted to produce the following results:

1. the effects of the behaviour have to be experienced in public places, but it does not matter where the behaviour itself occurs.

2. the behaviour has to occur in a public place, but its effects can be experienced in private as well as public places.

A long-standing common law exception, recognised in a number of jurisdictions, exists to the fundamental rule that the prosecution must prove every element of the offence charged. Those cases involve provisions that prohibit the doing of some specified act *unless* it is done, e.g.:

(i) in specified circumstances; or
(ii) by persons of specified classes or with specified qualifications; or (iii) with the licence or permission of specified authorities.

In these cases, the prosecution must prove that the defendant did the prohibited act (with the connected mental element), but they need not prove, even prima facie, that the case does *not* fall into those exceptions. The burden of proving that passes to defendants, who, on the balance of probability, must bring themselves within the special cases, to show that they are entitled to do the prohibited act.

Accordingly, drafters in writing penal provisions take advantage of this approach (which may be given statutory force, e.g. in the Criminal Procedure Code) to help prosecutors. It is appropriate, e.g. where the fact of being in a specified class or acting in specified circumstances is peculiarly within the knowledge of defendants, and it would, for that reason, be difficult for the prosecution to prove a negative - that the defendant does not come within the exception. To all intents, this produces a special defence.

Example Box 4

Road Traffic legislation typically requires drivers to hold a driving licence and car owners to have a certificate of car insurance. These duties are supported by penal provisions. The burden on prosecutors would be heavy if they were required to prove, *beyond reasonable doubt*, that the driver did *not* have a licence or that the owner was *not* insured.
In consequence, the Act typically prohibits driving a car *unless* the driver holds a licence and a certificate of insurance is in force in respect of the car. The driver, if prosecuted, must then produce the evidence that brings him or her within the exception. After all, they are best placed to do so.

Complete Self-Assessment Exercise 5 and then compare your answer with that provided at the end of this unit.

SELF ASSESSMENT EXERCISE 5

Which of the following is to be preferred, and why?

1. A proprietor of a shop shall not sell intoxicating liquor for consumption on the shop premises unless the proprietor holds a liquor licence in respect of those premises.

2. The proprietor of a shop in respect of which the proprietor does not hold a liquor licence commits an offence if he sells intoxicating liquor for consumption on the shop premises.

As we saw in **LED: 705** (*Fundamental Freedoms*), the Constitution may set limits to the extent to which the burden of proof may be transferred to the accused. For this may contradict the presumption of innocence. But many Constitutions specifically make provisions for the case under consideration here.

SELF ASSESSMENT EXERCISE 6

The following is a typical provision from a Commonwealth Constitution:

(1) Every person charged with a criminal offence is presumed to be innocent until proved guilty.
(2) Nothing in this section invalidates any law by reason only that the law imposes upon such a person the burden of proving particular facts.

Note down, with the reference, any equivalent provision in the Nigerian Constitution.

However, take care not to place upon a defendant the onus of proving an essential or important element of the offence, under the guise of creating a special defence in this form. Although Commonwealth

courts have accepted that the burden of proof may be shifted in exceptional circumstances when the public interest demands, in many instances such practices have been challenged as unconstitutional.

Example Box 5

5.-(1). A person commits an offence who sells a firearm or ammunition to a person *knowing* that person to be under the age of 17 years. **(2)** It is for the person charged with an offence under subsection (1) *to satisfy the court that he did not know* the person to whom he sold was under the age of 17 years.
6. A person commits an offence who has in his possession any thing that is reasonably suspected of having been stolen and *who does not give an account, to the satisfaction of a magistrate,* how he came by the thing.
In both these cases, a core element of the offence has, in essence, to be proved by the defence, thereby challenging the presumption of innocence.
A person*, other than a member of a disciplined force*, commits an offence who, in a public place or at a public meeting, has with him an offensive weapon *without reasonable excuse*.
Both the highlighted phrases concern matters that the accused would have the burden of proving. The absence of reasonable excuse would not be treated as an element of the offence that the prosecution must establish. The central elements are having an offensive weapon (which would be defined to indicate its dangerous nature) in public. The reasonable excuse is essentially a defence.

4.5 Including the Mental Element

This is a complex area of law, with which you will already be familiar. We have considered earlier a number of issues that the drafter must keep in mind. If you do not supply words in a penal provision indicating the mental element that the prosecution must prove, the courts may well supply them. The presumption that offences carry a mental element is very strong.

Mental elements of an offence:

Mens rea refers to the mental element required to be proved by the definition of the crime. By the definition of the crime, mental element is referring to the statutory provision that describes what the offence is. If the prosecution cannot prove this element, then their case fails. Also, mens rea differs from crime to crime and is contained in the definition of the crime.

The words that are commonly used to represent mens rea in the statutory definition of a crime include:

Intention.

Recklessness

Knowledge

Negligence

Rashness

Voluntariness

Dishonesty

Fraudulent

1.Intention: In order to determine intention, it is viewed from three perspectives:

- A consequence is intended if it is the aim and objective of the accused
- A consequence is intended if it is the aim of the accused and is foreseen as a virtual, practical or moral certainty.
- A consequence is intended when it is foreseen as as a probable result of the action of the accused.

In the case of ***Hyam vs DPP (1975) AC***, the accused poured petrol into the letter box of her lover's mistress' house and then ignited it, knowing fully well that there were persons sleeping inside. This resulted in the death of the persons inside.

In the case of ***Ubani vs The State (2003) vol 18 NWLR pt 851***, the accused and appellant, armed with machetes and guns, beat the deceased till he fell and discharged excreta. As a consequence of this, he died.

On appeal the Supreme Court held that death or grievous bodily harm done to the deceased was, to the knowledge of the accused, a probable consequence of his action. Thus, the accused was held guilty.

See also: ***Idowu vs State (2000) vol 12 NWLR, Idiok vs The State (2006) vol 12 NWLR pt 913***

2. Recklessness: Recklessness occurs in a situation in which the accused knew that there was a likelihood of his action resulting into a crime but he still went ahead with the action. For example,by **S. 59 of the Criminal Code** if a statement, rumour, or report likely to cause public alarm is published, and there is a likelihood that such information is false, and it turns out to be false, the publisher would be penalised.

3. Knowledge: This is a state of mind in relation to the circumstances in which the act or omission occurred. In this kind of situation the words 'knowingly' or 'consciously' is used to prove a guilty mind. Knowledge can constructive, actual or willful blindness.

For example, **S.319A of the Penal Code** provides that whoever knowingly possesses stolen property or property reasonably suspected to be stolen and does not give a satisfactory account as to how it came into his possession shall be punished with six months imprisonment, fine or both.

4. Rashness: This is a type of mens rea that is related to gross negligence or recklessness and relates to acts done without premeditation.

5. Negligence: This is a situation in which the failure to perform a duty imposed on the accused results into a crime. For example, according to the provision of **S. 138 of the Criminal Code**,if a person who is in charge of confining a prisoner, negligently allows him to escape, he is guilty of a misdemeanor punishable with two years.

6. Voluntarily: According to the provision of **S. 27 of the Penal Code**, an effect is voluntarily caused if the perpetrator intended that his action would cause it, or if at the time of doing such act, there is a reasonable likelihood of such act being caused.

For example, if A sets fire to an inhabited house for robbery and causes the death of the occupants, he would be said to have voluntarily caused their deaths. This is regardless of the fact that he didn't want to cause their death; if he knew it was likely to cause their deaths, it would be regarded as voluntary.

7. Dishonestly: This is used in a situation in which the an act is not done in good faith. Thus, **S. 286(1) of the Penal Code** provides that whoever dishonestly takes a movable property out of the owner's possession without his consent, is liable for committing theft.

8. Fraudulently: This can be used interchangeable with dishonestly. For example in **S.320 Penal Code**, it is stated that anyone who fraudulently or dishonestly induces a person to part with his property is committing the offence of cheating.

Many provisions do not require any words to be added. The statement of the prohibited conduct itself makes clear enough that it must, e.g. be deliberate and that it is not intended to be, e.g. a strict liability offence.

Example Box 6

A person commits an offence who refuses to allow an inspector to examine records or books of account required to be kept under this Act.
A person commits an offence who purchases or hires a firearm or ammunition unless he or she holds a firearms licence.
A person commits an offence who commits an act of gross indecency with or towards a child under the age of 14.
In the absence of express words the courts would read in an appropriate *mens rea*. However, in the last case, good practice suggests that the provision should indicate the required mental element in relation to the child's age.

But in a number of cases, consider giving clear guidance:

(i) where conduct is prohibited because of its effects, consider whether the offence should be committed only if the accused was aware of, or reckless as to, the likely effects when acting;

(ii) where the prohibited conduct involves an element that can arise or happen without the accused being aware of it, consider whether to require that the accused must be aware of it;
(iii) where the conduct is prohibited because it is aimed at a particular goal, consider whether to require the accused to have a specific intent to bring about that goal;
(iv) where the action can be committed accidentally as well as deliberately, consider whether to add words that confine the offence to deliberate behaviour;
(v) where an offence depends upon a fact about which the accused may have to make a judgment, consider whether to require that the accused knew the fact to be present or was reckless in that respect, or whether the accused should be allowed to prove that he did not know.

Example Box 7

The following are examples of these cases:
A person commits an offence under this Act who publishes or distributes written material that is threatening, abusive or insulting, *knowing that it is likely to stir up ethnic hatred*.
A person commits an offence who makes a return under this Act *knowing that it contains information that is false*.
A creditor commits an offence who, in any proceeding under this Act, makes a false claim *with intent to defraud*.
A person commits an offence who *intentionally* lowers the quality or value of seeds by mixing other seeds with them after they have been tested and marked under this Act.
(1) A person commits an offence who sells or lets for hire a firearm or ammunition to a person under the age of 17. **(2)** It is a defence to a charge for an offence under subsection(1) that the person charged *believed the other person to be of or above the age of 17 and had reasonable grounds for the belief.*

Conversely, if you intend to exclude a mental element that might be read into the offence by the courts, use appropriate words to make that intention clear. An effective way is to state directly that knowledge, intention, awareness are immaterial, so that it is no defence that the accused lacked the conventional mental state.

Example Box 8

A person commits an offence who has in his or her possession a substance prohibited under section 10, *whether or not he or she knew the substance to be prohibited*.
(1) A person who sells or lets for hire a firearm or ammunition to a person under the age of 17 commits an offence.
(2) *It is immaterial that the person charged with an offence under subsection (1) believed that the other person to be of or above the age of 17.*
It is no defence to a charge under this section that the defendant *did not know or had no reasonable cause to believe* that the information was confidential.

Traditionally, drafters have used a number of terms to express the mental element. Some of these, now archaic should be avoided. More conventional terms such as "intend"; "recklessly"; "knowing that" should be used, as the case may be:

1. Willfully - a term to express intention and commonly (but not invariably) requiring knowledge of the associated facts and foresight of likely outcome.

2. Maliciously - an archaic term used to convey an intention to do the prescribed harm or reckless as to whether the harm, of which the accused had foresight, might occur (but it does not involve wicked motives).

3. Knowingly - a term to require knowledge of all the prescribed elements of the offence and that may say no more than will be presumed by the courts.

4. Fraudulently - a term to convey that the described behaviour is to be undertaken dishonestly (i.e. knowing that by ordinary standards the act is considered dishonest) or with an intent to defraud (a preferable phrase).

5. Permit - a term to indicate that the accused gave leave or deliberately let stated events take place in full knowledge or was willfully blind as to what was happening when he or she was in a position to forbid or prevent the events.

6. Suffer - an archaic term that means much the same as "permit", though it gives the impression of mere indifference as to whether the events take place.

7. Allow - a term often used as an alternative to "permit", though it appears to be more passive as it does not convey as strongly the case of giving leave.

8. Cause - a stronger term than “permit”, indicating the giving of authority for another, or putting another in a position, to do the forbidden act, but it does not convey clearly whether knowledge or awareness of the likely results is required.

Trainee drafters are inclined to include "permit" or "allow" or "cause" the prohibited conduct as *additional* ways in which the offender may commit the offence. This is usually unnecessary. A person who "aids, abets, counsels or procures" another to do an act is, at common law and under the Criminal/Penal Codes, treated as a principal offender. If you use an agent to do something (i.e. "cause" the thing to be done), then *you* can be treated as the offender.

Example Box 9

1. A person commits an offence who sells or lets for hire, *or causes or permits the sale or letting for hire of,* a firearm or ammunition to a person under the age of 17.
The highlighted words are not required in this context.
2. A licensed firearms dealer commits an offence who *permits the sale or letting for hire of* a firearm or ammunition to a person under the age of 17.
The highlighted words are used here solely to create vicarious liability.

4.5.1 Providing Special Defences

We have already seen that you should consider whether special defences should be included when drafting strict or absolute liability offences. In particular, give thought to any circumstances where it might be thought unjust to penalise a defendant who was acting from good motives or when he or she has acted reasonably. By creating a defence, of course, the special factors can be left for the accused to raise and prove.

Example Box 10

25. -(1) A person commits an offence who:

(a) kills, injures or takes, or attempts to kill, injure or take a protected wild animal; or

(b) cruelly ill-treats a protected wild animal; or

(c) uses a prohibited instrument in the course of killing or taking, or attempting to kill or take, a protected wild animal.

(2) A person does not commit an offence under subsection (1) by reason only of:

(a) taking or attempting to take a protected wild animal that has been disabled, otherwise than by his act, solely in order to tend it;

(b) killing or attempting to kill a protected wild animal that appears to be so seriously injured or in such a condition that to kill it would be an act of mercy;

(c) unavoidably killing or injuring a protected wild animal as an incidental result of a lawful action.

One defence that should be considered for strict or vicarious liability offences is that of due diligence or taking reasonable steps to prevent the offence occurring. This may be needed where the offence is committed by an employer (especially a corporate body) but the breach will invariably be the result of actions by employees. In most cases, the creation by the employer of proper safeguards properly operated and monitored should excuse the employer.

Example Box 11

In any proceedings for an offence under this Act, it is a defence for the person charged to prove:

(a) that the commission of the offence was due to a mistake or to an accident or some other cause beyond his or her control; and

(b) that he or she took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or herself or by any person under his or her control.

However, in cases where the damage that flows from a breach of the duty is likely to be very serious (e.g. causing dangerous pollution or public health risks), consider whether the employer should be made liable no matter what steps may have been taken.

4.5.2 When Penal Provisions Might Also Give Rise to Civil Liability

If an Act creates an obligation and enforces its performance in a particular way, the obligation cannot be enforced in any other way - an application of the *expressio unius* canon. So if an Act imposes a duty and makes it enforceable by criminal proceedings, that duty cannot be enforced by civil actions, unless that is specifically stated. The trend of case law is to reverse the traditional rule to a large extent. In particular, two exceptions are usually recognised (eg, *Lonhro v Shell Petroleum* [1981] 2 All ER 456 (HL), at 461-2, from Lord Diplock), where:

(i) from the context of the statute, it appears that the duty (or prohibition) that has been breached was imposed for the benefit or protection of a particular class of individuals;

(ii) the statute confers a legal right on all members of the public (who wish to avail themselves of it), and a particular member of the public suffers special damage from actions interfering with that right.

In both cases, the courts may give a civil remedy (e.g. for damages) to an injured person in the class or to the individual suffering special damage, although the statute is silent on the matter.

Example Box 12

These principles can be illustrated by three English decisions.
In *Rickless v United Artists Corp.* [1987] 1 All ER 679 (CA), s.2 of the Dramatic and Musical Performers' Protection Act 1958 created a criminal offence if a film was produced, essentially, without the consent in writing of the performers. The duty to obtain consent was held to have been imposed for the benefit of the performers and, if breached, gave rise to a right to civil remedies as well to the possibility of prosecution.
In *Monk v Warbey* [1935] 1KB 75, s.35(1) of the Road Traffic Act, 1930 created a criminal offence if the owner of a car failed to take out thirdparty insurance. A person injured by a negligent driver of a car not covered by such an insurance was held to have a civil remedy against the owner of the car. The aim of the legislation was to protect injured persons against economic loss.
In *Lonhro,* above, a statutory sanctions order imposed by the British Government prohibiting the supply of oil to Southern Rhodesia (which had declared unilateral independence) was held not to be imposed for the benefit of any particular class of persons engaged in delivering oil, nor to create a public right. The order was aimed at stopping the supply of oil by withdrawing rights of British suppliers to trade in oil in that country. No civil remedy could be sought by the owners of a pipeline in Rhodesia against Shell who allegedly were supplying oil in breach of the statutory duty.

Cases of this kind need not have arisen if the drafter deals with the matter expressly, either by providing for a civil remedy or excluding it. Attention should be paid, in the planning of the Bill, to the legal position of those directly benefiting from compliance with the duty or adversely affected if the duty in question is contravened. As a matter of routine, then, consider the question of civil liability whenever you are imposing statutory duties of these kinds that are to be enforced by a criminal sanction, no matter the form in which you propose to express that duty.

Example Box 13

(3) Breach of a duty imposed by subsection (1) is actionable so far, and only so far, as it causes personal injury, subject to the defences and other incidents applying to actions for breach of statutory duty.

On the other hand, your consultations may indicate that members of the particular class are not to have a civil remedy, e.g. because criminal proceedings are considered adequate to enforce the duty or because it is inappropriate or impractical for those upon whom the duty is imposed to bear any loss these persons may suffer. In that case, provide expressly that civil proceedings are excluded.

Example Box 14

This Act is not to be construed so as to confer a right of action in civil proceedings in respect of a breach of any duty imposed by sections 12 or 14 or by regulations made under section 15.

4.6 SUMMARY

To conclude, bear in mind that the expression "person" is generally given an extended meaning by the Interpretation Act to include nonnatural legal persons. However, penal provisions rarely need to deal with the matter of secondary parties. In this unit you have explored the ways that penal provisions should be drafted. You should now be confident that you know how to draft them most effectively. You should also have placed penal provisions into a broader context of regulation and enforcement.

If you are unsure of what was discussed in the text, or how to deal with a particular topic, rework that part of the text, giving particular attention to the relevant Boxes. Here, as in other recent units, you must not expect to have every detail of every practice described at the forefront of your mind. You can always verify them by referring back. But you should now know when and how to give effect to them. Many of the techniques become routine as you put them to use. It is important then when you are putting them to use to ensure that you do so without error. Make a point of checking that you are following best practice. If in doubt, look again at the relevant part of this module.

SELF ASSESSMENT EXERCISE. Discuss the elements of a crime.

4.7 REFERENCES/FURTHER READING /WEB RESOURCES

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

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4.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE no. 4

1. A person commits an offence who:

   (a) uses threatening, abusive or insulting words or behaviour; or
   (b) displays written material, that is likely to occasion or stir up racial hatred *in a public place*.

2. A person commits an offence who, *in a public place*:

   (a) uses threatening, abusive or insulting words or behaviour; or
   (b) displays written material, that is likely to occasion or stir up racial hatred.

or

3. A person *in a public place* commits an offence who:

(a) uses threatening, abusive or insulting words or behaviour; or
(b) displays written material, that is likely to occasion or stir up racial hatred

Note the difference in effect in modifying the conduct or the subject as in 2 and the impact of the conduct in 1.

Possible answer to self to self-assessment no. 5

In the second case the prosecution has the burden of proving that the shop was unlicensed. That task falls to the proprietor in the first version; the proprietor is best placed to prove the existence of a licence if one has been issued.

1. Is the following way of stating an offence likely to give rise to legal difficulties?

The owner of a boat used in fishing, or attempting to fish, in the prohibited zone, commits an offence.

2. What additional matters (other than fixing the penalty) should be considered for inclusion in the provision?

1.8 POSSIBLE ANSWER TO SELF-ASSESSMENT no 2.

Two relative clauses can be avoided in several ways, of which four are illustrated.

A person who is not the holder of a licence under this Act commits an offence if he or she sells intoxicating liquor.

A person, not being the holder of a licence under this Act, who sells intoxicating liquor commits an offence.

A person who sells intoxicating liquor when not the holder of a licence under this Act commits an offence.

A person who sells intoxicating liquor commits an offence unless he or she holds a licence under this Act.

The last version shifts to an accused the burden of proving that he or she falls within the exception, i.e. that he or she does in fact hold a licence. In the other cases, the prosecution will have to prove the negative since holding a licence is made a component of the *actus reus*.

1.8 Possible answer to self-assessment exercise: The elements of a crime are.

Intention.
Recklessness
Knowledge
Negligence
Rashness
Voluntariness
Dishonesty
Fraudulent

MODULE 2

UNIT 1; HOW TO DRAFT SUBSIDIARY LEGISLATION?

1.1 INTRODUCTION

This last module concentrates upon subsidiary instruments. Most of your earlier work has been focused upon Bills, though in many respects, what you have learned there is equally relevant to subsidiary legislation. Here we look at the special demands made by this kind of legislation, and in particular the drafter's responsibilities. In a number of Commonwealth countries preparation of this type of legislation is undertaken by legal officers attached to the executive authority on which the legislative power is conferred. Even when the Legal Drafting department deals with both primary and subordinate legislation, instruments are unlikely to be drafted by the same Legislative Counsel who drafted the Bill. This is typically a task given to junior members of the office. Drafters come to this task with little advance knowledge of the legal context in which the subsidiary legislation must be placed. This calls for a distinct approach.

You should find that you already have a good deal of relevant background knowledge which should help in studying this module. Much of it is concerned to draw attention to features you must provide when drafting subsidiary instruments. This requires you to compare model provisions in the text with

those currently used in Nigeria. You should not find too much difficulty in discovering what you need to provide, but it may be useful to make a short checklist that you can refer to until you are fully conversant with local practice.

1.2 LEARNING OUTCOMES

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

l .determine what matters may need to be dealt with in a simple subsidiary instrument.

ii. Evaluate subsidiary Legislation is been drafted.

iii. You will then be able to devise your own ways of looking for them. You can remind yourself from this part about what you are looking for.

1.3 GENERAL CONSIDERATIONS

Subsidiary legislation means proclamation, regulations, rules, rules of court, bye-laws, order, notice or other instrument made under a written law and having legislative effect. Individual instruments of subsidiary legislation are typically said to be "made" rather than "enacted".

Drafting subsidiary legislation is the first drafting task given to most Legislative Counsel. However, in some jurisdictions this form of drafting may be the function of departmental lawyers, rather than a centralised drafting service. Many of the instruments are short and straight-forward in their objectives and contents and can be modelled on earlier precedents. But it is a useful way of learning the basic drafting skills.

SELF ASSESSMENT EXERCISE 1

1. Indicate whether Legislative Counsel in your jurisdiction are responsible for drafting or vetting subsidiary legislation:

	drafting	**vetting**
(1) all subsidiary legislation		
(2) very important or difficult instruments only		
(3) no subsidiary instruments		

2. Note which other Government lawyers (if any) undertake the drafting of subsidiary instruments:

1.4 HOW DOES DRAFTING SUBSIDIARY LEGISLATION DIFFER FROM DRAFTING BILLS?

In most respects, preparing subsidiary legislation does not differ very much from Bills. The tasks that you may have to undertake over a range of instruments are very similar: providing preliminary and final provisions, substantive rules, penal provisions, amending, revoking, etc. The approaches you have developed for Bills are likely to be much the same in these cases. But there are two major legal

constraints applying to subsidiary legislation that can have an effect on the way you go about drafting them. These are:

1. The instrument must not be *ultra vires* the parent Act.

2. The instrument must be drafted to be fully consistent with the parent Act.

These constraints deserve closer examination.

1. The instrument must not be *ultra vires*

Common law courts treat as void provisions in instruments that are outside the scope of the delegated powers to legislate. Although in principle they have power to sever invalid provisions to enable the remainder to continue in force, often this is not possible. Removal of the invalid provisions can alter the substantive effect of the instrument, e.g. by leaving a gap in the scheme or by changing its operation or application in a material way. If that is likely to occur, the courts treat the whole instrument as void.
Do not rely upon the courts to rescue defective instruments by severance or interpretation. It should be no concern of yours as to whether a legal challenge will in fact be brought. It is your responsibility to ensure that the instrument fully complies with the delegated powers. Make sure, then, that the instrument:

(a) is made by the correct authority (i.e. the body to which the power to legislate was delegated);

(b) is made in accordance with any mandatory requirements as to the procedure before, during or after its making;

(c) covers only those matters authorised by the parent Act and is within the limits prescribed by that Act;

(d) deals with those matters in a way that does not contradict the policy or principles, as well as an individual provision, of the parent Act.

Approval by resolution of the Legislature will not save an instrument that is defective in any of these ways. The Legislature cannot change the law by mere resolution.

2. The instrument must be fully consistent with the parent Act

Not only must the provisions of an instrument be consistent with the policy, principles and substantive requirements of the parent Act; as a matter of sound drafting, they must also be consistent with the structure, concepts and language used in the Act.

In a large part, your choice of terms for the instrument must be dictated by this factor. In strict law, the instrument is not treated as an integral part of the Act; it is subordinate to it. But from the standpoint of

drafting, look at it as if it is a part of the full statutory scheme, the key features of which are found in the parent Act.

1.5 THE DRAFTING APPROACH

1.5.1 How to Approach the Drafting of Subsidiary Legislation

Legislative drafting like any other form of legal drafting is an institutionalised means of communication. The essential distinction is that unlike other forms of legal drafting which may be easily altered or changed, legislative drafting is more of a permanent enactment which stands on its own and speaks for itself without any form of assistance, elucidation or explanation from the drafter or draftsman. It is imperative that a great deal of care and diligence be exercised in drafting enactments to reduce as much as possible the probable difficulties and confusion that may befall the future administration and interpretation of enactments. Thus, the legislative drafting process may be said to begin with the receipt of drafting instructions and ends with completion of the draft. For there to be a legislative drafting, there must be a legislative draftsman.

As with Bills, how you undertake the task of preparation and drafting is the way that you find most comfortable and effective. With experience, we all develop our own preferred approach. But the constraints we have just considered suggest a number of steps that at some stage should be part of your approach.

Step 1: understand the parent Act

Make yourself thoroughly conversant with the parent Act and all the amendments to it, and with any associated legislation (including any subsidiary legislation already made under it or any statutes linked to it referentially). Read the legislation carefully to:

(i) understand the policy objectives and the legislative scheme which the Act is intended to put into effect;
(ii) make yourself familiar with the structure of the Act and the terminology it uses (paying particular attention to any terms that are defined);
(iii) discover how and to what extent the subsidiary legislation is intended to supplement the provisions of the Act.

Step 2: Analyse the delegated power

Pay particular attention to the provisions of the parent Act which delegate the power to legislate. But do not read these in isolation; they are part of the legislative scheme and so must be construed in the context of the Act as a whole. This is especially the case if the powers are expressed as given for "carrying this Act into effect" or for similar general purposes or are to be used to deal with specified matters that the Act states are to be "prescribed". Pay particular attention to:

(i) the type of instrument that is to be made;
(ii) the person or body by whom it is to be made;
(iii) the subject matter covered by the power to legislate and any stated purposes for which it may be used;
(iv) any procedures that must be followed in making the instrument or after it is made.

Step 3: Analyse the instructions

As with Bills, master the instructions and clarify or research specific matters that require further information. But throughout keep in mind that you are working within the framework of the law set by the parent Act. Typically, the instrument is needed to elaborate upon the Act, especially by providing detailed provisions that infill the scheme. Your analysis should be aimed at identifying those aspects of the Act that must be developed in this way in order to secure the objectives set out in the instructions.

You may be given instructions merely to provide those regulations as seem to be needed to enable the Act to operate as originally intended. This often happens with respect to the first instrument after the enactment of the Act. Well drafted delegated powers may indicate specifically what matters have to be provided for. Even so, work through the Act systematically asking whether particular features need to be supplemented (and whether there is a power to do so). Make a list of all the matters with a note of the sections of the Act to which they relate.

On occasions when new substantive matters are required, your instructions will (or should) be more specific. Here you are in much the same situation as if the proposals are for a Bill, since you are asked to give effect to policy in a particular way determined by the client. In these cases, consult as necessary with the instructing officer from the client Ministry to confirm your understanding of what is required.

As with a Bill, you are likely to finish your analysis with a detailed list of items to be dealt with in the instrument.

Step.4: check for *ultra vires*

Carry out a series of checks on the matters you are asked to cover and your list of items to ensure that there is power in the Act to deal with them as instructed. This is the corollary of the exercise that the drafter of the Bill undertook in formulating the delegated powers.

1.5.2 How to Check to Prevent *ultra vires* Instruments

These are the kinds of questions to ask:

1. Is there authority to deal with the matter by subsidiary legislation?

(i) Is there power in the parent Act to deal with all the matters contemplated?
(ii) If not, are there powers in any other Act to deal with the matters?
(iii) Are the powers under which the instrument is to be made still in force?
(iv) Is the client in fact the authority authorised to "make" the instrument under the power that has to be relied upon?
(vi) If not, has the proper authority formally consented to the preparation of the instrument?
(vii) If a purpose of the instrument is to revoke or amend an earlier instrument, is there power to do so, e.g. in the parent Act or, failing that, in the Interpretation Act?

SELF ASSESSMENT EXERCISE 2

Note down any equivalent provision in your Interpretation legislation to **section 40(2)** of the **model Interpretation Act 1992** (which implies these powers into the power to make instruments).

2. Can the power be exercised at the time requested?

(i) Has the parent Act, and in particular the delegated legislative power, already come into force?
(ii) If not, is there power to "make" the instrument in anticipation of the Act or the power coming into force, or are you confined to preparing the instrument in draft only?

SELF ASSESSMENT EXERCISE 3

1. Note down any equivalent provision in your Interpretation legislation to **section 19** of the **model Interpretation Act 1992** (which contains authority to make instruments in anticipation of the delegated power coming into force).

2. Pay particular attention to when this power may be used and to its limits.

3. If the instrument cannot be "made" before the power comes into force, what is the time scale for bringing it into force, and is the instrument to be brought into force at the same time as the legislation containing the power or at a later date?

4. Because of factors such as these, is it necessary to include in the instrument a provision setting a specific date for it to come into force?

SELF ASSESSMENT EXERCISE 4

At common law, an instrument comes into force when it is "made" (e.g. when signed by the relevant authority). Interpretation or other legislation sometimes stipulates a different date (e.g. when it is published in the *Gazette*).

1. Read **section 18(2)** of the **model Interpretation Act 1992** (which sets the date of publication as the commencement date unless the parent Act or the instrument stipulates a different date).

2. Note down the gist of the equivalent rules in your jurisdiction (with the relevant statutory reference).

(v) Are any conditions prescribed in the parent Act that must be met before the instrument can be made?

(vi) If so, are you satisfied, from your instructions, that these conditions are met?

(vii) Is the delegated power one that can be exercised only once or can it be used whenever needed?

SELF ASSESSMENT EXERCISE 5

Note down any equivalent provision in the Interpretation Act to **section 45** of the **model Interpretation Act 1992** (which permits powers to be exercised whenever the occasion requires).

3. Are the proposals *intra vires* the parent Act?

(i) Are the substantive rules requested in the instructions fully consistent with the underlying policy of the Act, as well as falling within the express terms of the delegated power?

(ii) Is each of the items that are needed in order to fulfill the instructions within the express terms of the delegated power?

SELF ASSESSMENT EXERCISE 6

Remind yourself, as necessary, of the consequences that flow from the following different types of delegated powers (discussed in **LED: 704**):

- a general power to legislate;
- a power to legislate for a particular purpose or subject only;
- a power to legislate on a specific matter.

(iii) If the matter requires an offence or penalty, is this covered by express authority or does the delegation use terms (e.g. "control"; "regulate") that imply that power?

(iv) If not, is there power to do what is required under other legislation (e.g. the Interpretation Act)?

SELF ASSESSMENT EXERCISE 7

Note down any equivalent provision in the Interpretation Act to **section 40(5)** of the **model Interpretation Act 1992** (which gives a limited authority to create summary offences and penalties up to a set maximum).

(v) If the matter requires a compulsory financial charge to be provided (especially if it can be construed as a tax), does the parent Act or other legislation authorise this? (No tax should be imposed unless there is the clearest authority in the parent Act).

SELF ASSESSMENT EXERCISE 8

Note down any provisions of the Interpretation Act that gives a general authority to impose fees or charges in subsidiary legislation. Take particular note of any limits to the use of this power.

(vi) If the instructions require amendment of substantive provisions in the parent Act, do the delegated powers extend to those matters?
(vii) If the instructions require retrospective changes in the law, is there clear authority in the parent Act to use subsidiary legislation in this way? (If provisions of the Act make such changes, subsidiary legislation in support of those provisions also do so.)
(viii) If the instrument needs to impose binding obligations on the State or Government, does the Act authorise this expressly or by necessary implication?

SELF ASSESSMENT EXERCISE 9

Note down any equivalent provision in the Interpretation Act to **section 9(2)** of the **model Interpretation Act 1992** (which is declaratory of the common law).

(ix) If the instructions require sub-delegation of the legislative power to another authority, is there express or implied authority in the parent Act?

Example Box 1

Sub-delegation may be involved if an instrument:
- authorises another body to specify a set of standards that are to be enforceable under the instrument; or
- incorporates by reference, as part of its terms, provisions contained in nonstatutory documents as made from time to time for the purpose of the legislative scheme by another body.
In both cases, the decision to make provisions as to the matter rests with the other body, and not with the body to whom the power to legislate has been delegated. The clearest words are needed in the parent Act if this is to be *intra vires*. Sub-delegation does not occur where the decision is taken by an official who is part of the administration of the delegate.

(x) If any item is not expressly covered by any of the enabling powers, can it be dealt with as "fairly incidental" to one of the powers?

SELF ASSESSMENT EXERCISE 10

Note down any equivalent provision in your Interpretation legislation to **section 46(b)** of the **model Interpretation Act 1992** (which reiterates this common law rule).

4. Do all the proposed items need to be dealt with in the instrument?

(i) Are any of the items already dealt with by other legislation, including the parent Act or subsidiary legislation made under it?
(ii) Is there any item that need not be provided for by legal rules at all (e.g. because they could be dealt with by administrative directions or other procedures internal to Government)?

5. What procedural steps must be followed in making the instrument?

(i) Does the parent Act require another body, in addition to the delegate, to be concerned in the making of the instrument (e.g. by giving approval, consent or confirmation)?
(ii) If so, what steps must be taken, and by whom, and what has to be done to ensure that the necessary action occurs at the right time?
(iii) Does the parent Act prescribe any procedures to be followed during the process of making (e.g. consultation or publication or tabling in the Legislature in draft)?
(iv) If so, at what stage are these procedures to be followed (e.g. in respect of the proposals or of the draft instrument)?
(v) If the procedures relate to the proposals, have they been duly completed (e.g. has a required consultation taken place) and have the proposals been reconsidered by the client in the light of the information obtained?
(vi) If the procedures relate to the draft instrument, has the client decided when they are to be instituted and how they are to be conducted?
(vii) If no procedures are required under the parent Act but the instrument is likely to have a considerable impact on a class of people, has the client considered whether consultation with representatives of the class might be beneficial?

6. What procedural steps must be followed after the instrument is made?

(i) Does the parent Act contain express requirements as to printing or publication or are the standard procedures (e.g. for Gazetting) to be followed?
(ii) Are you responsible for assigning the number (or other classification reference) to the instrument, or is this done routinely by the Government Printer?
(iii) Must the instrument be tabled in the Legislature? If so, within what period after it is made?
(iv) Is the instrument subject to affirmative or negative resolution by the Legislature; if so, within what period after it is tabled?

SELF ASSESSMENT EXERCISE 11

Note down, in relation to your jurisdiction, whether:

1. tabling of instruments is routinely required:

2. the client or Legislative Counsel is responsible for sending the instrument to the Clerk to the Legislature for tabling:

Legislative Counsel must be prepared to bring to the client's attention any procedural requirements that are prescribed by the parent Act for the making of instruments. Although it is not strictly your function to monitor compliance, draw attention to them, especially if they appear to have been overlooked. It is good practice to find out whether the required action has been taken or will be taken at the relevant time.

1.5.1 Attributes of a Legislative Draftsman

A legislative draftsman is a person engaged in the drafting of legislative Bills and other instruments at whatever level of government. In Nigeria, the offices of legislative draftsmen are found in various government ministries, parastatals and in all legislative institutions.

i. He must be a lawyer, who must have undergone training in law, with a basic knowledge; and must have practised as a lawyer with special interest in drafting.
ii. He must have a good command of English language so as to take concise and accurate instructions. He should also be able to communicate effectively with precision and in simple, clear and precise English language.
iii. He must be patient, meticulous, analytically minded, critically minded, and research driven.

iv. He must be familiar with the interrelationships of the various departments of government; and a good knowledge of the political, sociology, psychology and economic system/society of which you are drafting the law.

v.He must develop interest and flare for the subject of legislative drafting and exhibit a high sense of tolerance, commitment and dedication in the drafting process. Thus, he must be ready to carry out researches; and must know where and how to find the law.

vi.He must be a very simple and humble person with a good spirit of team workmanship. He must be committed and fully devoted to his work as a legal draftsman.

Vii.He must have the ability to work under pressure. Have a clear mind and mental capacity to draft laws.

viii. He should be able to work with little supervision and exhibit willingness to accept criticisms in good faith.

SELF ASSESSMENT EXERCISE; List 5 attributes of a legislative Draftsman

1.6 SUMMARY

To conclude, preparing subsidiary legislation does not differ very much from Bills. The tasks that you may have to undertake over a range of instruments are very similar. Courts treat as void provisions in instruments that are outside the scope of the delegated powers to legislate. Do not rely upon the courts to rescue defective instruments by severance or interpretation. In this unit, we have considered the difference between drafting subsidiary legislation and Bills and how to approach the drafting of subsidiary legislation. You should now be able to check to prevent *ultra vires* instruments.

SELF ASSESSMENT EXERCISE: How do we check to prevent *ultra vires* instruments?

1.7 REFERENCES/FURTHER READING/WEB RESOURCES

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

Model Interpretation Act of 1992.

1.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE

The doctrine of ultra vires is the basic doctrine in administrative law. The doctrine envisages that an authority can exercise only so much power as is conferred on it by law. An action of the authority is intra vires when it falls within the limits of the power conferred on it but ultra vires if it goes outside this limit. The doctrine of ultra vires has two aspects: substantive and procedural.

Sometimes it is found that the Enabling or Parent Act is not violative of the Constitution, but the subordinate or delegated legislation made under It violates the provisions of the Constitution. Such subordinate or delegated legislation will be unconstitutional and void, though the Enabling or Parent Act is perfectly valid. Thus, the subordinate or delegated legislation, (e.g., rules, regulations, by- laws, etc.) made under the Enabling or Parent Act may be unconstitutional while the Enabling or Parent Act is constitutional.

Rules have to be consistent with the provisions of the parent statute. A rule cannot enlarge the meaning of a statutory provision. A rule has to yield to the statutory provision. If a rule goes beyond what the section in the Act contemplates, the rule has to go. A rule is ultra vires when it goes beyond the authority conferred on the rule making body by the relevant statute.

To be valid, a rule must fulfill two conditions, they are:

it must conform to the provisions of the statute under which it is framed; and

it must also come within the scope and purview of the rule making power of the authority framing the rule

UNIT 2 DRAFTING SUBSIDIARY LEGISLATION

2.1 INTRODUCTION

In this unit, we concentrate on drafting of subsidiary legislation. Subsidiary legislation has its own forms and has to comply with distinctive conventions that vary a little from one jurisdiction to another. You must be able to prepare instruments according to the house-style.

2.2 LEARNING OUTCOMES

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

i. Prepare and draft the main types of subsidiary legislation in keeping with the practice and house-style in Nigeria.

ii .Have a deeper knowledge of subsidiary Legislation

2.3 FORMS OF SUBSIDIARY LEGISLATION

More than one model of making subsidiary legislation can be found in the Commonwealth. Which is adopted affects the form that the instruments must comply with. In many, a single instrument is made that sets out all necessary details as to the maker and the maker's statutory authority and the like, as well the substantive provisions. In other jurisdictions, two instruments are used. One, an executive order, recites the enabling power, the authorized delegate and compliance with any required conditions precedent to the making. The other contains the substantive provisions.

Subsidiary legislation is often called delegated legislation, subordinate legislation or legislative instruments, and can include **regulations**, **rules**, **orders**, **statutory instruments**, **by-laws** and so on. Parliament does not make subsidiary legislation, instead they delegate the powerto someone else to do so. In delegating the power to make subsidiary legislation, Parliament imposes precise restrictions on the exercise of this power.

Delegated legislation is law made by some person or body other than parliament, but with the permission of parliament. The authority is laid down in a parent act of parliament, known as an 'enabling act' which creates the structure of the law and then delegates' powers to others to make more detailed law in the area. A good example of enabling acts includes the access to justice 1999 which gave the Lord Chancellor wide powers to alter various aspects of the legal funding scheme

Subsidiary legislation must exist in relation to an enabling Act. The enabling Act is often called the principal Act. It provides for subsidiary legislation to be made and will specify who has been delegated the power to do so under the Act.

An enabling Act may have multiple pieces of subsidiary legislation enabled by it operating under it. These will contain the administrative details that are necessary to ensure that the provisions of the enabling Act will operate successfully. The delegated legislation may be administered by Government Departments, Local Councils, Courts or some other body to which the authority has been delegated.

Regulations are the most common form of delegated legislation, these are made by the executive or a Minister to apply to the general population. They are used for legislation of general application emanating from a government department. These are published in the Statutory Rules series until 2004 and in the Select Legislative Instrument series from 2005. For example, the *Jetties Amendment Regulations 2020* (WA).

Types of Delegated Legislation

Delegated Legislation is a term which covers the vast amount of legislation made by government agencies and the Governor-General under authority of Acts of Parliaments, which delegate this power to agencies. This type of legislation is also known as Subordinate Legislation or, since 2005, Legislative Instruments. Within the broad area of Delegated Legislation the following more specific terms are sometimes used:

Regulation	The most common form of delegated legislation. Used for legislation of general application emanating from a government department. Published in the *Statutory Rules* series until 2004 and in the *Select Legislative Instrument* series from 2005
Rule	Legislation specifying procedural formalities, eg court procedures such as the High Court Rules. Published in the *Statutory Rules* series until 2004
Ordinance	Primary legislation of non self governing territories, made by a federal government department to apply to a particular territory. Also used for the legislation of some State local government bodies.
By-law	Made by a statutory corporation having effect only within the area of responsibility of the authority. Also used for the legislation of some State local government bodies

SELF ASSESSMENT EXERCISE 1

Note down, in relation to your jurisdiction, whether subsidiary legislation requires the preparation of:

(a) a single legislative instrument; or

(b) two instruments, one an executive order, the other the legislation.

This unit concentrates on the single instrument model, which in our experience is more typical. However, its formal features (which we identify in the discussion that follows) are those dealt with in the executive order in the two instrument model.

Read through the model Animals (Custody) (Amendment) Regulations 1992 below, looking in particular at the features described in the next part of this Unit. The numbers on the model refer to the items discussed below.

MODEL Animals (Custody) (Amendment) Regulations 1992 is shown below.

EXAMPLE OF SUBSIDIARY LEGISLATIVE INSTRUMENT

Legal Notice No.200 [1]

ANIMALS ACT [2]
(CHAPTER 300)

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[3]

ANIMALS (CUSTODY)(AMENDMENT) REGULATIONS 1992

The Minister of Animal Affairs, in exercise of the powers conferred by [4] section 8 of the Animals Act, makes the following Regulations:

Short title and commencement. [5]

1.-(1) These Regulations may be cited as the Animals (Custody) (Amendment) Regulations 1992.

(2) These Regulations come into force on 1 June 1992. [6]

Regulation 5 amended. [7]

2. Regulation 5(2) of the Animals (Custody) Regulations is amended by deleting the word "captive" wherever it appears in the subregulation.

20 May 1992 [8]

ABC [9]
Minister of Animal Affairs

Explanatory Note [10]

(This Note does not form part of these Regulations but is intended to explain their purport)

Regulation 5 of the Animals (Custody) Regulations imposes specific duties on those who have custody of non-domesticated animals. Regulation 5(2) imposed additional duties on those persons in respect of such of those animals as are required to be kept in cages and pens ("captive" animals). By the deletion of the word "captive" by Regulation 2, the additional duties become applicable to all classes of non-domesticated animals.

There are variations, some of them considerable, in the formats used in Commonwealth jurisdictions. To an extent the format is influenced by those used locally for Acts, but there are usually distinctive features with which you should make yourself familiar.

SELF ASSESSMENT EXERCISE 2
Look out a few (short) subsidiary instruments, preferably containing regulations or rules, recently made in your jurisdiction.
1. Compare their standard features with those referred to in the model above.
2. Make a short note of any distinctive differences you notice.

2.3. 1 Characteristic of Subsidiary Instruments

The task of actually composing the text of legislative instruments is very much like that for a Bill. Similar considerations, for example, apply with respect to drafting for them penal provisions, amending and revoking provisions, savings and transitional provisions.

Remember to use the same terms in the instrument to express the same ideas found in the parent Act (and to use different terms from the Act if expressing a different idea).

Treat the instrument as an extension of the Act and as containing provisions that could well have been part of the original Bill.

The major differences from primary instruments lie in the treatment of specific technical features. We look at the following features (the letters in the text refer to the feature as illustrated in the model instrument above):

1. Type of instrument
2. Headings
3. Authorising words
4. Title
5. Commencement
6. Definitions
7. Substantive provisions
8. Section notes
9. Amendments, revocation and re-enactment
10. Signifying words
11. Dating
12. Explanatory Note.

But in examining these features pay full regard to your house-style.

2.4 What type of instrument is required?

The enabling section should indicate the type of instrument you are to prepare (i.e. whether it is to be an order, regulations or rules, etc.) The type of instrument may affect the draft in three ways:

(a) the type has to be referred to in the title and any heading that cites the title;

(b) in the case of regulations, rules and bye-laws, what in an Act is called a section is typically referred to as a regulation, rule or bye-law, as the case requires;

(c) different terms may be used to describe the equivalent of subsections in the various types of instrument.

Practice on the last two matters varies considerably between jurisdictions. A sound approach is to follow the same practices used for Bills. But few jurisdictions do this consistently. Indeed, ease of communication may be impaired by the lack of uniformity of practice between different instruments in the same jurisdiction.

As far as the house style permits, set out to achieve consistency in these features, at least between instruments of the same kind.

SELF ASSESSMENT EXERCISE 3

The following grid suggests terms typically used for different types of instrument. In the blank spaces, enter the equivalent term used in your jurisdiction if it is different. (Look at recent precedents).

Regulations	**Regulations**	**Rules**	**Rules**

regulation	
subregulation	
parargraph	
subparagraph	

rules	
subrule	
paragraph	
subparagraph	

Bye-laws	**Bye-laws**
bye-law	
sub-byelaw	
paragraph	
subparagraph	

Orders, etc.	**Orders, etc.**
section	
subsection	
parargraph	
subparagraph	

2. What headings are required?

The following formal features should be included:

A: the instrument number

A classification number is typically assigned to the instrument when printed in the *Gazette* (usually by the Government Printer). In this case, it would be abbreviated in future citations to, e.g. LN 200/1992.

B: a heading identifying the parent Act

The main heading to the instrument indicates the principal parent Act under which the instrument is made.

C: a heading giving the title or citation

A heading is also given to the instrument referring to its title or citation (*not* "short title", as there is no "long" title).

An instrument is easier to find if it sets out prominently:

(i) the number assigned to it, that it will carry when printed in the annual collection and by which it may be cited;
(ii) the short title and reference of the parent Act under which it is made;
(iii) the title of the instrument by which it may be cited.

SELF ASSESSMENT EXERCISE 4
Refer to your own house style, and note down:
1. the method of classifying and numbering subsidiary legislative instruments and how that is shown on the instrument (e.g. "SI 1995 No.123").
2. whether or not subsidiary legislation typically carries headings stating:
(a) the short title and reference of the parent Act:
(b) the title of the instrument:

3. What authorising words should be used?

The following formal feature is typically included:

D: the authorising words

These are the equivalent of enacting words in a Bill. They refer to the delegate authorised to make the instrument and state that the instrument is made in exercise of the stated statutory powers.

The formula is rarely set by law; it is one conventionally followed in the particular jurisdiction. Some have remained unchanged for decades, still using the verbose language of the past, which serves no legal purpose.

The function of authorising words is to indicate:

(i) the maker of the instrument;
(ii) the statutory source of the legislative power that is being exercised;
(iii) that a mandatory procedure (where one is prescribed) has been complied with.

These matters, which may be important if an issue of *ultra vires* arises, can be covered by an uncomplicated formula.

Example Box 1

The Minister of Agriculture makes the following regulations under section 49 of the Agricultural Credits Act 1989:
The Courts Rules Committee, with the consent of the Chief Justice, makes the following rules of court under sections 68 and 75 of the Supreme Court Act:
The Minister of Justice, after consulting the Nigerian Bar Association, makes the following regulations under section 22 of the Legal Practitioners Act:

Wide-ranging subsidiary legislation may have to be made under enabling powers found in more than one Act. Identify all these, as far as possible. To prevent the construing of an accidental omission of a source as a deliberate intention not to rely on it, some jurisdictions make a practice of adding safeguarding words. Protection may also be given by the Interpretation Act.

Example Box 2

The Minister, in exercise of the powers conferred by section 49 of the Agricultural Credit Act 1989, section 53 of the Agriculture Exports Guarantee Act 1990 *and all other enabling powers*, makes the following regulations:
The highlighted phrase is made unnecessary by **section 40(1)** of the **model Interpretation Act 1992.**
The first line of this formula could equally well use "under" instead "in exercise of the powers conferred by".

Some jurisdictions have reduced the words to a simple formula which merely states the section conferring the power, relying on the reference to the enabling Act set out in the heading to the instrument. If another body is associated with the making, this can be dealt with in the signifying words at the end of the instrument.

Example Box 3

The Minister of Justice makes the following regulations under section 22:
.....
.....

Made, after consultation with the Nigerian Bar Association, on 25 May 2004:

_____
Hon. Attorney-General of the Federation and Minister of Justice

4. How should the title be drafted?

The following formal feature is typically included:

E: the title (citation)

A regulation or sub-regulation (the equivalent of a subsection) designates the title or citation to the instrument.

Typically a title or citation is needed for all instruments except proclamations and notices. It facilitates citation and retrieval. (A "*short*" title is not appropriate in this context; there is no long title.) Its position in the instrument (as the first or last provision) generally follows the practice for Acts in this respect.

SELF ASSESSMENT EXERCISE 5

1. Is a title a standard feature of all subsidiary legislation in your jurisdiction?

2. Note down the position that it is conventionally given in the instrument:

Similar considerations apply to selecting a good title as for selecting short titles for Bills. (If you are unsure of these, refer again to **LED: 602** (*Preliminary provisions*)). But it is good practice to include the first words of the short title of the parent Act as the first words of the instrument title. This offers benefits:

(i) the instruments title clearly shows the link with the parent Act;
(ii) in an alphabetic index of legislation, the parent Act and all the subsidiary legislation made under it will be gathered together, since they share the same beginning words.

If a series of legislative instruments is likely to be made under the same parent Act, the title can also include after the first words the gist of the subject matter of the instrument (in a parenthesis). This gives a distinctive character to each, without losing the common element.

Example Box 4

1. The titles in column 1 were given to the instruments when first drafted under the Storage of Petroleum Act. Those in column 2 were substituted during a Law Revision on the principles just explained:

former title	**present title**
Petroleum Regulations 1932	Storage of Petroleum Regulations
Petroleum Warehouse Regulations 1905	Storage of Petroleum (Warehousing) Regulations
Volatile Petrol Regulations 1929	Storage of Petroleum (Licensing) Regulations

2. As with Bills, an instrument amending regulations indicates the fact in the title too. This may lead to a rare case when two parentheses are called for.

Storage of Petroleum (Licensing) (Amendment) Regulations 2004

But approach the matter differently:

(i) if the title is becoming too long; or
(ii) the short title of the Act already includes words in brackets; or
(iii) the subject matter is important enough to deserve special recognition.

Example Box 5

The following title is too long, but inevitable by reason of the title of the original instrument and that of the enabling Local Authorities (Recovery of Possession of Property) Act:

Local Authorities (Recovery of Possession of Property) (Sectional Titles) (Amendment) Regulations 1987.

A better solution might have been to give the original instrument one of the following titles (depending on whether other regulations are to be made under the Act):

Local Authorities (Recovery of Possession of Property) Regulations

Sectional Titles (Recovery of Possession by Local Authorities) Regulations

5. When should provision be made for commencement?

The subsidiary instrument may require the following feature:

F: commencement

Provisions fixing the date of commencement may be necessary if a special date is called for or if it is not local practice to tie commencement in with publication in the *Gazette*.

Users find it helpful if the date of commencement is set out in the instrument itself. But if the instrument is to come into force on the date that it is published in the *Gazette*, that date cannot be inserted in the instrument when you are drafting it. There are two solutions:

(i) arrange for the date to be inserted in the instrument editorially by the Government Printer when it is received for publication; or
(ii) include a provision in the instrument itself setting a precise date for its commencement (which can be the expected date of publication or one shortly after).

In principle, the date of commencement can be postponed to a date to be fixed by subsequent order, as in the case of Bills. But keep postponement for instruments that make substantial legal changes and that require public or administrative preparations of uncertain duration to be put in hand first.

SELF ASSESSMENT EXERCISE 6

Is a standard practice followed in your jurisdiction as to the way commencement dates are dealt with in subsidiary instruments? If so, note down the gist of it.

6. When should definitions be included?

Definitions may be needed to perform the same functions as in a Bill. Use the same techniques to find out when they are needed and how they should be expressed. (If unsure, refer to **LED: 602**). But bear in mind several special considerations:

(i) definitions of terms provided by the parent Act are treated as applying to those terms when used in the subsidiary instruments made under it, unless you show a contrary intention in the instrument. This is typically confirmed by the Interpretation Act.

SELF ASSESSMENT EXERCISE 7

Note down the reference to any equivalent provision in your jurisdiction to **section 41(1) of the model Interpretation Act 1992** (which applies definitions in the parent Act to instruments made under it).

(ii) if you cannot avoid using a term in the instrument in a different sense from that defined in the parent Act, include a new definition in the instrument indicating that the meaning has effect "in" or "for the purposes of" the instrument. But try to find an alternative term (which you define in the instrument) to reduce the possibility of confusion.

(iii) the authority to make subsidiary instruments does not import the same latitude to create definitions as you have when drafting primary legislation. You must draft them consistently with the language and the context of the parent Act.

Strictly, a definition provided by the Act need not be repeated in the instrument. There are dangers in doing so. If the definition in the Act is altered by amendment, the need to make a similar alteration to the definition may be overlooked, especially if the drafting of instruments is not the responsibility of Legislative Counsel preparing the amendment to the Act.

Yet many users of instruments are unaware that the definitions in the parent Act apply or in any case they may have difficulty in consulting that Act quickly. If the instrument contains a body of rules that depends upon important definitions in the Act and is likely to be used independently of the Act (e.g. a set of procedural rules):

(i) consider repeating the definitions in the instrument; or

(ii) draw attention in the instrument to the existence of the definitions in the parent Act.

Example Box 6

Interpretation.
2. In these regulations, "document", "publication" and "writing" have the meaning given by section 2 of the Act.

7. What special factors should be borne in mind in drafting substantive provisions?

G: substantive provisions

Substantive provisions are placed after those dealing with preliminary matters (e.g. interpretation; application).

In most respects drafting of these provisions is little different from drafting substantive provisions for a Bill. However, take particular care:

(i) not to duplicate provisions already dealt with in the parent Act or to include matters that are already adequately dealt with there;

(ii) not to contradict the provisions of the parent Act (which in any case takes legal precedence), especially those allocating functions to particular authorities;

(iii) to use the same terminology as the parent Act when you are dealing with the same matters.

Example Box 7

1. The parent Act stipulates that:
24. Contravention of a provision of regulations made under this Act constitutes an offence under this Act and is punishable by the penalty prescribed in the regulations; but the penalty must not exceed a fine of ₦100,000 or imprisonment for 3 months.
Regulations must not then state that contraventions of any of its provisions are offences, as doubts arise as to their legality, as well as to whether the offence should be charged under the Act or the regulations. The regulations must do no more than describe the requirements that must be complied with and state the penalties that attach to violations up to the specified maximum.
2. The parent Act stipulates:
24. Contravention of a provision of regulations made under this Act constitutes an offence under this Act and is punishable by a fine of ₦100,000 or imprisonment for 3 months. Regulations may only describe the requirements that must be complied with; they must not stipulate that violations are offences or prescribe any penalty.

When cross-referring to provisions of the parent Act, make sure to identify them as being provisions of *that Act*. This is made easier by providing a definition in the instrument of "the Act" (as meaning the parent Act) and using that short phrase where needed. Some
Interpretation Acts provide for the general application of this practice.

SELF ASSESSMENT EXERCISE 8

Note down the reference to any equivalent provision in your jurisdiction to **section 41(2) of the model Interpretation Act 1992** (which permits "the Act" to be used in an instrument to refer to the parent Act).

8. Should section notes be provided?

Notes attached to individual regulations or rules can be just as useful as those attached to sections in Acts, especially in instruments that are long or complex. In some countries they are hardly ever provided. In drafting an instrument, consider whether the interests of its likely users would be served by adding these. The same principles apply as for Bills.

SELF ASSESSMENT EXERCISE 9

Note down whether section notes are a standard feature of all or of particular kinds of legislative instruments in your jurisdiction.

9. Are there special features for amending, revoking or reenacting provisions?

The approach on these matters for subsidiary instruments is largely the same as for Bills. Similar rules apply as to the effects of repeals and the same requirement to consider whether saving and transitional provisions are needed in consequence of the change.
As we have seen earlier, the power to make is typically treated as including the powers to amend or revoke earlier instruments. But these powers are to be exercised "in the same manner and subject to the same conditions" as apply to the making. So check:

(i) whether any mandatory procedures must be followed (e.g. consultations);

(ii) whether any requirements as to the circumstances in which the power may be exercised are fulfilled.

Differences may be found in the terms used for repealing subsidiary legislation. Typically:

(i) "revoke" is used for repealing regulations and rules:
(ii) "cancel" is used for repealing bye-laws and orders.

SELF ASSESSMENT EXERCISE 10

Note down the term used in your jurisdiction for repealing each of the following:

regulations:

rules:

bye-laws:

orders:

10. What signifying words are needed?

Subsidiary instruments typically include the following formal feature:

I: the signature and office title

Without the signature of the authorised delegate (who is formally identified by office title), the instrument is not duly made. The signature may be accompanied by signifying words (e.g. "signed by").

An instrument is formally made when it is signed. A place must be made in the instrument for that signature and, as appropriate, signifying words added. If other action is required to make the instrument valid, such as some consent, approval, or confirmation, signatures are required to indicate that this has been duly given.

Place these entries at the very end of the instrument after the legislative text (including any Schedules). They are intended to indicate that all that precedes has been formally validated as law by the signature. Use the simplest words possible to state the action which the signature confirms has taken place. But the office of the signatory must be included. The words can be personalised.

Example Box 8

1.	Made by the Commissioner for Health Signed: [ABC}
2.	I approve. [ABC] Commissioner for Health

If the required signature is that of a person formally acting for the authorised delegate, e.g. during an absence, add "ag" (meaning "acting") before the office title. If the instrument is to be signed by an agent of a Minister (in cases where that is permitted), include the office of the signatory and the fact of acting for the authorised delegate in signing.

SELF ASSESSMENT EXERCISE 11

Note down any equivalent in your Interpretation legislation to **section 48** of the **model Interpretation Act 1992** (which recognises the power of those appointed to act temporarily in an office to exercise the powers of the office.

11. How should the making of an instrument be dated?

The instrument must bear the following formal feature:

H: the date of signature

The instrument bears the date when the delegate signs it. This is the date on which the instrument is treated as having been made (i.e. when it becomes an instrument with legislative effect).

A date must be added to indicate when the making takes place. Indicate a place with the signifying words for the date to be added. If other actions are linked to the making (e.g. approval or consent of another body), those too must be dated. Indicate places for those dates too. A simple formula is enough. The flowery forms of the past are unnecessary.

Example Box 9

Avoid: Dated this twentieth day of January in the year one thousand nine hundred and ninety nine.
Rather use:
1. Dated: 20 January 2004 2. Signed: 30 May 2004
Approved: 1 June 2004
3. Made by the Arcadia Town Council on 5 May 2004
Approved by the Minister for Local Government on 12 May 2004.

SELF ASSESSMENT EXERCISE 12

Note the way in which signifying words and dates are typically expressed in subsidiary legislation in your jurisdiction:

12. Should an Explanatory Note be added?

The following formal feature is used in some jurisdictions:

J: the Explanatory Note

This note is added by way of explanation. It sets out the essential effect of the instrument. It is merely editorial material and has no legal standing.

In some countries, all legislative instruments carry a note of this kind explaining the reasons and effect of the instrument. This is usually provided by the drafter, although it has no legal status (as the note itself may state) and is typically printed after the effective provisions.

This practice has much to commend it. It enables users quickly to find out the general purpose and scope of the instrument (which is made no easier to ascertain by the fact that a table of contents is rarely provided). It helps establish the context when reading the detailed provisions.

SELF ASSESSMENT EXERCISE 13

1. Are explanatory notes a standard feature of subsidiary legislation in your jurisdiction?
2. Do they follow a standard format?
3. Is their status as merely editorial matter stated as part of the note?

In drafting notes of this kind, your aim should be to:

(i) outline the essential features of the instrument;

(ii) indicate how its contents relate to the scheme in the parent Act or its relationship with earlier instruments that it amends or repeals.

It follows that the note should be more substantial than, e.g. a long title. Try to provide an explanation that covers the complete instrument, but as briefly as possible.

2.6 SUMMARY

In conclusion, remember to use the same terms in the instrument to express the same ideas found in the parent Act; and to use different terms from the Act if expressing a different idea. Treat the instrument as an extension of the Act; and as containing provisions that could well have been part of the original Bill. In this unit, we considered drafting of subsidiary legislation. You should now be able to prepare and draft the main types of subsidiary legislation in keeping with the practice in Nigeria and your house-style.

Self Assessment exercise
Discuss the main features of subsidiary legislation?

2.7 REFERENCES/FURTHER READING

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

Model Interpretation Act of 1992.

2.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE: The features of subsidiary Legislation are:

i.These are laws made by persons or bodies to whom parliament has delegatedlaw making authority.

ii.It required in enabling or parent or Act.

iii.It contains many administrative details

iv.It may administratered by government department, Local government or courts.

It is required in enabling or parent Act. It contains many administrative details necessary to ensure that the provisions of the Act will operate successfully. It may be administered by Government Departments, Local Councils or Courts.

UNIT 3: DRAFTING EXECUTIVE INSTRUMENTS AND TREATIES

3.1 INTRODUCTION

Legislative Counsel may be instructed to draft instruments of an executive nature to be made under the authority of an Act, especially in the early stages of their career. These can take a wide variety of forms:

(i) orders giving commands or instructions to particular persons or classes of persons, often in connection with the performance of their statutory functions;
(ii) orders giving authority to a particular person or classes of persons to act in a particular way (e.g. as specified in a statute) or to perform particular functions or in particular offices (e.g. as an acting holder or by delegation);
(iii) notices announcing that action has been or is to be taken, usually under some statutory power;
(iv) directions indicating how particular functions (again often derived from statute) are to be performed.

Treaty is defined in the Vienna convention on the law of Treaties: (Article 2(1)(a) as an international agreement concluded between states in written form and governed by international law; whether embodied in a single instrument or in two or more related instruments. International conventions are products of compromise. In most cases the compromise is based upon political considerations, national interacts and expediency.

3.2 LEARNING OUTCOMES

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

i.Anayses the special factors to bear in mind when drafting executive instruments

ii.Define Treaties

iii.explain the differences between United Nations General Assembly Resolution Negotiated agreement and arrangement which do not have the characters and status of a treaty

iv.Evaluate the different types of Treaties • understand the significance of Treaty drafting.

This unit is added to draw attention to differences in approach that you may have to adopt when drafting executive instruments and treaties.

3.3 SPECIAL FACTORS TO BEAR IN MIND WHEN DRAFTING EXECUTIVE INSTRUMENTS

Drafting these instruments should follow the lines suggested for subsidiary legislation. Here too, bear in mind the question of *ultra vires*. But, typically, fewer technical features have to be observed.

Bear in mind that the provisions of the Interpretation legislation relating to written laws do not apply to executive instruments. On occasions, you may need to include in such an instrument matters that are provided for by the Interpretation Act in the case of subsidiary legislation. However, the Act does contain provisions relating to statutory powers generally, and so may be relevant to the exercise of powers authorising the making of an executive instrument.

The principal provisions in the **model Interpretation Act 1992** are the following:

section 45: a statutory power may be exercised as the occasion requires.

section 46: a statutory power includes power to do anything reasonably necessary to enable an action to be carried out, or that is fairly incidental.

section 47: statutory powers of appointment, by implication, include powers to make reappointments and acting appointments, and to discipline and remove from office.

section 48: statutory powers may be exercised by the temporary occupants of an office;

section 49: a statutory power to delegate carries a series of implied powers, including those of adding conditions, limitations and exceptions to the performance a function when delegated.

SELF ASSESSMENT EXERCISE 1

From the comparative table in the Annex to **LED: 705** (*Working under an Interpretation Act*), remind yourself as to which of these rules are in force in your jurisdiction. Check the Interpretation Act for equivalent provisions.

Many of the technical features of subsidiary legislation are not included in executive instruments. Typical exclusions are a title, authorising words, definitions, formal sectioning and section notes and explanatory notes.

Executive instruments are typically written in the form of prescriptive statements, each in a separate paragraph. In much the same form as used in subsidiary legislation, they should:

(i) indicate the statutory source under which they are made;
(ii) be of the type authorized;
(iii) include the date when they come into force;
(iv) start with appropriate headings that identify the subject matter; (v) finish with signifying words and date.

They may be classified, numbered and printed in a different series from legislative instruments (e.g. as *Government Notices*, rather than *Legal Notices*). But that distinction requires a decision to be made as to which category the instruments belong. This is difficult in borderline cases and, in fact little purpose is served by doing so. The practice is anyway difficult to sustain if there is no administrative authority legally empowered to make a final ruling on the issue.

Many executive instruments are of a routine nature, dealing with frequently repeating matters. In these cases, your task is considerably eased by following the house style as conveyed by your precedents.

3.4 Negotiation and Treaty Drafting

Because of the nature of international treaties which in most cases is based on compromise predicated on political considerations, national interests and expediency, hence the niceties of the Six cardinal objectives of the drafting process, namely; clarity conciseness, comprehensiveness, comprehensibility, consistency and certainty are not attainable, Where more than three or four languages are agreed as authentic versions of the treaty, the issues becomes complicated. In that it may not be possible to translate words into several languages with the same exactitude as would be the position if only one language is adopted. Even in domestic legal systems, as we all know, a word may conjure different meaning to different users.

Treaty Drafting involves the preparation stage before negotiation. Preparation is a vital part of the negotiation process because the degree of success achieved in negotiation is directly related to the level of preparation.

In the United Nation today there are a total of 166 members. It is very difficult to frame a convention or treaty in such a manner as will make it meet the complete acceptance, i.e. acceptance without reservation, of motley of 166 members, although at a conference of Plenipotentiaries called for the adoption of a treaty, there is usually elected a drafting committee. Yet the drafting committee is always

elected with geographical spread and various legal systems in mind. Just as at municipal level it is imperative for the drafter to be thoroughly conversant with the substantive law on the subject matter which forms the basis of his drafting. So also the international law concerned with the topic of the treaty must be well understood before drafting commences.

However, where treaty is the product of the preparatory work of the International Law Commission, there is the consolation that the text has been remitted to various governments, members of the U.N. for comments, observation, amendments and recommendations. Therefore the final text produced can be said to represent the general consensus of the international community. This in itself will not free the treaty from ambiguity.

3.5 THE PREPARATORY STAGE

There should be internal meetings between the delegation to the treaty negotiation and other interested parties within the country before the negotiation takes place. The purpose of these meetings would be to work out the country's policy and technical approach to the negotiation.

Composition of Delegation

The selection of delegates for treaty negotiation is very crucial and important. Ideally a delegation should be comprised of a technical person or persons who have special knowledge in the area covered by the treaty, and a lawyer or lawyers conversant with the constitution, laws of his country and the law of Treaties.

Venue

The venue of treaty negotiation is very important, in view of the fact that financial constraints may prevent a third world country from sending a large delegation to negotiations abroad. For example, it may not be possible to send more than one person to Bilateral Investment Treaty negotiation abroad. But if the meeting were at home, you would be able to field a delegation comprising an economist from Ministry of Finance or an officer of the Central Bank, an officer of the Ministry of Foreign Affairs and an officer from the department responsible for investment promotion (Nigerian Investment Promotion Council) and a lawyer. A lawyer should always be part of the delegation; no matter how technical the subject matter of a treaty is. Essentially what it does is to set up rights and obligations for the parties under international law – a matter which is better appreciated by a lawyer than a technical person.

3.3 TYPES OF TREATIES

3.3.1 Bilateral Treaties

In dealing with treaty negotiation it is useful to distinguish between bilateral and multilateral treaties.

Bilateral Treaty negotiation may be considered easier than multilateral treaty negotiation since one is more likely to obtain consensus between two than among twenty or a hundred States. Bilateral treaty negotiation allows the special circumstances peculiar to the two negotiating states to be taken into account in a manner which is not so easy to duplicate in multilateral treaty negotiation in respect of twenty or a hundred States.

Bilateral treaties are between two party States. However, bilateral treaty presents a danger because most of the treaties' developing countries conclude are with the developed countries. They are usually treaties dealing with economic, social and cultural matters but mostly economic matters such as Trade, Aid, Co-operation Technical Assistance and Investment Protection. Therefore the developed countries which are stronger economically and also more powerful in military terms do exert unnecessary pressures on the third world countries. The third world countries because of their position are open to all forms of pressures and persuasions from them.

3.3.2 Multilateral Treaties

Multilateral Treaty negotiation is aimed at arriving at a point of the ultimate convergence of the position and policies of many countries involved. A multilateral treaty is the one between several countries. At the multilateral level of the U.N, it may be more difficult to get one national position reflected in the wider group. Multilateral treaty offer weaker countries a kind of protective cover in form of group solidarity e.g. Group of 77 in the U.N consisting of 120 countries or the NonAligned movement. It is no secret that it is because of the numerical strength of the Group of 77 in the U.N that the U.S.A does not like multilateral diplomacy and as such prefers to operate at the bilateral level where it is better able to secure agreement with its policies

3.4 TREATY NEGOTIATION AND DRAFTING

Treaty drafting and negotiation is joined to emphasize the interrelationship between the two. Treaty drafting is really one side of a coin of which the other is treaty negotiation. It is the product of treaty negotiation. It is important that it should not be seen as something apart from treaty negotiation. Its purpose is to find language which expresses the political will of the parties. Since treaties, particularly multilateral treaties are negotiated on the basis of a compromise package and consensus, the language and formulations must be such as to satisfy the interest of all the negotiating states .There are two aspect of Treaty drafting that are of crucial importance for multilateral treaty (and even for a bilateral treaty).

3.4.1 Drafting in the Negotiation Room

This is a stage in treaty negotiation, as negotiation progresses and states find that they cannot secure their original position; that they will have to move away from that position to a point where they give and take and trading i.e. this is part of negotiation which results in a reconciliation and accommodation of views where various formulation will be proposed in the effort to find consensus.

3.4.2 Formal Drafting

The second stage in Treaty drafting is the formal drafting which takes place in a drafting group established to refine the language that has already been worked out and agreed to at political policy- making level. Its customary function at the multilateral level essentially is to refine the language and particularly to ensure that there is linguistic conformity and juridical concordance as between the different languages. Quite often we find out that an inelegant and vague formulation that has won acceptance will emerge from the drafting group unchanged because the delegation will argue that any change will upset the delicate balance reflected in the compromise formulation.

Take Article 59 of the U.N Convention on the Law of the sea. One may argue that the drafting in terms of precision, elegance, style and length could be improved. It is such a long convoluted sentence. But that language represents the political compromise worked out and agreed to between those who felt that the exclusive economic zone was a zone of high seas, and those for whom it was a zone of national jurisdiction. There is a delicate balance between competing interests reflected in that formulation, but it is not a matter of language, it is a matter of substance and political accommodation. An example of a vague and ambiguous formulation is Article 74 (1) of the U.N Convention on Law of the sea.

Article 74(1) provides:

> "The delimitation of the exclusive economic zone between States with opposite or adjacent States shall be effected by agreement on the basis of international law".

Article 23 of the Convention on the Territorial sea and contiguous zone (TSCZ) of 1958 provides:

> "If any warship does not comply with the regulations of the Coastal state concerning passage through the terrestrial sea and disregard any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea".

The convention therefore contains no provision expressly allowing or denying a right of innocent passage to a warship. This lack of clarity has been repeated in the 1982 Montego Bay convention on the Law of the sea this century. The International Court of Justice (ICJ) in the ***Corfu Channels case***: UKVA/banca/CJ Reprints (1949) 8, argued that the right to send warship though territorial sea is implied

3.5 IMPLEMENTATION OF TREATIES

Ratification is the end product of any treaty and as the mode of ratification varies from country to country, so also the mode of implementation varies in some jurisdictions. Legislations may not be necessary to bring a treaty into effect at the domestic level. Once the State has ratified the treaty, it becomes operative as a matter of course and the court will take judicial notice of such a treaty when a matter relating to any of its provision falls due to be decided by any court. The United States of America

provides a good example. There, Article VI section 2 of the American Constitution stipulates that treaties are "the supreme law of the land".

The German Constitution contains far reaching provisions to the effect that international law is treated as an integral part of municipal law.

In Britain treaty – making power is vested in the executive which in British constitutional law is the crown. The binding force of a treaty is a matter of international law. The British practice is that a treaty is required to be implemented by an enabling legislation.

A mere general or vague allusion to the treaty in a statute is not sufficient to constitute the necessary legislative implementation. One exception is the constitutional convention known as the "Ponsonby Rule" whereby treaties, subject to ratification are laid before both House of parliament for a period of 21days before the government proceeds to ratification by submitting them to the sovereign. Since negotiation of treaties are often conducted in secret in the past but nowadays there is increasing tendency not only to keep parliament informed but also to invite expressions of opinion before the crown finally commits itself. e.g. the Maastricht Treaty on European Union.

3.5.1 Nigeria Practice

The practice in Nigeria before independence and until recently, Nigeria's domestic law relating to treaties has been characterised by neglect and lack of co–operation. Right from the time of the Clifford Constitution in 1922, the British Colonial Suzerain imposed a limitation on the Legislative Council regarding issuance of ordinance which could affect rights and obligations emanating from treaties' application to Nigeria (see Nigeria (Legislative council) order–in-council Nov 21, 1922.). Even the Macpherson Constitution of 1951 which was thought to be a little more progressive than the 1922 empowered the governor of a region to disallow any Regional Law which would be inconsistent, *inter-alia* with treaty obligations of Nigeria entered into on its behalf by the colonial government.

Surprisingly, after independence, Nigeria exhibited the same lacuna prevalent in the constitutions of commonwealth federations most of which lacks clear – cut provision on the treaty–making power of the State and instead, as usual with commonwealth federations approached the issues by way of treaty implementation. This tendency has been exhibited in all the Nigeria constitutions from independence to now.

When Nigeria became independent in 1960, the first document which involved treaty implementation was the Devolution Treaty/Agreement of October 1, 1960 between the outgoing British Government and the first Nigeria Prime Minister at independence, Sir Abubakar Tafawa Balewa.

In two terse clauses the agreement reads as follows:

(i) all obligations and responsibilities of the Government of the United Kingdom which arose from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Nigeria, be assumed by the Government of Nigeria.
(ii) The rights and benefits enjoyed by the Government of the United Kingdom by virtue of the application of any such international agreement to Nigeria shall henceforth be enjoyed by the Government of Nigeria.

Note the extra–territorial effect of the British Colonial Laws Validity Act 1865. This was applicable to all British dominions and colonies except the Channels Islands and the Isle of Man & India. It stipulated that a Colonial Act: (i.e. Measure Passed by a colonial legislature) was absolutely void and inoperative if repugnant to English Law.

Note the changes brought about by the Statute of Westminster 1931 – It removed restrain on Legislative powers of the Dominions by exempting them from the operations of the Colonial Laws Validity Act 1865. The restrains in respect of colonies remained.

Provisions of Nigerian Constitutions as they relate to Treaty implementation

(i) The 1960 Independences Constitution

Section 69 provides:

"Parliament may make Laws for Nigeria or any part thereof with respect to matters not included in the legislative list (i.e. neither in exclusive legislative list nor in the concurrent legislative list and the residuary legislative list) for the purpose of implementing any treaty convention or agreement between the federation and any other country or any arrangement with or decision of an international organization of which the federation is a member. Provided that any provision of Law enacted in pursuance of this section shall not come into operation in a Region unless the
Governor of that Region has consented to its having effect."

(2) The 1963 Republican Constitution

Section 74 of the Constitution of the Federation 1963, which dealt with treaty implementation, was worded as that of the 1960 Constitution quoted above.

(3) The Constitution of the Federal Republic of Nigeria 1979

The wording of Section 12 of the Constitution of the Federal Republic of Nigeria 1979 is entirely different. It provides as follows:

Section 12.(1) "No treaty between the Federation or any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly"
(2) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive legislative list for the purpose of implementing a treaty.

(3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent and shall not be enacted unless it is ratified by a majority of all the House of Assembly in the federation.

It is the problem of domestic implementation that makes the U.S.A shy away from adopting many International Labour Organisation (ILO) Conventions as they deal with matters in most cases within the purview of State Component Units of the American Federation.

(a) The provisions of the treaty or some of them that are consistent with the provisions of the Statute may be embodied in the domestic statute, thus producing a version that meets the needs of the local legal system. See the Geneva Convention Act: All the Act did was to lift some articles of the various Geneva Convention Acts and marry them to the local statute concerned.

One disadvantage of this approach is that it may militate against harmonious and uniform application of the treaty in all member states parties to the treaty, since the Bill to implement the Convention may not adopt language taken from the Convention.

(b) A second method is to directly enact the treaty i.e. state the provisions of the treaty as they are in the treaty with the provision that they are thereby to have effect as domestic Laws.

It wound appear that Section 12 of the 1979 & 1999 Constitution of the Federal Republic of Nigeria envisages a situation in which a statute has to directly enact a treaty before it can have the force of law or become operative in Nigeria.

(c) The third method is where the statute sets out the convention in a schedule and endows it with the force of law. This is what happens at present in practice. For example, in the case of the African Charter on Human and Peoples' Right (Ratification and
Enforcement) Act, the Charter was reproduced verbatim in the Schedule to the Act and then references made in the long title, preamble, short title and commencement to the Charter and to the effect that it shall have the force of law.

3.6 SUMMARY

In conclusion, bear in mind that the provisions of the Interpretation Act relating to written laws do not apply to executive instruments. Preparation is a vital part of treaty negotiation process. There should be internal meetings between the delegation to the treaty negotiation and other interested parties within the country before the negotiation takes place. The selection of delegates for treaty negotiation is very important. In this unit, we considered drafting of executive instruments and treaties. You should now be able to draft them accordingly.

With practice and experience you will make these matters your own. For your present purposes you should feel confident that, if asked to draft a subsidiary instrument, you know how to proceed, what to look out for and how to put together the particular type of instrument required, with all its characteristic features.

Self-Assessment exercise
How are treaties enforced in Nigeria?

3.7 REFERENCES/FURTHER READING

D.L Mendis: The Legislative Transformation of Treaties (1992)13 Stat. LR 216

F.A Mann: "Uniform Statute in English Law 62 LQR 278; 99 LQR 376.

Patrick Robinson: Treaty Negotiation Drafting and Ratification; West India Law Journal: P1.

Thornton G, C. Legislative Drafting (3rd ed.). P. 236.

3.8 POSSIBLE ANSWER TO SELF-ASSESSMENT EXERCISE ON ENFORCEMENT OF TREATIES IN NIGERIA

In Nigeria, international agreements do not automatically have the force of law after ratification; there is a constitutional requirement for every international treaty to be domesticated before it can have the force of law. Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) stipulates that: *"No treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."* As a result of this constitutional provision the figurative hands of justice have been held captive, as judges are usually reluctant to deliver decisions which directly conflict with the provisions of the constitution and would generally refrain from enforcing the provisions of international treaties which have not yet been domesticated. In ***Abacha v Fawehinmi***, the Nigerian Supreme Court held that: It is therefore manifest that no matter how beneficial to the country or the citizenry, an international treaty to which Nigeria has become a signatory may be, it remains unenforceable, if it is not enacted into the law of the country by the National Assembly.

ANNEX

INTERPRETATION ACT 1992

No.2 of 1992

PART I - PRELIMINARY

PART II - GENERAL PROVISIONS RELATING TO WRITTEN LAWS

PART III - COMMENCEMENT OF WRITTEN LAWS

PART IV - CONSTRUCTION OF WRITTEN LAWS

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PART XI - MISCELLANEOUS

INTERPRETATION ACT 1992

No.12 of 1992

AN ACT to provide for the application, construction, interpretation and operation of written law; to provide with respect to the exercise of statutory powers and duties; and for connected purposes.

[*Commencement*: 1 January 1993]

ENACTED BY THE PARLIAMENT OF UTOPIA:

PART I - PRELIMINARY

Short title and commencement.

1.-(1) This Act may be cited as the Interpretation Act 1992.

(2) This Act comes into force on 1 January 1993.

Application.

2.-(1) This Act applies to every enactment, whether enacted before or after the commencement of this Act, unless, in relation to a particular enactment:

(a) express provision is made to the contrary by a written law; or

(b) the context of the enactment is inconsistent with that application.

(2) This Act applies to the provisions of this Act.

Act to bind the Republic.

3. This Act binds the Republic.

PART II - GENERAL PROVISIONS RELATING TO WRITTEN LAWS

Style of statutes.

4. All statutes in Utopia are to be styled Acts.

Citation of written laws.

5.-(1) In referring to a written law, it is sufficient for all purposes to cite or refer to the written law by:

(a) the short title or the citation by which it is expressed that the law may be cited; or

(b) the year in which the law was passed or made and the number among the Acts or subsidiary legislation, as the case may be, for that year; or

(c) the Chapter number, or other reference number, given to the law in the revised edition of the laws.

(2) The citation or reference to a written law must relate to a copy of that law printed, or purporting to be printed, by the Government Printer.

Words of enactment.

6. Every Bill presented to the President must contain words of enactment which must precede the individual clauses of the Bill and be as set out in Schedule 1.

Acts to be public Acts.

7. Every Act is, and is to be judicially noticed as, a public Act.

Application of written law.

8. Every written law applies to the whole of Utopia unless the contrary intention appears.

When written laws bind the Republic.

9.-(1) A written law does not bind the Republic unless it is expressed to do so or unless it appears to do so by necessary implication.

(2) Subsidiary legislation does not bind the Republic unless made under an Act that binds the Republic or unless the Act under which it is made authorises it to do so.

Provisions to be substantive enactments.

10. Every provision of a written law has effect as a substantive enactment without introductory words.

Acts may be amended in the same session.

11. An Act may be amended or repealed in the same session of Parliament as that in which it was passed.

Preambles and Schedules.

12.-(1) The preamble to a written law forms part of that law and is to be construed as a part intended to assist in explaining its purport and object.

(2) A Schedule, appendix or table in a written law, together with any notes to it, forms part of that law.

Headings, notes, etc.

13.-(1) The headings to the Parts, divisions or sub-divisions into which a written law is divided form part of that law.

(2) The marginal or shoulder notes, or footnotes, to any provision of a written law are not to be taken as forming part of that law.

(3) Words in or attached to an enactment that are descriptive of the contents of a provision of that or another enactment are not to be used as an aid to construction but are to be taken as intended for convenience or reference only.

Punctuation.

14. Punctuation forms part of a written law, and regard may be had to it in construing that law.

Use of extrinsic materials in interpretation.

15.-(1) Subject to subsection (3), in the interpretation of a provision of an Act, consideration may be given to any material, not forming part of the Act, that is capable of assisting in ascertaining the meaning of the provision:

(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when:

(i) the provision is ambiguous; or

(ii) the ordinary meaning so conveyed leads to a result that is manifestly absurd or unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered under that subsection includes:

(a) any relevant report of a State Commission, law reform commission, committee of inquiry or other similar body that was laid before Parliament before the time when the provision was enacted;

(b) any relevant report of a committee of Parliament that was made to Parliament before the time when the provision was enacted;

(c) a treaty or other international agreement that is referred to in the Act;

(d) an explanatory memorandum relating to the Bill containing the provisions, or any other relevant document, that was laid before, or supplied to members of, Parliament by a Minister before the time when the provision was enacted;

(e) the speech made to Parliament by a Minister on the occasion of the moving by the Minister of a motion that the Bill containing the provision should be read a second time in Parliament;

(f) a document that is declared by the Act to be a relevant document for the purposes of this section; and

(g) any relevant material in the official record of debates of Parliament.

(3) In determining whether consideration should be given to any material under subsection (1), or in considering the weight to be given to any such material, regard must be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

References in written law

16.-(1) A reference in a written law to an enactment is to be construed as including a reference to that enactment as it may be amended from time to time.

(2) A reference in a written law by number or letter to two or more Parts, divisions, sections, subsections, paragraphs, Schedules or other portions of a written law is to be construed as including the references first and last mentioned.

(3) Where in a written law:

(a) a reference is made to a Part, division, section, Schedule, appendix or form; but

(b) nothing in the context indicates that a reference to a Part, division, section, Schedule, appendix or form in another written law is intended,

the reference is to be construed as a reference to a Part, division, section, Schedule, appendix or form in the written law in which the reference appears.

(4) Where in a provision of a written law:

(a) a reference is made to a subsection, paragraph, sub-paragraph or other division; but

(b) nothing in the context indicates that a reference to a subsection, paragraph, sub-paragraph or other division of some other provision is intended,

the reference is to be construed as a reference to a subsection, paragraph, sub-paragraph or other division of the provision in which the reference appears.

(5) Where in a Schedule to a written law:

(a) a reference is made to a paragraph, subparagraph or other division; but

(b) nothing in the context indicates that a reference to a paragraph, sub-paragraph or other division of some other provision is intended,

the reference is to be construed as a reference to a paragraph, sub-paragraph or other division of the Schedule in which the reference appears.

(6) Where in a written law:

(a) reference is made to subsidiary legislation; but

(b) nothing in the context indicates that a reference to subsidiary legislation made under some other written law is intended,

the reference is to be construed as a reference to subsidiary legislation made under the written law in which the reference appears.

PART III - COMMENCEMENT OF WRITTEN LAWS

Date of passing, etc, of written laws.

17.-(1) The date on which an Act is passed is the day on which the President signifies on the Bill for the Act the giving of the President's assent to the Bill.

(2) The date on which subsidiary legislation is made is the day when it is signed by or on behalf of the person having the authority to make it.

(3) Where a date appearing on a written law printed or purporting to be printed by the Government Printer, purports, as the case may be, to be:

(a) the day on which the President assented to it; or

(b) the day it was signed by or on behalf of the person having authority to make it,

the apparent date is to be received as evidence that it was the date that it purports to be and is to be judicially noted accordingly.

Coming into force of written laws.

18.-(1) An Act comes into force on the day that it is passed, unless the contrary intention is expressed in the Act.

(2) Subsidiary legislation comes into force on the day that it is published in the *Gazette*, unless the contrary intention is expressed in the subsidiary legislation or in the Act under which it is made.

(3) The provision of an Act providing for the coming into force of the Act, or a specified provision of the Act, on a day to be fixed by an instrument, and the provision of the Act providing for the short title, come into force on the date the Act is passed, unless it is otherwise provided.

(4) Where an enactment comes into force on a particular day, it is to be treated as coming into force at the first moment of that day.

(5) Where an Act provides that it is to come into force on a day to be fixed by an instrument, such an instrument:

(a) may apply to the whole or to any provision or provisions of that Act; and

(b) may be issued at different days in respect of different provisions,

but it may not fix a day prior to the date on which the instrument is published in the *Gazette*, unless the Act makes express provision to that effect.

(6) Where subsidiary legislation provides that it is to come into force on a day to be fixed by an instrument, the instrument may not:

(a) fix different days for different provisions; or

(b) fix a day prior to the date on which the instrument is published in the *Gazette*,

unless an Act makes express provision to that effect.

(7) A reference in a written law, in whatever terms, to the day of the coming into force of a written law, where different provisions come into force on different days, is to be construed as a reference to the day of the coming into force of the appropriate provisions of the written law.

Exercise of powers before commencement.

19.-(1) Where a provision of written law does not come into force on the date that it is passed or made, and that provision confers power:

(a) to make subsidiary legislation;

(b) to make an instrument or issue or serve a document or notice;

(c) to hold an election for, or make an appointment to, a specified office;

(d) to establish a specified body of persons;

(e) to prescribe forms or give directions; or

(f) do anything for the purposes of the written law,

that power may be exercised at any time after the date the written law is passed or made, to the extent appropriate for the purpose of bringing the written law into force or of making it effective upon it coming into force.

(2) Where the power exercised is of a kind mentioned in subsection (1)(a), (b) and (e), it does not take legal effect before the date on which it could have legal effect following the coming into force of the provision conferring the power.

(3) Where the power exercised is of a kind mentioned in subsection (1)(c) and (d), the person elected or appointed to the office or the body established, as the case may be, may perform his, her or its functions, but only to the extent specified in subsection (1); but the term of office or membership of the body is to be treated as beginning on the coming into force of the provision conferring the power.

PART IV - CONSTRUCTION OF WRITTEN LAWS

Law always speaking.

20.-(1) A written law is to be considered as always speaking.

(2) Where, in a written law, anything is expressed in the present tense, it applies to the circumstances as they occur, so that effect may given to every provision according to the true spirit, intent and meaning.

Application of interpretation provisions in written laws.

21.-(1) Definitions or rules of interpretation in a written law apply to the construction of the provisions of the law that contain those definitions or rules, as well as to the other provisions of the law.

(2) An interpretation section or provision in a written law is to be read and construed as applying only if a contrary intention does not appear in the law.

Corresponding meanings of parts of speech.

22. Where a word or expression is defined in a written law, other parts of speech and grammatical forms of that word or expression, and cognate expressions, have corresponding meanings in that law.

Rules as to gender and number.

23.-(1) In an enactment:

(a) words and expressions importing the masculine gender include the feminine gender; and

(b) words and expressions importing the female gender include the masculine gender.

(2) In an enactment -

(a) words and expressions in the singular include the plural; and

(b) words and expressions in the plural include the singular.

Construction of "shall" and "may".

24. In an enactment:

(a) the expression "shall" is to be construed as imperative; and

(b) the expression "may" is to be construed as permissive and empowering.

PART V - GENERAL INTERPRETATION PROVISIONS

Definitions for legislative purposes.

25.-(1) For the purposes of every written law, the expression:

"**Act**" means an Act of the Parliament of Utopia;

"**amend**", in relation to an enactment, means modify, vary or add to, or replace or substitute, in whole or in part, the enactment by another written law;

"**commencement**", in relation to an enactment, means the time when that enactment comes or came into operation;

"**enact**", in relation to a written law, includes pass, make or issue the law;

"**enactment**" means an Act or subsidiary legislation, or a provision or a portion of an Act or subsidiary legislation;

"**Parliament**" means the Parliament of Utopia;

"**prescribed**", when used in a written law, means prescribed by the written law, or by subsidiary legislation made under the written law;

"**repeal**", in relation to an enactment, includes revoke, rescind, cancel or delete the enactment by a written law;

"**sitting**", in relation to Parliament, means a period during which Parliament is sitting continuously without adjournment, and includes a period during which the House is in Committee;

"**sitting days**", in relation to Parliament, means the days on which Parliament is sitting;

"**Speaker**" means the member of Parliament from time to time elected to be Speaker of Parliament;

"**subsidiary legislation**" means a proclamation, regulations, rules, rules of court, bye-laws, order, notice or other instrument made under a written law and having legislative effect;

"**written law**" means the provisions of the Constitution, an Act or subsidiary legislation, for the time being in force.

(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..

(3) The expression "subject to affirmative resolution", when used in relation to subsidiary legislation, means that:

(a) the legislation is to be tabled in Parliament; and

(b) if, at the end of the statutory period next after it has been tabled, Parliament has not passed a resolution that it is to come into force or to continue to have effect, the legislation does not come into effect or ceases to have effect from that date, as the case may be;

but its ceasing to have effect does not affect the validity of anything previously done under the legislation.

(4) The expression "subject to negative resolution", when used in relation to subsidiary legislation, means that:

(a) the legislation is to be tabled in Parliament; and

(b) if, within the statutory period next after it is tabled, Parliament passes a resolution that it is disallowed, the legislation ceases to have effect from the date of the resolution,

but its ceasing to have effect does not affect the validity of anything done previously under the legislation.

(5) For the purposes of subsections (3) and (4), the expression "statutory period", means a period of 40 days or such other period as may be prescribed, in the enactment in which the expression is used; but in reckoning the period, the time that Parliament is dissolved or prorogued is to be disregarded.

Definitions for judicial purposes.

26. For the purposes of every written law, the expression:

"**Chief Justice**" means the Chief Justice of Utopia appointed under section 62 of the Constitution;

"**court**" means a court of Utopia of competent jurisdiction;

"**Court of Appeal**" means the Court of Appeal established by section 60 of the Constitution;

"**court of summary jurisdiction**" means a court exercising a statutory summary jurisdiction;

"**Director of Public Prosecutions**" means the Director of Public Prosecutions appointed under section 85 of the Constitution;

"**Judge**" means the Chief Justice or a Judge or an acting Judge of the Supreme Court;

"**Judicial Service Commission**" means the Judicial Service Commission established by section 65 of the Constitution;

"**magistrate**" means a magistrate appointed under the Magistrates Courts Act, and includes a senior magistrate;

"**magistrate's court**" means a magistrate's court established under the Magistrates Courts Act;

"**rules of court**", in relation to a court, means rules made by the authority having for the time being power to make rules regulating the practice and procedure of that court;

"**summary conviction**" means conviction of a summary offence by a court of summary jurisdiction;

"**summary offence**" means an offence triable otherwise than on indictment;

"**Supreme Court**" means the Supreme Court of Utopia established by section 58 of the Constitution.

Definitions for official purposes.

27. For the purposes of every written law, the expression:

"**Auditor-General**" means the Auditor-General appointed under section 94 of the Constitution;

"**Cabinet**" means the Cabinet established by section 45 of the Constitution;

"**Commonwealth country**" means an independent sovereign state that is a member of the Commonwealth;

"**Consolidated Fund**" means the Consolidated Fund established by section 87 of the Constitution;

"**Constitution**" means the Constitution of Utopia;

"**financial year**" has the meaning given by section 33(2);

"***Gazette***" or "***Official Gazette***" means the *Official Gazette* printed and published by the Government Printer, and includes a supplement to the *Official Gazette*;

"**Government**" means the Government of Utopia;

"**Government Notice**" means an announcement, whether or not having a legislative character, made in the *Official Gazette* by or with the authority of the Government;

"**Government Printer**" includes a printer authorised by the Government to print and publish written laws or other documents of the Government;

"**Minister**" means a Minister appointed under section 44 of the Constitution, and:

(a) in relation to an Act, means the Minister for the time being having responsibility for the administration of the Act;

(b) in relation to subsidiary legislation, means the Minister for the time being having responsibility for the Act under which the subsidiary legislation is made;

"**Police Force**" means the Police Force of Utopia constituted and maintained under the Police Act;

"**police officer**" means a person appointed a police officer or special constable under the Police Act;

"**Police Service Commission**" means the Police Service Commission established by section 103 of the Constitution;

"**President**" means the President of Utopia appointed under section 28 of the Constitution;

"**Prime Minister**" means the Prime Minister appointed under section 73 of the Constitution;

"**public office**" means any office of emolument in the public service;

"**public officer**" means the holder of a public office and includes a person appointed to act in such an office;

"**public service**" means the service of Utopia in a civil capacity in respect of the government of Utopia;

"**Public Seal**" means the Public Seal of Utopia;

"**Public Service Commission**" means the Public Service Commission established by section 92 of the Constitution;

"**Republic**" means the Republic of Utopia;

"**statutory board**" means a board, commission, committee, council or other similar body established by or under a written law.

Definitions for local government purposes.

28. For the purposes of every written law, the expression:

"**Council**" means a Local Government Council established under the Local Government Act;

"**local government area**" has the meaning given by section 2 of the Local Government Act;

"**Local Government Service Commission**" means the Local Government Service Commission established by section 94 of the Constitution.

Miscellaneous definitions.

29. For the purposes of every written law, the expression:

"**act**", where used in reference to an offence or civil wrong, includes an omission, a series of acts or omissions or a series of acts and omissions;

"**affidavit**", in the case of a person permitted by law to affirm or make a declaration instead of swearing, includes an affirmation and declaration;

"coin" means a coin that is legal tender in Utopia;

"contravene", in relation to a provision of a written law, includes a failure to comply with a requirement or condition in that provision;

"definition" means the meaning or interpretation given to a word or expression by a written law;

"document" includes:

(a) a publication; or

(b) any matter written, expressed or described on any substance by means of letters, figures or marks (or more than one of those means), which is intended to be used or may be used for the purpose of recording any matter;

"function" includes a power, duty, responsibility or jurisdiction:

"individual" means a natural person;

"land" includes buildings and other structures and land covered with water;

"month" has the meaning given by section 33(3);

"oath", in the case of a person permitted by law to affirm or declare instead of swear, includes affirmation and declaration;

"penalty" means a fine, imprisonment or other form of punishment;

"perform", in relation to a function, includes to exercise a power, duty, responsibility or jurisdiction;

"person" includes a company, corporation, and association or body of persons, corporate or unincorporate;

"power" includes a privilege, authority or discretion;

"publication" means:

(a) written or printed matter; or

(b) record, tape, disk or wire, or cinematographic, television or video film; or

(c) other medium by means of which information may be produced, reproduced, represented or conveyed, mechanically, electrically, electronically or optically;

and includes a copy or reproduction of a publication as defined in paragraph (a), (b) or (c);

"public holiday" means a day appointed as a public holiday under the Public Holidays Act;

"public place" means a place to which, at the material time, members of the public have, or are permitted or entitled to have, access, whether on or without making payment;

"service by post" means service in accordance with section 56(2);

"sell" includes exchange, barter, offer to sell or expose for sale;

"ship" means a vessel used or capable of being used for transport by sea;

"sign" includes affix or make a mark or fingerprint, or to affix a seal or chop;

"standard time" has the meaning given by section 30;

"statutory declaration" means:

(a) a declaration made in Utopia under the Statutory Declarations Act; or

(b) a declaration made outside Utopia but effective in Utopia under that Act;

"surety" means sufficient surety;

"swear", in the case of a person permitted by law to affirm or declare instead of swear, includes to affirm and to declare;

"under", in relation to a written law or a provision of a written law, includes **"by"**, **"in accordance with"**, **"pursuant to"**, **"in pursuance of"** and **"by virtue of"**;

"vessel" means a ship, boat, lighter or other floating craft used or capable of being used for transport by water;

"will" includes a codicil and every writing making a voluntary posthumous disposition of property;

"word" includes a figure or symbol;

"writing" includes printing, photographing, filming, photocopying, type-writing, electronic processing and any other mode of representing or reproducing words in a visible form;

"year" has the meaning given by section 33.

PART VI - PROVISIONS RELATING TO TIME AND DISTANCE

Standard time.

30.-(1) In an enactment, an expression relating to time and references to a point of time shall be determined by reference to standard time.

(2) In an enactment, the expression "standard time" means:

(a) exactly 4 hours later than Greenwich mean time; or

(b) such other time as the President declares by proclamation to be the standard time of Utopia.

Provision where no time fixed.

31. Where in a written law no time is fixed or allowed within which anything must be, or is to be, or may be, done, the thing must be, or is to be, may be, done, as the case may be, with all reasonable speed and as often as due occasion arises.

Expressions relating to time.

32.-(1) The following provisions have effect for the purpose of computing time under an enactment.

(2) Where a period of time is expressed to begin on a particular day, that day is to be included in the period.

(3) Where a period of time is expressed to be reckoned from, or after, a particular day, that day is not be included in the period.

(4) Where a period of time is expressed to end on, or to continue to, or to be reckoned to, a particular day, that day is to be included in the period.

(5) Where:

(a) the time for doing anything is limited, or a particular day is specified, by an enactment; and

(b) that time expires on, or that time or day falls on, a Sunday or a public holiday,

the thing may be done on the next day that is not a Sunday or public holiday.

(6) Where a period of time set for the doing of anything does not exceed 6 days, Sundays and public holidays are not to be included in the computation of the period.

(7) Where a period of time is expressed as a number of "clear days", or as a number of days qualified by the expression "at least" or "not more than", both the first day and the last day expressed are to be excluded in the computation of the period.

Reckoning years and months.

33.-(1) A reference in an enactment to a year is to be construed as a reference to a period of 12 months.

(2) A reference in an enactment to a financial year is to be construed as a reference to a period of 12 months ending on 31 March.

(3) A reference in an enactment to a month is to be construed as a reference to a month as directed by the calendar.

Distance.

34. In measuring any distance for the purposes of a written law, the distance is to be measured in a straight line on a horizontal plane.

PART VII - REPEAL OF WRITTEN LAW

Repeal of written law as amended.

35. The repeal of a written law that has been amended by another written law includes the repeal of all provisions of the other law that made the amendments.

Repeal of a repeal.

36. Where a written law repeals a repealing enactment, that repeal does not revive any enactment, or rule of unwritten law, previously repealed unless words are added reviving it.

Repeal and substitution.

37. Where a written law repeals an enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.

Effect of re-enacted provisions.

38. Where a written law repeals and re-enacts an enactment, with or without modification:

(a) a reference in another enactment to the repealed enactment is to be construed as a reference to the enactment as re-enacted;

(b) all offices constituted, and appointments of officers made, under the repealed enactment, and in existence at the commencement of the re-enacted enactment, continue as if constituted or made under the re-enacted enactment;

(c) all councils, corporations, boards, tribunals, commissions or other bodies constituted, and all elections and appointments of their members made, under the repealed enactment, and in existence at the commencement of the re-enacted enactment, continue as if constituted or made under the re-enacted enactment;

(d) all proceedings taken under the repealed enactment are to be continued under and in conformity with the re-enacted enactment, so far as is consistent with that enactment;

(e) all subsidiary legislation or instruments made under the repealed enactment, and in force or having effect at the commencement of the re-enacted enactment, continue in force or to have effect as if made under the re-enacted enactment, so far as is consistent with that enactment; and

(f) all decisions taken, consents given, authorisations and directions issued, applications and requests made, and things done, under the repealed enactment, and having effect at the commencement of the re-enacted enactment, continue to have effect as if taken, given, issued, made or done under the corresponding provision of the re-enacted enactment, so far as is consistent with that enactment.

Effect of repealing provisions.

39.-(1) Where a written law repeals an enactment, that repeal does not, unless the contrary intention appears:

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the repealed enactment or anything duly done or suffered under that enactment;

(c) affect any right, title, interest, status, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment prior to the repeal;

(d) affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;

(e) affect any investigation, legal proceeding or remedy in respect of any such right, title, interest, status, privilege, obligation or liability, or penalty or forfeiture.

(2) An investigation, legal proceeding or remedy mentioned in subsection (1)(e) may be instituted, continued or enforced, and a penalty, forfeiture or punishment liable to be incurred may be imposed, as if the enactment had not been repealed.

(3) Nothing in this section authorises the continuance in force after the repeal of an enactment of any subsidiary legislation or instrument made under that enactment.

(4) The inclusion in the repealing provisions of an enactment of an express saving with respect to the repeals effected by it does not prejudice the operation of this section with respect to the effect of those repeals.

(5) This section applies with respect to an enactment that expires or ceases to have effect as if that enactment had been repealed.

PART VIII - SUBSIDIARY LEGISLATION

Provisions relating to the making of subsidiary legislation.

40.-(1) Where subsidiary legislation purports to be made in exercise of or under particular powers, it is to be treated as to be made in exercise of or under all powers under which it may be made.

(2) Where a written law confers a power to make subsidiary legislation, it is to be treated as also including a power to amend or revoke that subsidiary legislation in the same way and subject to the same conditions, if any.

(3) Where an enactment confers power on a person to make subsidiary legislation for any general purposes and also for any special purposes incidental to those purposes, the enumeration of the special purposes does not affect the generality of the powers conferred with reference to the general purposes.

(4) A power in an enactment to make subsidiary legislation may be exercised:

(a) in relation to:

(i) all cases to which the power extends;

(ii) all those cases subject to specified exceptions; or

(iii) any specified cases or classes of case; and

(b) so as to make, as respects the cases in relation to which it is exercised:

(i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise);

(ii) the same provision for all cases in relation to which the power is exercised;

(iii) different provision for different cases or classes of case;

(iv) different provision as respects the same case or class of case for different purposes of the written law; or

(v) any such provision either unconditionally or subject to any specified condition.

(5) Subsidiary legislation may provide:

(a) that contravention of a provision of the legislation constitutes a summary offence; and

(b) for the penalty for that offence, which must not exceed a fine of $1000 and imprisonment for 3 months.

Expressions in subsidiary legislation.

41.-(1) Words and expressions used in subsidiary legislation have the same respective meanings as in the written law under which the subsidiary legislation is made.

(2) A reference in subsidiary legislation to "the Act" is to be construed as a reference to the Act under which the subsidiary legislation is made.

Relationship with parent legislation.

42.-(1) A reference in an enactment to a written law is to be construed so as to include a reference to any subsidiary legislation made under that written law.

(2) An act done under subsidiary legislation is to be treated as done under the written law under which the subsidiary legislation was made.

Rules of court.

43.-(1) Where an enactment confers jurisdiction on a court, or extends or varies the jurisdiction of a court, the authority having for the time being power to make rules of court for that court may make rules of court for the court in exercise of the jurisdiction conferred, extended or varied.

(2) The power of that authority to make rules of court includes a power to make rules of court for the purpose of any written law which directs or authorises anything to be done by or in accordance with rules of court.

Deviation in forms.

44. Where a form is prescribed or specified under a written law, deviations from it that do not materially effect the substance nor are likely to mislead do not invalidate the form used.

PART IX - STATUTORY POWERS AND DUTIES

Exercise of powers and duties.

45. Where an enactment confers a power or imposes a duty, the power may be exercised and the duty must be performed from time to time as occasion requires.

Incidental powers.

46. Where an enactment empowers a person or authority to do an act or thing, all such powers are to be regarded as given:

(a) as are reasonably necessary to enable that person or authority to do the act or thing; or

(b) as are incidental to the doing of the act or thing.

Provisions as to holders of offices.

47.-(1) Where an enactment authorises the appointment of person to any office and declares that this section applies to that appointment, it is to be treated as also conferring on the authority having the function of appointment:

(a) power, at the discretion of that authority, to remove or suspend the office holder; and

(b) power, exercisable in the like manner and subject to the like consent and conditions (if any) applicable on the appointment:

(i) to reappoint or reinstate the person to the office;

(ii) where the office holder is for any reason prevented from performing the functions of the office, to appoint another eligible person in the stead of the office holder, or to act in that stead, and to provide for the remuneration of the person so appointed;

(iii) to fix or vary the remuneration, to withhold the remuneration in whole or part during a period of suspension from office, and to terminate the remuneration on removal from office, of the office holder.

(2) Where:

(a) an enactment authorises the appointment of a person to an office; and

(b) that function is exercisable only upon the recommendation or subject to the approval, consent or concurrence of some other authority or person,

the powers in subsection (1) are exercisable only upon the recommendation or subject to the approval, consent or concurrence of that other authority or person.

Exercise of powers of holders of offices.

48. Where an enactment confers a power or imposes a duty on the holder of a public office, the power may be exercised and the duty must be performed by the person for the time being lawfully holding, acting in or performing the functions of that office.

Power of majority, quorum, etc. of statutory body.

49.-(1) Where an enactment confers or imposes a function upon a body or a number of persons consisting of not fewer than 3 persons, the function may be performed by a majority of those persons.

(2) Where a statutory board consists of 3 or more persons:

(a) a quorum is constituted at a meeting of the board by a number of members of the body equal to:

(i) at least one-half of the number of members provided for in the written law establishing the board, if that number is a fixed number; and

(ii) if the number of persons is not so fixed but is within a range having a maximum or minimum, at least one-half of the number of members in office;

(b) an act or thing done by a majority of the members of the board present at the meeting, if those members constitute a quorum, is to be regarded as having been done by the board.

(2) Where a written law authorises or requires a document or notice to be served on, delivered, sent or given to, a person, by post, the service, or delivery, sending or giving, is to be treated as having been completed:

(a) by properly addressing and posting by pre-paid post as letter to the last-known address of the person; and

(b) at the time when the letter would have been delivered in the ordinary course of post, unless the contrary is proved.

Membership of the Commonwealth.

57.-(1) The Schedule has effect for the purpose of determining which countries are members of the Commonwealth.

(2) The President may amend the Schedule, by order, by adding the names of countries that have become Commonwealth countries or by deleting countries that have ceased to be Commonwealth countries.

(3) An order made under subsection (2) may declare the date from which the Schedule is amended in respect of a particular country, whether that date is before, on or after the date on which the order is made.

(4) In a proceeding before a court or a person or authority acting judicially:

(a) a certificate signed by the Minister responsible for Foreign Affairs that on a date specified in the certificate -

(i) a specified country was or was not a Commonwealth country; or

(ii) that a specified territory was or was not one for whose international relations a specified Commonwealth country was responsible,

is conclusive evidence of the matters stated in the certificate; and

(b) if no certificate issued under paragraph (a) is produced:

(i) the fact that a country is specified in the Schedule is conclusive evidence that the country is a Commonwealth country; and

(ii) the fact that the country is not so specified is conclusive evidence that the country is not a Commonwealth country.

(5) Where a certificate is produced under subsection (4), the court or person or authority is to take judicial notice of the signature of the Minister on the certificate.

SCHEDULE 1 (section 6)

Words of enactment

1. In every Bill presented to the President for assent, other than a Bill mentioned in paragraph 2, the words of enactment must be as follows:

"Enacted by the Parliament of Utopia:".

2. In every Bill presented to the President for assent under section 35 (1) of the Constitution (which relates to the amendment of the Constitution), the words of enactment must be as follows:

"Enacted by the Parliament of Utopia in accordance with section 35(1) of the Constitution:".