

## Chapter 15

# Delegated Powers to Make Legislation

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### 15.1 Why are powers to legislate delegated?

As has been seen (Chapter 1), constitutional power to legislate is expressly vested in the body generally known as 'Parliament'. Nevertheless, the power to legislate is often delegated by Parliament owing to:

- pressure on parliamentary time
- the difficulty of legislating in detail
- the technical nature of some legislation and its consequent unsuitability for parliamentary debate.

Legislation produced as a result of this delegation is called variously:

- subsidiary legislation
- subordinate legislation
- delegated legislation
- secondary legislation
- statutory instruments
- statutory rules.

Because it is the term most commonly used in Commonwealth jurisdictions, the first of these, subsidiary legislation, is used here.

Subsidiary legislation gives considerably greater flexibility as it is easier to amend than primary (i.e. statute) legislation, which under a democratic constitution is always subject to debate and the parliamentary timetable (and Parliament may not even be in session when urgent amendment is required). But Ministries tend to want to retain legislative power to themselves; the Attorney General needs to take care to ensure that the constitutional powers of the legislature are not misapplied in this way.

The enabling legislation (i.e. that giving the power to make subsidiary legislation) should itself contain **the principal substantive and administrative rules needed to give effect to the policy**, namely:

- matters involving significant effect on policy
- rules which will have a significant effect on individual rights and duties

- significant offences and penalties
- taxes and significant fees and charges
- procedural matters which go to the heart of the legislative scheme
- amendments and repeals to existing statutes or the common law.

On the other hand, subsidiary legislation might contain:

- detailed rules setting out norms and procedures required for the policy to be implemented
- features of the scheme that are likely to need frequent amendment
- technical rules in a specialist area
- procedural rules for regulating meetings of a body
- procedures for obtaining licences and permits
- ancillary fees or forms.

## 15.2 What form does subsidiary legislation take?

There are standard terms in the Commonwealth:

**Regulations:** the main form for substantial subsidiary legislation (e.g. Building Regulations, Customs & Excise Regulations, Immigration Regulations, etc.; also for emergency powers).

**Rules:** appropriate where it is desired to lay down successive steps needed to accomplish a particular result, for example rules of court; or for an appeal procedure; or to obtain a licence (e.g. Road Traffic (Licensing) Rules).

**Orders:** normally for short directions in respect of particular persons, or classes of persons or things, for example conferring of diplomatic immunities (e.g. Privileges and Immunities (Application) Order), institution of specified price controls (Price Control (Bread) Order), remissions of taxes or duties (Customs and Excise (Remission) Order).

**By-laws:** (this word is spelt in a number of different ways, such as 'bye laws', 'bylaws'). These are laws made by local authorities and other bodies which need to control specified activities (e.g. airport authorities, universities).

**Standing Orders:** rules of procedure for larger bodies (Parliament, local authorities, prisons).

**Articles of Association:** normally confined to rules of procedure for companies.

Although strictly speaking the last two categories are subsidiary legislation, they might not be formally so regarded in most jurisdictions; and in neither case would requirement of publication in the official *Gazette* be in practice required. And the precise categories (especially the first three) are not always followed. There are also many other instruments which are often considered to be subsidiary legislation, for example **proclamations**, and various types of declarations, specifications, exemptions and appointments, which have no generic name and are usually referred to as ‘Government notices’, ‘*Gazette* notices’ or ‘legal notices’.

### 15.3 Questions about delegation which need to be considered by legislative counsel

WHAT power is being delegated? Does the Act enable the delegate to do the things proposed? This raises the important question of *intra* and *ultra vires* (“within” or “beyond” the powers delegated).

There are presumptions that power to make subsidiary legislation does **not** include power to do the following things **unless it is given expressly** either in general interpretation legislation or in the relevant Act itself:

- to amend provisions in an Act
- to impose a tax or fee
- to create penalties
- to enable subsidiary legislation to operate retrospectively
- to create exemptions or exceptions
- to bind the State
- to sub-delegate.

Powers may be given in general terms, or more specifically, or by a combination of these forms. There are usually background rules in an Interpretation Act to the effect that where powers are given for general purposes and also for specific ones, the recital of specific powers does not detract from the generality. If so, it would be unnecessary to draft as follows:

The Minister may make regulations for the better carrying out of the purposes of this Act, and *without prejudice to the generality of that power* to:

- (a) specify the forms of licences granted under section 6;
- (b) ...

Very wide general powers, sometimes referred to as ‘Henry VIII powers’ (after one of England’s monarchs, who exercised nearly absolute power), are

sometimes given in the interests of expediency. In practice they tend to be given in order to iron out inconsistencies or anomalies that may be found:

The Minister may by order make such modifications to the provisions of this Act as may appear to the Minister to be necessary or expedient for the purposes of removing any difficulty occasioned by the coming into operation of this Act, but only as regards the performance of the functions and the exercise of the powers of the Council.

The provisions quoted are, however, limited in extent (in the example above they relate only to powers of the Council). These kinds of wide powers are also sometimes limited in time (e.g. with a limitation period of two years, after which the power lapses); even so, some commentators consider the giving of these general powers to be unconstitutional, in that they do not so much delegate power to legislate as **transfer** it.

Subsidiary legislation is capable of being declared *ultra vires* in two ways:

- it covers matters not authorised by the enabling Act
- or
- (in practice more usually) it is applied in a way not authorised or envisaged by the enabling Act<sup>1</sup>.

**WHEN** can the power be exercised? There are normally general provisions in an Interpretation Act allowing exercise from time to time as the occasion requires.

**WHEN** does subsidiary legislation come into force? Again, normally in accordance with an Interpretation Act or an Act dealing expressly with subsidiary legislation such as a Subsidiary Legislation Act, on publication in the *Gazette*, unless otherwise provided in the instrument itself. The presumption against retrospective operation needs to be remembered.

**BY WHOM** is the power exercisable? Again, there are normally Interpretation Act or other Act provisions enabling exercise by the holder for the time being of an office, or a person acting in that office. It is important to know who is accountable to Parliament: the President, the Governor in Council, a Minister, the Treasury, etc.

If there is sub-delegation, for example to a statutory authority or corporation, clear authority to do this must be stated in the enabling provisions.

**HOW** is the power to be exercised? Directly; or after consultation with, with the approval of, or on the advice of, some specified person or body?

<sup>1</sup> See *Raymond v Honey* [1982] 1 All ER 756; and *R v Secretary of State for Health, ex parte US Tobacco International Inc.* [1992] 1 All ER 212.

## 15.4 How does the legislature supervise the making of subsidiary legislation?

There will typically be contained in an Interpretation Act or other Act dealing expressly with subsidiary legislation provision for “positive” and “negative” resolution procedure in relation to subsidiary legislation.

Under ‘**Positive (or Affirmative) Resolution**’ procedures, the subsidiary legislation either:

- cannot come into force until (depending on the relevant law) either
  - the subsidiary legislation as made or
  - a draft of the proposed subsidiary legislation has been laid before the legislature and a resolution passed authorising its coming into force (or making and coming into force);
 or
- can come into force for only a limited and specified period, following which its continuance in force will depend on a resolution of the legislature to that effect.

Under ‘**Negative Resolution**’ procedures, the subsidiary legislation either:

- as made
- or
- as made and brought into force,

must be laid before the legislature within a specified time; and unless the legislature then passes a resolution, again within a specified period, that the subsidiary legislation is to be annulled or (depending on the power reserved) amended, it comes into force, or continues in force, at the end of that period.

Legislative counsel will need to be aware of the precise terms of the above procedures that apply in his or her jurisdiction, as failure on the part of a government department to abide by the relevant rules could nullify the subsidiary legislation concerned.

## 15.5 Drafting subsidiary legislation

### 15.5.1 General

Legislative counsel needs to be familiar with:

- the application of general rules (e.g. in an Interpretation Act or other Act dealing with subsidiary legislation)
- conventional features (see specimen lay-outs below)

- relationship with the parent Act (e.g. that words and expressions used in subsidiary legislation typically are to be given the same meaning as those used in the enabling Act).

## 15.5.2 Formal and general provisions in subsidiary legislation

### Headings

Typically set out are:

- the legal notice or statutory instrument number
- the short title of the enabling legislation
- the citation of the subsidiary legislation, which can precede or follow the recital of the enabling powers (see below).

### Enabling provisions

It is usual to recite the powers under which the subsidiary legislation is made and by whom (if appropriate also with a reference to any other person or body whose consent is required or with whom consultation, etc., has been required).

### Preamble

Similar considerations apply with regard to preambles in statutes, although in practice this device is hardly ever used in subsidiary legislation except under military regimes.

### Citation or title

This serves exactly the same purpose as a short title in a statute. It is not a 'short title', as there is no long title. If possible it should contain the wording of the short title of the enabling legislation, but not at the cost of clumsiness (see Chapter 12). It should be as far as possible an easily quotable title, although this is more difficult to apply, especially as subsidiary legislation citations more often contain bracketed references such as '(Amendment)' and '(No.2)', etc.

### Signature

Conventions vary. All that is needed is the date of making the instrument (not to be confused with the date of commencement, although there could be provision for both to be the same) and the name and title of the maker.

## 15.6 Typical layouts of subsidiary legislation, and executive instruments that are in some jurisdictions treated as subsidiary legislation

[Legal Notice][Statutory Instrument] No. 355 of 2015

### **Agriculture Act 2013**

(No. 16 of 2013)

[In exercise of the power conferred by section 51 of the [Agriculture] Act [2013], the Minister of Agriculture makes the following Regulations]  
[Under section 51 of the Act]:

### **Agriculture (Land Husbandry) Regulations 2017**

1. These Regulations [may be cited as the Agriculture (Land Husbandry) Regulations 2017 and] come into force on 1 December 2017:

2. ....

.....

SCHEDULE

(r.12)

.....

30 September 2017

I. C. Fields  
Minister of Agriculture

[Legal Notice][Statutory Instrument] [Executive Instrument] No. 356 of 2017

### **Meat Control Act**

(Cap. 294)

### Declaration of Approved Slaughterhouse

[Under] [In exercise of the power conferred by] section 3(1) of the Act, the Minister for Livestock Development declares the abattoir at ..... in ..... District to be an approved slaughterhouse for the purposes of the Act.

30 September 2017

A. Shepherd  
Minister for Livestock Development

