

Chapter 3

Background Legislation

The Constitution and the Interpretation Act are of fundamental importance to legislative counsel, who must be completely familiar with the detailed provisions of both.

3.1 The Constitution

3.1.1 General duty of legislative counsel

Legislation which is held to be inconsistent with the Constitution will be void to the extent of the inconsistency. Great care needs to be exercised to ensure that challenges on the ground of lack of constitutionality are kept to a minimum.

Counsel's duty is therefore to:

- identify constitutional issues that may arise
- alert Government to these
- ensure so far as possible that legislation is not open to constitutional challenge
- ensure compliance with any formal or procedural matters, for example with regard to money Bills (these will be considered in Chapter 20)
- be prepared to suggest alternatives where instructions are considered to be inconsistent with the Constitution.

The last of these calls for considerable ingenuity, tact and skill on the part of legislative counsel. Alternatives might include:

- modifying the proposal to permit conformity with the Constitution
- dropping the proposal
- proceeding with the proposal, while taking the risk of successful challenge in the courts
- or even, in an appropriate case, seeking to amend the Constitution.

3.1.2 Where constitutional issues are most likely to arise

Constitutional issues are most likely to arise in legislation concerned with or involving the types of matter considered below.

Separation of powers

The following are examples of cases in which the courts have found legislation to have offended against this principle:

- allocation to the executive of a discretion to decide the severity of punishment or to fix the penalty for persons convicted of criminal offences [a judicial function – *Hinds v R* [1976] 1 All ER 353 (Jamaica)]
- conferring power on the executive to nominate the judges who were to exercise judicial power in a particular case – *R v Liyanage* (1962) 64 CNLR 313 (Sri Lanka)
- reversal by the legislature of judicial decisions determining the rights of particular individuals or of their acquittal in a criminal case – *Mahboob v Government of Mauritius* [1983] 9 CLB 81
- reversing retrospectively a judicial interpretation of a statutory provision – *Diagoras Development Ltd v National Bank of Greece* [1987] 13 CLB 38 (Cyprus).

The rule of law

This requires that:

- interference with activities is permissible only in so far as authorised by law
- powers must not confer unfettered or arbitrary discretion
- powers given must be proportionate to the problems they address (so that they go no further than is reasonably required in order to achieve the desired goals)
- powers should be subject to judicial review.

Exceptional powers

For example to hold suspects for extended periods without charge or (even more exceptionally) to detain them indefinitely without trial.

Delegation of legislative powers

Powers must be **delegated**, not **transferred**, and a very wide power to make subsidiary legislation might be held to offend against this. This is considered in Chapter 15.

Curtailement of fundamental rights and freedoms

There is a growing body of internationally recognised case law on this subject. Certain of these are typically absolute (no slavery, torture or inhuman or degrading punishment) while others (e.g. freedom of expression

or association; non-discrimination) are qualified to the extent that legislative restrictions to them may typically be allowed where they are:

reasonably required in the interest of [defence], [public order], [public morality], [public health] or for the purpose of protecting the rights and freedoms of others, and except so far as [the measure] is shown not to be justifiable in a democratic society.

3.1.3 Particular constitutional constraints

Legislative counsel need to ask questions about, and be aware of, the following principal matters likely to affect the laws:

On legislative functions

- Is there restriction on retrospective operation of criminal law and penalties?
- Are there requirements with regard to methods of introduction of particular forms of legislation (e.g. money Bills, private members' Bills; private or local Bills), and must some Bills be introduced into the lower House?
- What is the procedure where there is deadlock (e.g. between Houses or after use of a power of veto)?

On judicial functions

- Are there provisions to the effect that hearings must be by an independent and impartial tribunal, and within a reasonable time?
- Is the jurisdiction of inferior courts stipulated or is this left to be prescribed by an Act of Parliament?
- Is an ouster of judicial review prohibited?

On executive functions

- How is the assignment of responsibility to Ministers to be carried out (e.g. by formal instrument)?

3.2 The Interpretation Act

3.2.1 General

An Interpretation Act is a fundamental aid to drafting legislation. Short titles for this legislation vary somewhat in Commonwealth jurisdictions (e.g. Interpretation and General Provisions Act; General Provisions Act), but 'Interpretation Act' is the most common. As its title implies, it contains a number of basic rules relating to the construction of legislation, but also

many more relating to more fundamental things such as application and commencement and, typically, a number of definitions of common words in general legislative use (e.g. ‘contravene’, ‘document’, ‘land’, ‘person’, ‘prescribed’, ‘vessel’).

The Act will be expressed to apply to all legislation (except for the Constitution, unless the Constitution itself expressly otherwise states) ‘unless a contrary intention appears’ (see below).

3.2.2 Basic questions answered by the Interpretation Act

Typically an Interpretation Act will provide answers to the following questions:

- What are the basic terms used to refer to legislation (e.g. ‘Act’, ‘enactment’, ‘subsidiary legislation’, ‘written law’) and how are these defined?
- When does primary legislation (i.e. Acts) and subsidiary legislation come into force?
- When legislation is amended, how does this affect references to it in other legislation?
- What consequences flow from repealing legislation?
- What are the normal incidents of statutory powers and duties (e.g. performance from time to time as occasion requires; incidental implied powers; power to act by a simple majority)?
- How is time to be reckoned?
- What general provisions apply to penalties?
- Do written laws bind the Government? (See further, Chapter 17.)

3.2.3 The importance of an Interpretation Act

Standardisation of legislative expression

The following are the general definitions typically provided by an Interpretation Act:

- official authorities and officers – ‘Minister’, ‘police officer’, ‘public office’
- words and expressions which have no clear-cut meaning but which are to be given a settled one for legislative purposes – ‘financial year’, ‘prescribed’
- words which have a usual meaning but which are to carry an extended meaning in legislation – ‘act’ (extended to include an

- omission), 'oath' (to include an affirmation), 'person' (to include a body of persons), 'sell' (to include offer for sale)
- definitions that are intended to give precision to commonly used words or expressions that are indeterminate or capable of more than one meaning – 'land', 'writing'
- convenient shorthand expressions – 'contravene', 'prescribed'.

Consistency in legislative style and reduction of repetition

- references within written laws and provisions in them (e.g. a reference to a section in an Act means a reference to a section of the Act in which the reference occurs, thus eliminating the need to refer to 'section 6 of this Act', unless ambiguity might arise)
- imposition of penalties (see Chapter 14, 'Penal provisions')
- exercise of power before written law comes into force (to allow for, e.g., the appointment of a Board or supervising authority).

3.2.4 'Unless a contrary intention appears' and similar phrases

A contrary intention can be indicated:

- expressly, by redefining a word or expression (e.g. 'land', 'writing')
- by clear evidence of a contrary intention to that expressed in the Interpretation Act rule (as by requiring a stated percentage of votes required to act, displacing a rule about action on a majority vote)
- by placing the matter in a context in which sense can be made of the provision only if a contrary meaning is given, as by displacement of a definition that 'person' includes a body corporate in the case of offences capable of being committed only by individuals (e.g. sexual offences or those involving physical violence to the person).

3.2.5 How well do others know the Interpretation Act?

Even though background rules are provided in the Act, consideration needs to be given to the desirability of repeating some of them in certain types of legislation in order to give a complete picture, for example in legislation setting up statutory corporations (see Chapter 18).

