

# Attorney-General's Department

Office of Parliamentary Counsel

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## **Understanding legislation**

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**Government  
of South Australia**

Attorney-General's  
Department

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### Disclaimer

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## 1—Introduction and terminology

### 1.1 Legislation

Legislation consists of Acts of Parliament and subordinate (or delegated) legislation made under Acts of Parliament.

The term legislation can refer to a single law (also known as a statute) or a collection of laws. Members of the Parliament are referred to as legislators, persons who make laws. Collectively they constitute a legislature, a body that makes laws.

All persons are required to comply with legislation that applies to them.

### 1.2 Bills

A Bill is a proposed Act of Parliament that has been introduced into the Parliament. It becomes a new Act of Parliament (or amends an existing Act) when assented to by the Governor after having passed through both Houses. Many Acts come into force on a later date than the date of assent (for example, after detailed regulations required to support their operation are prepared).

The principal stages in the consideration of Bills by each House are as follows:

- first reading: the introduction of a Bill;
- second reading: consideration of the general principles and purposes of a Bill;
- committee stage: when a Bill may be considered in detail and may be amended;
- third reading: final consideration of the Bill.

The convention of reading a Bill dates back centuries to when most people were illiterate and the Clerk had to read the Bill aloud.

After being passed by the House in which it originated, a Bill is then sent to the other House for its consideration. Difficulties may arise if the Houses disagree. Negotiations often occur and a Bill may be referred to a conference of managers appointed by the Houses. If no compromise can be reached, a Bill will lapse. Once both Houses agree to a Bill it is sent to the Governor for formal assent and becomes law. The process is known as “royal assent” because assent is given by the Governor on behalf of the Queen.

Most Bills can be introduced by any member of the Parliament. However, some proposed laws, such as those that impose taxes or authorise the spending of government money (money Bills), can only be introduced by a Minister in the House of Assembly. If a Bill introduced into the Legislative Council contains a money clause, the clause is printed in erased type and does not form part of the Bill.

Until a Bill is introduced into Parliament, it is a confidential document. However, in some cases the Minister or member proposing the Bill may release it to the public for consultation before presenting it to Parliament.

To find out whether a Bill on a particular subject is being drafted or for any information about a particular Bill, members of the public should contact the responsible Minister or member. To find out whether a Bill has been introduced into Parliament, check this website or contact the responsible Minister or member.

### **1.3 Acts**

An Act of Parliament or Act is a Bill that has been enacted by Parliament and assented to by the Governor. An Act is a public document and is not confidential.

An Act is essentially a sequence of provisions containing statements and rules designed to give effect to a particular policy. What is achieved by the Act depends on the interpretation of the provisions.

An Act generally deals with all matters of importance for the implementation of a particular policy. Matters of detail and matters likely to experience frequent change are generally contained in subordinate legislation.

### **1.4 Subordinate legislation**

Subordinate legislation, also known as delegated legislation, is law made by the executive branch of government with the authorisation of Parliament. Subordinate legislation includes regulations, rules, by-laws, certain policies, proclamations and notices. These laws are made under an Act of Parliament. The power to make law is delegated by an Act of Parliament to the Governor or another authority. Hence the use of the descriptions subordinate and delegated.

Until published in the South Australian Government Gazette draft subordinate legislation is confidential. To find out whether subordinate legislation on a particular subject is being drafted or for any information about particular subordinate legislation not yet made, members of the public should contact the responsible Minister. In some cases, as with some Bills, the responsible Minister proposing subordinate legislation may release it to the public in draft form for consultation.

Policies are made in accordance with a particular process set out in the Act under which they are made and this usually requires public consultation.

Subordinate legislation made by the Governor must be made with the advice and consent of Executive Council. The Executive Council is the body by which the Government formally advises the Governor in the exercise of most of his or her powers. Under the *Constitution Act 1934* all Ministers are members of the Executive Council.

## 2—Legislative power of the State

The Parliament of South Australia is entitled to legislate on any matter for the peace, welfare and good government of the people of the State of South Australia. There is no principle of separation of powers in the State constitution nor is the State's legislative power subject to a requirement to preserve fundamental human rights.

However, there are certain limitations on the State's legislative power, including the following:

- The subject matter must have a nexus with the State.
- The Parliament must comply with manner and form provisions relating to the constitution or the powers and procedures of the Parliament.
- The State cannot legislate in an area where the Commonwealth has exclusive legislative power (for example, section 90 of the Commonwealth Constitution (Exclusive power over customs, excise, and bounties)).
- A State law that is inconsistent with a valid Commonwealth law will be invalid.
- The State law must conform with requirements of the Commonwealth Constitution, for example, section 92 (Trade within the Commonwealth to be free), section 114 (States may not raise forces. Taxation of property of Commonwealth or State) and section 117 (Rights of residents in States).

State legislation must be consistent with the *Australia Act 1986* of the Commonwealth.

## 3—When is legislation necessary?

Policy may be implemented in many ways that may or may not require legislation. For example, a policy may be implemented by agreements or industry codes of practice or by administrative action of a government agency.

Legislation will be required or chosen for the implementation of a policy if:

- existing rights and obligations are to be modified
- the policy is to have long term operation
- the policy is of a very high level of importance.

## 4—Commencement of an Act

Broadly, there are 3 methods employed for commencing an Act or bringing an Act into operation:

- The Act may be silent — in which case the Act will come into operation on the day on which it is assented to (see section 7(1) of the *Acts Interpretation Act 1915*).
- The Act may contain a commencement provision setting out a specified day or time when the Act (or part of the Act) comes into operation. Section 14D of the *Acts Interpretation Act 1915* provides that when an Act, or part of an Act, comes into operation on a particular day, it will be taken to have come into operation as from 12 o'clock midnight of the preceding day.
- The Act may contain a commencement provision stating that the Act (or part of the Act) will come into operation on a day to be fixed by proclamation.

Section 7(3) of the *Acts Interpretation Act 1915* enables the proclamation to:

- fix different days or times for different provisions of the Act to come into operation
- suspend the operation of specified provisions of the Act until a day or time or days or times to be fixed by subsequent proclamation or proclamations.

The date fixed by proclamation may be delayed by further proclamation. Under section 7(5) of the *Acts Interpretation Act 1915*, if a proclamation is not made before the second anniversary of the date on which an Act enacted after 16 April 1992 was assented to, the Act will come into operation on that anniversary.

Commencement provisions often combine the above approaches.

## **5—Committal of an Act**

Most Acts of Parliament are "committed" to a Minister. A particular Minister is given responsibility for its administration. This is done by a proclamation made under the *Administrative Arrangements Act 1994*. The Minister to whom the administration of an Act is committed will also be responsible for all subordinate legislation made under the Act.

A list of the Acts committed to Ministers is accessible at the legislation website.

## **6—Subordinate legislation made under an Act**

### **6.1 Introduction**

An Act will often require subordinate legislation to be in place before it can be brought into operation. The Act must be read together with its subordinate legislation for a full picture of the written law of South Australia on a particular topic.

## 6.2 Regulations

### 6.2.1 General

Regulations are the most common form of “subordinate legislation”.

Most Acts include a section (at or towards the end of the Act) providing general regulation making power.

Regulations provide a lot of the detail within the statutory structure or framework that has been created by the statute; they naturally lend themselves to more detail.

The history of regulations can be traced back to at least 1337. The following quotation from 1893 is still relevant today:

"Statutory rules are themselves of great public advantage because the details ... can thus be regulated after a Bill passes into an Act with greater care and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides, they mitigate the inelasticity which would otherwise make an Act unworkable and are susceptible of modifications ... as circumstances arise."

Regulations must:

- be within the limits of power to make regulations
- comply with any preconditions set out in the principal Act, such as consultation with specified office-holders or bodies
- be consistent with the purpose and intent of the principal Act
- not confer discretionary power, unless the principal Act allows this sort of delegation.

Regulations may also be challenged within the courts on various grounds, including:

- repugnance to the common law
- being unreasonably oppressive or unjust
- being uncertain
- being for an improper purpose.

Rules made by the Governor (such as rules under the *Road Traffic Act 1961*) are effectively the same as regulations.

### 6.2.2 Making and disallowance

Section 10 of the *Subordinate Legislation Act 1978* sets out the process for making most regulations, requiring them to be made by the Governor. Occasionally, a particular Act provides for its regulations to be made in a different manner.

All regulations are published in the Government Gazette on the day on which they are made in Executive Council.

Regulations must be laid before each House of Parliament within 6 sitting days of that House after being made.

After a regulation is laid before each House of Parliament:

- the report prepared for the Legislative Review Committee is forwarded to that Committee and the Committee inquires into and considers the regulation
- there is a period of 14 sitting days (which need not fall within the same session of Parliament) within which a Member of Parliament may give a notice of motion for the disallowance of the regulation.

If a regulation is not laid before each House within the required time, the disallowance motion must be given within 6 sitting days of a report on the failure being made by the Committee.

If a regulation is disallowed, notice of the resolution is published in the Government Gazette. The regulation ceases to have effect when disallowed.

### **6.2.3 Commencement**

The *Subordinate Legislation Act 1978* governs the commencement of regulations.

If the regulations are silent about a commencement date, they will come into operation 4 months after the day that they are made. However, the regulations may specify a date *after* this 4 month period.

They may also specify a date that is *earlier* than the 4 month period, but this is only possible if the Minister responsible for the administration of the Act certifies that, in his or her opinion, it is necessary or appropriate that the regulations come into operation on an earlier date. The certificate cannot be called in question in any legal proceedings (see section 10AA(5)). The report to the Legislative Review Committee must set out the reasons for the issue of the certificate (see section 10A(1a)). The commencement date cannot be retrospective unless that is authorised by the Act under which the regulations are being made.

Regulations not required to be laid before Parliament come into operation on the day, or day and time, on which they are made or from such later date, or date and time, as is specified in the regulations (see section 10AA(3)).

The date for the commencement of a set of regulations may be specified by reference to the commencement of a provision of an Act.

An Act may alter any of these rules by making special provision for the commencement of its regulations. Sometimes an Act also allows transitional matters to be dealt with by regulation.

An Act may provide that regulations under the Act (or a particular section of the Act) cannot come into operation until the disallowance period has passed.

#### **6.2.4 Expiry**

Under Part 3A of the *Subordinate Legislation Act 1978* certain regulations expire on 1 September of the year following the year in which the 10th anniversary of the day on which the regulations were made falls. The Act allows the expiry to be postponed for a period or periods not exceeding 2 years at a time and not exceeding 4 years in aggregate. The purpose of the expiry program is to ensure that regulations are regularly reviewed and remade as appropriate before expiry.

In this context a reference to regulations includes a reference to rules and by-laws made under an Act.

The following regulations are outside the expiry program:

- regulations that are not required to be laid before Parliament
- by-laws made under the *Local Government Act 1934*
- regulations made by the Local Government Superannuation Board
- regulations amending an Act
- a regulation under the *Natural Resources Management Act 2004* declaring a watercourse, lake or well to be a prescribed watercourse, lake or well or declaring that part of the State is a surface water prescribed area
- by-laws made under section 171 of the *Natural Resources Management Act 2004*
- regulations made by a person, body or authority other than the Governor.

The program is designed to ensure that regulations are reviewed regularly and remade in a form that is appropriate to their current context.

#### **6.2.5 Revocation**

The operation of section 11 of the *Acts Interpretation Act 1915* should be kept in mind. Subject to that section, a regulation in force under an Act ceases to operate on the repeal of the Act. Section 11 provides that where the regulation could have been made under the repealing Act, the regulation will remain in force. Regulations usually remain in force for a relatively short period under this provision (if at all) until new regulations have been made under the repealing Act.

A regulation is impliedly revoked when the section of the Act under which it was made is repealed and not replaced with a similar provision.

### **6.3 Policies**

Policies under the *Aquaculture Act 2001* and the *Environment Protection Act 1993* are a special form of subordinate legislation provided for in those Acts. Those Acts set out the procedure for making, amending and revoking policies.

## 6.4 Rules and by-laws

The formulation, preparation and promulgation of local council, hospital, university and other by-laws and court rules, and the rules applied by other statutory bodies, are all covered by specific legislation.

## 6.5 Proclamations and notices

### 6.5.1 General

New proclamations or notices are often required before an Act can be brought into operation. Some are also required regularly as part of the day-to-day operation of complex legislative schemes.

A proclamation or notice is limited to the material allowed for in the Act under which it is made. There is no equivalent to the general regulation making power. However, some provisions contemplate proclamations or notices dealing with substantive matters in a creative manner.

It is important to note that, while regulations, rules and by-laws can always be varied or revoked (see section 39 *Acts Interpretation Act 1915*), proclamations and notices cannot unless the Act under which they are made expressly contemplates variation or revocation.

Proclamations must be issued by the Governor in Executive Council.

### 6.5.2 Commencement

Section 10A of the *Acts Interpretation Act 1915* governs commencement of statutory instruments other than regulations, rules and by-laws. If the instrument does not contain a commencement date (which cannot be before it is made unless authorised by the Act under which it is made), it commences on the day on which it is made, approved or adopted.

The majority of proclamations and notices take effect on the day on which they are made. A future date is also chosen from time to time—especially with commencement proclamations.

Some proclamations have other constraints—such as requiring a resolution of both Houses of Parliament.

## 7—Transitional arrangements

When a new Act is to come into operation or a principal Act is amended, it is often the case that special arrangements must be made for transitional matters. Such arrangements are usually found in a Schedule and are recorded in the legislative history at the back of the principal Act.

The *Acts Interpretation Act 1915* also contains relevant provisions relating to transitional arrangements.

## 8—Basic features of legislation

South Australian legislation will, by convention, usually have a format that includes—

- the short title—the name of the Act, regulation, rule, policy, proclamation or notice by which it is cited

- in the case of an Act, a long title, found under the short title, describing the scope or purpose of the Act
- an interpretation provision defining terms for the purposes of the legislation (usually in the preliminary part, but sometimes in a Schedule)
- a standard hierarchy for the structure of the body of legislation — Chapters, Parts, Divisions, Subdivisions. Chapters are reserved for use with long and complex Acts or subordinate legislation.
- Schedules at the end. Schedules have a number of uses including—
  - repeal or amendments of other legislation
  - setting out the text of agreements referred to in the legislation
  - procedural or administrative matters
  - transitional matters
  - matters of detail or definition
- text contained in individual provisions numbered according to a uniform system. In Acts these are called sections; in regulations, regulations; in rules, rules; in policies, proclamations and notices, clauses. Provisions in a schedule are also usually called clauses. The provisions may be further divided to assist comprehension as follows:

1-section/regulation/rule/clause

(1) subsection/subregulation/subrule/subclause

(a) paragraph

(i) subparagraph

(A) subsubparagraph

- subsubsubparagraph

Legislative history information is also added to each consolidated version of legislation and is a valuable source of information about legislation, including its making, commencement, operation, variation or cessation and the making, commencement, operation, variation or cessation of other instruments under the legislation.

## 9—Reading legislation

Legislation is a special kind of writing that is framed to convey ideas precisely and unambiguously, and may therefore involve exceptions, qualifications and the definition of certain terms. An Act of Parliament and some subordinate legislation may also be relatively lengthy. However, understanding the contents of legislation may not necessarily require special expertise.

A common sense approach should be applied to the interpretation of legislation (an approach that has judicial support).

Various rules of interpretation may apply. Perhaps the most important of these rules is to read an Act as a whole or, expressed another way, words must be read in their context. In this sense, an Act of Parliament is like most other written documents—the whole thing must be read in order fully to understand any part of it. The same can be said for subordinate legislation.

When reading legislation, it is accepted that words should be given their ordinary and natural meaning, unless the definition section requires otherwise. (There are also some exceptions in technical areas of the law where words have settled legal meanings.)

Acts often use the term "prescribed". This is defined by the *Acts Interpretation Act 1915* to mean prescribed by the Act itself, or by a statutory instrument made under an Act. Statutory instrument includes a regulation, and many Acts rely on regulations in this context.

It should be noted that the expression "this Act", when used in an Act, includes statutory instruments made under the Act in which it is used.

An expression used in a statutory instrument has the same meaning as in the Act under which it is made.

The *Acts Interpretation Act 1915* must also be considered when studying any Act or subordinate legislation.

This Act defines certain terms, including "prescribed" (mentioned above), and other terms, including "financial year", "the Gazette", "Minister", "month" and "proclamation".

The Act also contains certain rules of construction, including that the singular will include the plural, and that a word in either gender will be taken to include a body corporate as well as an individual.

Various Acts may be relevant to a particular subject matter and so it is necessary to consider the Statute Book as a whole. An electronic search across the Statute Book is a valuable tool for this purpose.

Legislative index and history information may also need to be examined in order to determine the relevant law at a particular point in time, to find out about future changes to the law and find the links between an Act and its subordinate legislation.

It may also be useful, particularly for research purposes, to study relevant Parliamentary debates contained in Hansard. Court decisions may also be relevant—either generally or in relation to a particular exercise at hand.