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ANNOTATED STATUTES

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By Daniel Greenberg

Advocate General for Northern Ireland

Under [section 27](#) of the [Justice \(Northern Ireland\) Act 2002](#) the Attorney General for England and Wales is also *ex officio* Advocate General for Northern Ireland.

The reason for the establishment of the Advocate General's office, and the nature of its functions, are explained by the following passage from the Government's Explanatory Notes for the 2002 Act—

“There are certain functions of the present Attorney General for Northern Ireland that cannot be given to the Attorney General for Northern Ireland appointed by the First Minister and deputy First Minister. These relate to matters over which the Northern Ireland Assembly has no jurisdiction. These 'excepted matters' are set out in [Schedule 2 to the Northern Ireland Act 1998](#) and include, for example, international relations (including treaties and the European Union), the defence of the realm, taxation and national security. Accordingly, this section establishes a new post of Advocate General for Northern Ireland to take responsibility for Northern Ireland interests in these issues. Subsection (1) of this section makes the Attorney General for England and Wales the holder of this post. The amendments set out in subsection (2) allow the Solicitor General (as the Attorney General for England and Wales's deputy) to also carry out the functions of the Advocate General for Northern Ireland. This is done by amending the provisions of the [Law Officers Act 1997](#). The office and functions of the Advocate General are made an excepted matter by means of subsection (4), which adds them to the list of excepted matters in [Schedule 2 to the Northern Ireland Act 1998](#).”

The functions of the Advocate General are set out in [Schedule 7](#) to the 2002 Act, and the Secretary of State may transfer to the Advocate General other functions of consenting to prosecutions. The functions include:

- referring Bills of the Northern Ireland Assembly to the Judicial Committee of the Privy Council on grounds of doubtful legislative competence (the Attorney General for Northern Ireland has the same power);
- sharing power with the Attorney General for Northern Ireland in the institution and defence of proceedings in relation to devolution issues;
- carrying out of the functions of the Attorney General if the operation of the Northern Ireland Assembly is suspended under the [Northern Ireland Act 2000](#);
- appointing the Crown Solicitor for Northern Ireland;
- consenting to prosecutions in "excepted" matters (as set out in [Schedule 2 to the Northern Ireland Act 1998](#)).

Appointed Day Orders

Statutory instruments made in pursuance of a power to commence all or part of an Act are commonly referred to as “appointed day orders” (because a common older form of conferring power was along the lines of providing for an Act to come into force on such a day as the Minister may by order appoint). A more usual modern term is Commencement Order.

See further, General Note: [Commencement](#).

Baldwin Convention

As a matter of law, the Government can spend money without substantive legislative authority. All that is needed to enable the Government to obtain access to the Consolidated Fund for money to pay for its activities is a “Vote” of the House of Commons, followed by the legislative authority of an Appropriation Act. But those Acts give very little detail about the nature of the activities on which public money has been spent.

In 1932 a Select Committee of the House of Commons – the Public Accounts Committee – objected to the Government’s practice of spending without specific legislative authority, and it was agreed that in the future the Government would ensure that significant and recurring expenditure was covered not just by an Appropriation Act but also by substantive legislation. The agreement is known as the Baldwin agreement, and it is responsible for a very considerable amount of material on the statute book that is legally unnecessary and inert.

Further information about financial legislation will be found in *Craies on Legislation*, Chapter 1.7.

See also General Note: [Sink Clauses](#).

Bank holiday

Statutes commonly exclude bank holidays from the calculation of particular periods of time, either directly or by the adoption of a concept of “working days” or “business days” that excludes bank holidays.

Bank holidays are days specified under [section 1](#) of, and [Schedule 1](#) to, the [Banking and Financial Dealings Act 1971](#).

The Schedule specifies different bank holidays for the different constituent parts of the United Kingdom.

The lists are varied from time to time: see, for a recent example, the [St Andrew's Day Bank Holiday \(Scotland\) Act 2007](#) (an Act of the Scottish Parliament).

In any particular year a bank holiday may be added or substituted by Royal Proclamation – section 1(2) and (3).

Christmas Day and Good Friday are not Bank Holidays; so specific provision is generally made for them.

Note that the standard forms for defining “working days” often include provision along the lines of “or a day that is a bank holiday in any part of the United Kingdom” with the arguably anomalous result that a day which is a bank holiday only in Scotland will be excluded from the calculation of a period in relation to England and Wales, and so on.

Bank of England

The constitution, regulation, financial arrangements and functions of the Bank of England are addressed by the [Bank of England Act 1998](#) (although the Bank is of course an ancient institution, founded in 1694 and nationalised with effect from 1946).

The Bank of England is the central bank of the United Kingdom.

The 1998 Act and other administrative arrangements entered into in 1997 were designed to give the Bank an element of operational independence. The Bank shares responsibility for monetary and financial stability with the Treasury and the Financial Services Authority, in accordance with a non-statutory Memorandum of Understanding between the three bodies.

A number of Acts confer functions on the Bank of England. See, in particular, the [Banking Act 2009](#), which gives the Bank a key role in taking action in respect of banks that are or likely to be in financial difficulty.

Bodies corporate

Statute frequently provides that “there shall be a body corporate” for a particular purpose. The result of that statement is to conjure out of the air an entity with legal personality, that continues to exist unless and until it is dissolved by or under the authority of another Act of Parliament.

A statutory corporation – another term for a body corporate created by Act – has no capacity beyond that which is conferred upon it by or under the authority of the Act which created it or another Act.

There are other ways of becoming incorporated, the most common being by formation as a company under the [Companies Act 2006](#).

A reference to “person” in statute includes a reference to bodies corporate (and unincorporate) – [Interpretation Act 1978, Schedule 1](#).

Further information about statutory corporations and corporations sole will be found in *Craies on Legislation*, Chapter 13.

Civil penalties

A number of modern Acts provide for a Minister, or a regulatory or other public authority, to be able to impose a penalty on a person in respect of failure to comply with a statutory duty or a regulatory code or in respect of some other kind of culpable behaviour.

The increasing incidence of civil penalties has made it more difficult than it once was to distinguish between the criminal and civil laws, a distinction which is important for a number of purposes, including the application of the European Convention on Human Rights and the determination of the appropriate burden of proof. In a number of cases the courts have had to decide whether particular procedures amount to criminal or civil processes.

Since civil penalties are not imposed by order of the court, the standard judicial mechanisms for collection of fines cannot be relied upon unless applied expressly, and statutes providing for civil penalties need to make express provision for their enforcement. A common approach is to enable the penalty to be collected as if it were a debt owed to the body imposing it.

Express provision also needs to be made about what happens to a penalty once paid. Again, a common approach is for it to be retained by the body imposing it and applied to the work of that body.

There is some political controversy attached to the notion of civil penalties, focusing in particular on the process for their imposition and the arrangements for appeal or challenge.

Further information will be found in *Craies on Legislation*, Chapter 1.6.

Civil Procedure Rules

The [Civil Procedure Rules 1998](#) (SI 1998/3132) (as amended by a regular series of amending instruments) is the single procedural code for civil proceedings in the county courts and the High Court in England and Wales.

The Rules are made by the Civil Procedure Rule Committee under [section 1 of the Civil Procedure Act 1997](#) (as to the Committee, see [section 2](#)).

The Rules replaced the old system of Rules of the Supreme Court and County Court Rules, although parts of both of those codes continue to have effect for certain purposes.

A major feature of the system instituted in 1998 is the “overriding objective” of the Rules, to which the courts are to have regard in applying them: Rule 1.1 says—

- “(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable—
 - (a) ensuring that the parties are on an equal footing;
 - (b) saving expense;
 - (c) dealing with the case in ways which are proportionate—
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
 - (d) ensuring that it is dealt with expeditiously and fairly; and
 - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”

Civil Service

A number of statutes refer to membership of “Her Majesty's Home Civil Service”.

The Civil Service consists of workers who are employed by or hold office under the Crown, with certain exclusions.

The rules about who are and are not civil servants are not always entirely clear to understand, nor are they set out in legislation. The following are not civil servants: members of the Armed Forces; police officers; staff who work for the Crown through certain statutory or other public bodies such as a National Health Service Trust or a local authority; staff employed by the Sovereign personally; and staff of the Houses of Parliament. Special Advisers are political appointees who are employed by government departments on special terms – they are civil servants. Staff of some large non-Ministerial departments are still civil servants, the largest example being Officers of Revenue and Customs – see the [Commissioners for Revenue and Customs Act 2005, s. 2\(6\)](#).

Because of the doubts about the edges of the class of civil servants, it is common for statute to declare that a particular kind of service is or is not service in the Home Civil Service: see, for example, the Regulatory Enforcement and Sanctions Act 2008, Sch.1 para. 5 or [Statistics and Registration Service Act 2007, s. 5\(7\)](#).

A draft Civil Service Bill was published by the Government in November 2004 (Cm 6373): that would have enabled greater clarity to be given to the class of civil servants – but it has not been proceeded with.

Staff of the devolved administrations are Crown servants and as such are part of the Home Civil Service; but a number of operational issues relating to the management of the staff of the devolved administrations are delegated to the devolved Executives, by agreement between them and the Minister for the Civil Service.

The Commissioners for the Civil Service are appointed by the Sovereign under the Royal Prerogative and are not themselves civil servants. Their primary role is to oversee the integrity of recruitment processes to and within the Civil Service.

There is a Minister for the Civil Service. This is a senior Ministerial Office, generally held (among other offices) by the Prime Minister. But operational responsibility for the management of the Home Civil Service is nowadays generally delegated to a junior Minister holding a title of Minister for the Cabinet Office or something similar.

See General Note: [The Crown](#).

Commencement

If nothing is said in an Act about when it comes into force, the default rule is that it comes into force at the beginning of the day on which it receives Royal Assent – [Interpretation Act 1978, s. 4.](#)

Royal Assent sometimes occurs on the day when a Bill completes its Parliamentary stages; but sometimes a number of Bills are allowed to complete their passage at different times and are then submitted for Royal Assent in a single batch. The choice is for the Government to make (although it is generally accepted that once one Bill is presented for Royal Assent, any other completed Bill waiting for Royal Assent must be presented with it).

Statutory instruments must state when they come into force.

If a particular date is specified in an Act or a statutory instrument for it (or part of it) to come into force, commencement is at the beginning of that day unless a specific time is mentioned (which would be very unusual) ([Interpretation Act 1978, s. 4\(a\)](#)).

As a general rule, at least 2 months are allowed to elapse between the passing or making of an Act or instrument and its commencement, to give people an opportunity to prepare for compliance with the new law. In some cases, however, legislation may come into force immediately, and may even have retrospective effect if that is provided for expressly.

The most common procedure for the commencement of all but the most simple Acts nowadays is by commencement order made by the Minister of the Crown with principal responsibility for the substance of the Act. Commencement orders are statutory instruments, and are generally not subject to any Parliamentary scrutiny arrangements, unless they contain significant incidental, transitional or consequential provisions. Commencement orders are sometimes called “appointed day” orders although the term is gradually falling into disuse.

It is not always easy to say when an Act or instrument comes into force. In the case of Finance Acts, for example, it is normal for each provision to state in respect of which tax-years or transactions it has effect. A provision made in Year 1 that has effect in respect of the taxation, in Tax Year 2 and later years, of profits from transactions entered into in Year minus-1, cannot helpfully be said to “come into force” at any particular time. The most helpful thing one can probably say is that it comes into force – that is to say, becomes part of the law – on Royal Assent, but only has practical effect for most purposes (other than tax-planning) from the beginning of Tax Year 2.

Legislation can be commenced at different times for different purposes, whether by provision in an Act or instrument to that effect or by virtue of a commencement order. Where the legislation is amending earlier legislation, the result of differential commencement will be that at least for some time there will be parallel texts of the amended legislation having effect for different purposes. It is not always easy for the reader to be certain that he or she is looking at the appropriate version.

See also General Note: [Appointed Day Orders](#).

Further information about commencement will be found in *Craies on Legislation*, Chapter 10.1.

Common law rules

A number of Acts expressly disapply or abolish “common law rules” about a particular matter (see, for example, the [Criminal Evidence \(Witness Anonymity\) Act 2008](#)).

A reference of that kind to “common law” is not intended to require determination of the precise legal origin of a particular rule of law (in particular, whether it derives from the common law or equity): it designates in essence all law of the United Kingdom which does not derive simply from legislation.

Statute law can also alter or abolish a rule of common law without express words, and does so automatically to the extent that its necessary effect is inconsistent with the continuance of that rule.

The precise effect that legislation has had on the common law – and how much room for development and manoeuvre is left to the judges – is not always beyond doubt.

Further information will be found in *Craies on Legislation*, Chapter 14.1.

Comptroller and Auditor General

The Comptroller and Auditor General is appointed by the Sovereign by Letters Patent ([Exchequer and Audit Departments Act 1866, s. 6](#)) in response to an address presented by the House of Commons ([National Audit Act 1983, s. 1\(1\)](#)). The Comptroller is therefore appointed, in effect, by the House of Commons, and is treated as an officer of that House (1983 Act, s. 1(2)).

Although functions of an auditing or financial control nature are generally conferred by statute on “the Comptroller and Auditor General”, in practice all these functions are exercised by the National Audit Office. Most people who have any involvement with public money are well aware of the existence and functions of the Office although they may have only a very hazy notion of the office of Comptroller.

The National Audit Office has separate statutory foundation (1983 Act, s. 3) by virtue of which it amounts to the Comptroller, as its head, plus staff appointed by the Comptroller.

“Comptroller” is simply an archaic form of the word “controller”.

On its website the National Audit Office describes its functions in the following terms—

“The role of the National Audit Office is to: Audit the accounts of all government departments and agencies as well as a wide range of other public bodies; Report to Parliament on the economy, efficiency and effectiveness with which these bodies have used public money.”

Although the National Audit Office has a UK-wide remit to some extent, there are also separate territorial auditors with broadly similar functions in relation to each of the constituent parts of the United Kingdom: the Auditor General for Wales appointed under [section 145 of the Government of Wales Act 2006](#) (working through the Wales Audit Office); the Auditor General for Scotland appointed under [section 69 of the Scotland Act 1998](#) (and working through a body called Audit Scotland); and the Comptroller and Auditor General for Northern Ireland appointed under [section 65 of the Northern Ireland Act 1998](#) (and working through the Northern Ireland Audit Office).

Consolidated Fund

The account at the Bank of England in which all public receipts are consolidated. Although in the books of the Bank of England the account is entitled the “Account of Her Majesty’s Exchequer”, the title Consolidated Fund is generally recognised and is used in legislation without definition.

Statute often requires sums received by Ministers to be paid into the Consolidated Fund: the requirement adds nothing to the position that would be achieved by silence, there being nothing that a Minister can do with money received other than paying it into the Fund (or holding onto it on account of money that would otherwise be paid out of the Fund, if expressly authorised).

There are territorial sub-funds known as Consolidated Funds: the Scottish Consolidated Fund ([Scotland Act 1998, s. 64](#)), the Welsh Consolidated Fund ([Government of Wales Act 2006, s. 117](#)) and the Consolidated Fund of Northern Ireland ([Northern Ireland Act 1998, s. 57](#)). But they are all secondary funds, being fed from and feeding into the Consolidated Fund itself.

More information about financial legislation will be found in *Craies on Legislation*, Chapter 1.7.

Consolidated Fund of Northern Ireland

A fund that has existed for several decades as a central fund for public money to be used in relation to Northern Ireland. It rests now on the statutory authority of [section 57 of the Northern Ireland Act 1998](#).

The Consolidated Fund of Northern Ireland feeds into, and may be fed from, the single UK Consolidated Fund (see General Note: [Consolidated Fund](#)).

See also the [Government Resources and Accounts Act \(Northern Ireland\) 2001](#) (an Act of the Northern Ireland Assembly).

Consolidation

Consolidation is the process of replacing one or more pieces of legislation that have been much amended with a single new piece of legislation. The resulting legislation can follow a logical structure and use modern language.

Consolidation Acts will generally be recognisable as such from their Long Title, which will contain an express reference to consolidation.

There is a general principle of construction according to which the courts will construe a consolidation measure according to a presumption that it is not intended to change the law. The presumption can be rebutted by express words or clear implication; for example, pure Consolidation Acts frequently include minor changes of the law recommended by the Law Commissions.

An Act or instrument which is not a “pure” consolidation, since its primary purpose is to change the law, may nevertheless amount to a consolidation with modifications, where the most effective or clearest way of changing the law is found to be not to make textual amendments of an old Act or instrument, but to replace it in its entirety, replicating its provisions subject to modifications to achieve the new policy.

Further information will be found in *Craies on Legislation*, Chapter 1.9.

Constable

Large numbers of statutory powers are vested in “a constable”.

The office of constable is an ancient one, to which every member of a police force is appointed: “Every member of a police force maintained for a police area and every special constable appointed for a police area shall, on appointment, be attested as a constable by making a declaration in the form set out in Schedule 4 before a justice of the peace having jurisdiction within the police area.” ([Police Act 1996, s. 29](#)).

The independence of the constable from the Executive is essential to the rule of law, and was famously asserted by Lord Denning MR in [R. v Commissioner of Police of the Metropolis Ex p. Blackburn \[1968\] 2 Q.B. 118](#) in the following words—

“The commissioner was a justice of the peace specially appointed to administer the police force in the metropolis. His constitutional status has never been defined either by statute or by the courts. ... But I have no hesitation in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, ...”.

Once sworn as a constable, a police officer has all the powers and responsibilities of a constable at all times, whether “on duty” or not. This arises from the constable’s status as an office-holder of the Crown, and not as a mere employee of the local police force. “A member of a police force shall have all the powers and privileges of a constable throughout England and Wales and the adjacent United Kingdom waters.” – [Police Act 1996, s. 30\(1\)](#).

Although constable is the title of the most junior rank within a police force, every police officer remains a holder of the office of constable, no matter how senior he or she becomes.

There is a general statutory offence of assaulting or obstructing a constable in the execution of his or her duty – [Police Act 1996, s. 89 \(1\) and \(2\)](#).

Consultation

Modern legislation abounds with duties to consult, principally duties for Ministers or other authorities to consult interested persons before making subordinate legislation or exercising other powers.

A duty to consult falls far short of a duty to comply with the consultees' wishes; but it is also far from an empty duty. In essence it imposes flexible but demanding procedural requirements: to communicate fully; to allow proper time to respond; and to consider carefully any responses received.

“The essence of consultation is the communication of a genuine invitation, extended with a receptive mind, to give advice ... without communication and the consequent opportunity of responding, there can be no consultation.” – [Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd. \[1972\] 1 W.L.R. 190 QBD](#) per Donaldson J.

For a searching analysis of what amounts to satisfactory consultation as a matter of administrative law in the context of modern Government, see [R \(Greenpeace Limited\) v Secretary of State for Trade and Industry \[2007\] EWHC 311 \(Admin\)](#). In that case a Government decision was declared unlawful as a result of being based on a “procedurally unfair” consultation. (See also [Breckland District Council, South Norfolk District Council, Borough Council of King's Lynn and West Norfolk v The Boundary Committee \[2008\] EWHC 2929 \(Admin\)](#).)

Legislation sometimes confers a power to consult, rather than a duty. This is rarely if ever necessary as a matter of law, and is included either for merely presentational purposes or as a hook for some other provision, such as a requirement to publish the results of any consultation carried out.

Contempt of court

A number of statutes rely, mostly implicitly, on the concept of contempt of court as a method of enforcing requirements imposed by courts. So, for example, the Criminal Evidence (Witness Anonymity) Act 2008 relies, but without express provision to that effect, on the courts' ability to enforce an order under the Act by contempt proceedings.

The reader of any legislation that empowers courts to make an order will therefore have to bear in mind the possibility of proceedings for contempt in order to form a complete picture of the enforcement possibilities.

Contempt of court is of various kinds:

- (1) Criminal contempt –
 - (a) "in the face of the court",
 - (b) by way of disobedience of a court order, and (c) by way of breaching an undertaking to the court.
- (2) Civil contempt –
 - (a) failure to attend at court despite a summons to attend, and
 - (b) failure to comply with a court order.

The [Contempt of Court Act 1981](#) is the principal legislation about proceedings for contempt, dealing in particular with contempt by way of publications which may have an impact on the course or outcome of criminal proceedings.

County courts

There are 216 county courts in England and Wales which nowadays have jurisdiction in most areas of the civil (non-criminal) law. They are particularly known for their jurisdiction in “small claims”, straightforward debt and damages claims and housing matters; but they also have a wide family and commercial jurisdiction.

Each of the county courts is a separate court (unlike the Crown Court which is a single court sitting in different places) whose jurisdiction is now wholly statutory, deriving from section 1 of the [County Courts Act 1984](#).

The county courts and the High Court share jurisdiction in a large range of kinds of case – in particular, damages for breach of contract, personal injuries and other tort cases – and the [High Court and County Courts Jurisdiction Order 1991](#) determines to which of the two a particular case may be brought. The Order is made under [section 1 of the Courts and Legal Services Act 1990](#). In some areas it limits the county courts’ jurisdiction to cases of a financial value below a certain limit; and in other areas it limits the High Court’s jurisdiction to cases above a certain limit.

The county courts include a small claims track for straightforward consumer disputes with a value of, presently, less than £5,000. The essence of the small claims track is to ensure a quick resolution of the case, generally without the intervention of lawyers.

See [County Courts \(Northern Ireland\)](#).

County Courts (Northern Ireland)

The county court system in Northern Ireland is broadly similar to that in England and Wales.

The most significant difference is that the county courts in Northern Ireland have a limited criminal jurisdiction, including hearing certain appeals from the magistrates' courts.

Court of Appeal

One of the three parts of the Supreme Court (soon to be the Senior Courts) under section 1 of the [Supreme Court Act 1981](#) (soon to be renamed the Senior Courts Act).

The jurisdiction of the Court of Appeal is conferred by [section 15](#) of the 1981 Act, but largely by reference to its pre-existing jurisdiction.

The Court of Appeal consists of two divisions, the Criminal and the Civil. In the Civil Division the Court hears appeals from the three divisions of the High Court (Chancery, Queen's Bench and Family Division), from the county courts and from certain Tribunals. In the Criminal Division the Court of Appeal hears appeals from the Crown Court.

The Court of Appeal is presided over by the Master of the Rolls.

Court of Appeal in Northern Ireland

Similar to the Court of Appeal in England and Wales, the Court of Appeal in Northern Ireland is one of the parts of the Supreme Court of Judicature of Northern Ireland by virtue of [section 3 of the Judicature \(Northern Ireland\) Act 1978](#).

The Court of Appeal is presided over by the Lord Chief Justice.

The Court of Appeal's jurisdiction is conferred by [section 34](#) of the 1978 Act, largely by reference to the historical jurisdictions of the former court of the same name and of the Court of Criminal Appeal.

The Court of Appeal has general jurisdiction to hear appeals from decisions of the High Court ([section 35](#) of the 1978 Act). It also hears appeals in criminal matters from the Crown Court and appeals on points of law from the county courts, magistrates' courts and certain tribunals.

Court of Session

The Court of Session is Scotland's highest civil court, with both first instance and appellate jurisdiction. Appeals from the Court of Session lie to the House of Lords.

The Court of Session is of ancient origin, dating back to the early 16th century.

The Court sits in Parliament House in Edinburgh.

Judges of the Court are designated Senators of the College of Justice or Lords of Council and Session. The court is presided over by the Lord President, whose deputy is the Lord Justice Clerk.

The Court is divided into the Outer House and the Inner House.

The Outer House consists of 24 Lords Ordinary sitting alone or with a jury. The Outer House hears a wide range of civil matters at first instance

The Inner House mostly hears appeals, from the Outer House, the Sheriff Court and certain tribunals and other bodies. There are two equally-ranking Divisions, the First and the Second, and an Extra Division. It is normal for three judges to hear a case.

The Crown

A statutory reference to the Crown is generally a reference to the public property and functions of the Sovereign: that is to say, property held by Ministerial and other official bodies designed to hold property for public purposes, and the functions of government exercised through or on the advice of Her Majesty's Government.

A reference is capable, however, of including a reference to private property of the Sovereign. So, for example, a proposition that "this Act binds the Crown" is sufficient (as a general rule) to impose liability on the Sovereign personally.

There is a general presumption that Acts do not bind the Crown unless they provide otherwise expressly or by clear implication (such as making amendments of an Act that expressly binds the Crown).

Acts therefore frequently include propositions expressly applying their provisions to the Crown, sometimes with modifications.

Acts also sometimes include propositions expressly exempting the Crown, either to rebut any suggestion of an implication to the contrary or because the exemption is to be limited in some way.

Acts establishing statutory bodies often include provision that they are not to be regarded as acting on behalf of the Crown or (less often required) that they are.

Further information will be found in *Craies on Legislation*, Chapter 11.5.

See General Note: [Civil Service](#).

Crown Court

One of the three parts of the Supreme Court (soon to be the Senior Courts) under [section 1 of the Supreme Court Act 1981](#) (soon to be renamed the Senior Courts Act).

The judges of the Crown Court are principally Circuit judges and Recorders; but any judge of the High Court can also sit.

The jurisdiction of the Crown Court is conferred by [section 45](#) of the 1981 Act, but largely by reference to its pre-existing jurisdiction. In essence, the principal jurisdiction of the Crown Court is serious criminal cases (including serious violent and sexual offences and robbery) including cases referred by the magistrates' courts on grounds of seriousness, either for trial or for sentence alone.

Crown Court trials are heard by judge and jury.

There is only one Crown Court, but it sits at 77 centres across England and Wales at the same time. The centres are distributed among seven regions (which replace the old Circuits): Midlands, North East, North West, South East, South West, London and Wales.

In addition to cases transferred from the magistrates' courts, the Crown Court hears certain appeals against decisions of Magistrate's Courts.

Directions

Statutes commonly empower a Minister or regulatory body to give directions to a specified authority about how particular functions are to be exercised.

Directions are a form of quasi-legislation, and do not attract automatically any of the normal provisions about publicity, enforcement or other matters.

They are not made by statutory instrument and will not therefore be subject to the rules on printing and publication in the [Statutory Instruments Act 1946](#). If they are to be made public, therefore, express provision will be made by the statute that confers the power to give them, either permitting or requiring their publication, and possibly specifying the manner in which they may or must be published.

Directions may, but need not be, mandatory. That being so, it is necessary for the statute that confers power to give them to specify what their effect is to be and how they are to be enforced. Common approaches are to require the body to whom directions are addressed either to comply with them or to have regard to them (see General Note: Have Regard To). If no express provision is made for the effect of directions, the courts will be reluctant to imply a duty to comply with them, but will probably be prepared to imply a duty to have regard to them (on the grounds that without that the power to give directions will generally be nugatory). In appropriate cases it is possible that the context will imply a duty to comply.

Directions are not included in the list in [section 14 of the Interpretation Act 1978](#), which implies a power to amend, revoke and re-enact. It is therefore common for statutes providing for the giving of directions also to provide expressly that they may be varied or revoked. It is likely, however, that the courts would be prepared to imply a power to vary or revoke, at least in a case where the context makes it unlikely (as it normally will) that Parliament could have expected a single direction to last forever, without the flexibility to adapt to changing circumstances.

It is often unclear what degree of generality or specificity is permitted by a power to give directions. As a general rule, a power to give directions to a body about the exercise of its functions is likely to be construed as permitting only directions of a general and strategic nature. There would probably have to be something express or clearly implied to permit a direction to interfere at an individual case-level.

Director of Public Prosecutions

The Director of Public Prosecutions is appointed by the Attorney General under [section 2 of the Prosecution of Offences Act 1985](#). The Director is the head of the Crown Prosecution Service, established by [section 1](#) of the 1985 Act.

The Director is responsible for initiating and conducting criminal proceedings, under the overall superintendence of the Attorney General.

Acts commonly make a power for a regulatory body to bring a prosecution subject to a requirement of the consent of the Director of Public Prosecutions.

In the words of the CPS' internet website—

“The Crown Prosecution Service is the principal prosecuting authority in England and Wales. We are responsible for determining the charge in all but minor cases, advising the police during the early stages of an investigation, reviewing cases submitted by the police for prosecution, preparing cases for court and the presenting those cases at court. The role of the Service is to prosecute cases firmly, fairly and effectively when there is sufficient evidence to provide a realistic prospect of conviction and when it is in the public interest to do so.”

EEA

The European Economic Area is established by the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (as adjusted by a Protocol signed at Brussels on 17th March 1993). It was added to the list of Community Treaties for the purposes of the [European Communities Act 1972](#) by the [European Economic Area Act 1993, s. 1](#).

The essence of the EEA is that it allows participating States (presently Norway, Iceland and Liechtenstein) to participate in certain aspects of the European Communities' or European Union's Internal Market. In particular, the freedom of movement of goods, persons, services and capital applies, together with some other social and environmental laws. The principal exclusions are agriculture and fisheries.

Because membership of the EEA attracts freedom of movement, it is now common for a number of statutes that make special provision for European Union citizens to make provision by reference to the EEA. EEA national is a term commonly found in, for example, Immigration Acts.

The powers of the [European Communities Act 1972](#) are available for giving effect to EEA obligations.

Enactment

The word “enactment” is used in legislation generally to mean a provision of legislation. It can refer to as much as a whole Act or as little as a section, or even part of a section.

There is no one single technical definition of “enactment”. Depending on its context, it may include or exclude secondary legislation, and it may even include provisions of European Union legislation. References to “enactments” are frequently followed by express definitions setting out what they do and do not include in the Act or instrument concerned; apart from that, each reference has to be construed in its context.

There is an express (but rebuttable) statutory presumption that a reference to an enactment does not include a reference to provisions of Acts of the Scottish Parliament – [Interpretation Act 1978, Sch. 1](#).

More information will be found in *Craies on Legislation*, Chapter 1.1.

England and Wales

“England and Wales” is the form used for many statutory purposes since the two together constitute a single legal jurisdiction.

But England and Wales are also separate territories, defined in [Schedule 1 to the Interpretation Act 1978](#).

So depending on what is meant, legislation will sometimes talk about “England and Wales” (as in “a prosecution may be commenced, in England and Wales, only with the consent of ...”) and sometimes about “England or Wales” (as in “in the application of this section to a school in England or Wales”).

See also General Note: [Extent](#).

European Communities Act 1972, s. 2(2)

Section 2(2) of the European Communities Act 1972 is the power under which almost all European Union law is implemented in the United Kingdom.

Section 2(2) confers power to do by subordinate legislation almost anything that can be done by an Act of Parliament. There are some restrictions (notably in the size of criminal penalty that can be imposed and in the amount of sub-delegation permitted) but the overall effect is to make section 2(2) instruments more like mini-Acts than normal statutory instruments.

Instruments under section 2(2) may be subject to negative or affirmative scrutiny procedure, the choice being the Government's.

The power in section 2(2) covers both implementation of the basic European Union obligations themselves and also matters arising as a consequence.

An enormous amount of legislation is made under section 2(2); instruments made entirely under section 2(2) and instruments made partly under that section and partly under domestic vires together account for hundreds of pages of legislation each year.

Further information about section 2(2) instruments will be found in *Craies on Legislation*, Chapter 3.10.

European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950; generally abbreviated to the European Convention on Human Rights.

The Convention was incorporated into the law of the United Kingdom by the [Human Rights Act 1998](#).

The incorporation effected by the 1998 Act operates by reference to the concept of the Convention rights, as defined in [section 1](#) of that Act, being “the rights and fundamental freedoms set out in – (a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention. These cover: Right to life; Prohibition of torture; Prohibition of slavery and forced labour; Right to liberty and security; Right to a fair trial; No punishment without law; Right to respect for private and family life; Freedom of thought, conscience and religion; Freedom of expression; Freedom of assembly and association; Right to marry; Prohibition of discrimination; Prohibition of abuse of rights; Limitation on use of restrictions on rights; Protection of property; Right to education; and Right to free elections.”

It is common for statutes to make provision by reference to the Convention Rights, adopting the definition of the [Human Rights Act 1998](#).

Explanatory Memorandum

The Government routinely prepares an explanatory memorandum for the benefit of the Joint Committee on Statutory Instruments in connection with most statutory instruments.

Like Explanatory Notes for Acts of Parliament (see General Note: [Explanatory Notes](#)) they vary in quality and penetration, but can be a significant source of assistance for the reader.

Explanatory Notes

A set of Explanatory Notes is prepared for each Act of Parliament by the Government Department with primary responsibility for the Act. These are based on the Notes produced for the Bills leading up to the Act as they proceed through each House of Parliament.

The Notes generally provide some policy background to the purpose of the Act, as well as an analysis of the purpose and effect of individual provisions.

The quality and penetration of the Notes varies. In some cases they add little or nothing to the text of the Act, while in other cases they are a very significant aid for the reader.

The Notes open with a standard disclaimer to the effect that they “do not form part of the Act and have not been endorsed by Parliament”. In practice, of course, they are likely to be treated as a particularly reliable indication of the intention behind the legislation. In particular, the courts have been prepared to have regard to Explanatory Notes for a number of purposes when construing and applying legislation – see, in particular, [R \(Westminster City Council\) v National Asylum Support Service \[2002\] UKHL 38](#).

Every statutory instrument contains at the end an Explanatory Note, which is also expressed not to form part of the instrument but to provide information that may be helpful to the reader. In particular, explanatory notes often provide useful information about the European Union obligations on which implementing legislation is based. (See also General Note: Explanatory Memorandum.)

More information about Explanatory Notes in general, and the courts’ attitude to them in particular, will be found in Craies on Legislation, Chapters 6.1, 9.4, 9.5 and 27.1.

Extent

Extent is a way of expressing what bodies of law a particular piece of legislation forms part of. For United Kingdom legislation, therefore, an Act or instrument may extend to England and Wales (which form a single legal jurisdiction), to Scotland, to Northern Ireland or to any combination of the three.

Most Acts carry a simple proposition at the end of the Act (before any Schedules) setting out their extent. If an Act says nothing about its extent, the default presumption is that normally that it is intended to extend to all three Parts of the United Kingdom. But an Act which only amends other legislation and says nothing about its own extent is presumed to have the same extent as the legislation that it amends. Subordinate legislation that contains no express proposition about its own extent is presumed to have the same extent as its parent Act.

Extent is not the same as application. An Act may, for example, extend to England and Wales but apply only to things done or located in England. And an Act may extend to the whole of the United Kingdom but apply differentially to different Parts.

Acts of the Westminster Parliament do not generally apply automatically to the Channel Islands: but Acts about certain matters (such as nationality and immigration) commonly allow an Order in Council to provide for extent to the Islands, with or without specified modifications.

Legislation made by one of the devolved legislatures (the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly) is presumed to extend only to the relevant Part of the United Kingdom.

See General Note: [Extraterritoriality](#).

Extraterritoriality

There is a presumption that in the absence of express provision United Kingdom will extend to the whole of the United Kingdom and to nowhere else. The presumption is rebuttable by express provision or clear implication; and it is rebuttable in either direction, so that certain Parts of the United Kingdom may be excluded or certain territories outside the United Kingdom (such as the Channel Islands) may be included.

The concept of extraterritoriality includes the concept of extent outside the United Kingdom, but it goes beyond that to include also the idea that UK legislation may apply to things done outside the UK, without purporting to extend there (that is to say, to form part of the law of the place concerned). Again, the starting point is the presumption that Parliament intends to legislate only for what goes on in the United Kingdom, but the presumption is rebuttable by express words or clear implication.

Further information will be found in *Craies on Legislation*, Chapters 11.1 and 11.2.

See General Note: [Extent](#).

Financial Services Authority (FSA)

A company limited by guarantee given statutory recognition by [section 1 of the Financial Services and Markets Act 2000](#) as the principal regulator of the financial services industry.

[Section 2\(2\)](#) of the 2000 Act gives the Authority 4 regulatory objectives: (a) market confidence; (b) public awareness; (c) the protection of consumers; and (d) the reduction of financial crime.

The Authority has operational independence from the Government for the purposes of its activities of regulating banks, investment bodies, insurers and other providers of financial services.

The Authority shares responsibility with the Bank of England and the Treasury for financial stability, in accordance with a Memorandum of Understanding agreed between the three bodies. This pivotal role is recognised by the conferring of a number of statutory functions, including, for example, by [Parts 1 to 3 of the Banking Act 2009](#) (the statutory resolution regime for banks and other institutions that are or are likely to be in financial difficulties).

First-tier Tribunal

A tribunal established by the [Tribunals, Courts and Enforcement Act 2007](#), designed to take over the functions previously exercised by a number of smaller, subject-specific tribunals under individual Acts.

In general, the Tribunal hears appeals against Government or other public-authority decisions, in accordance with its statutory jurisdiction.

The general jurisdiction of the Tribunal is being introduced in stages. To date the Tribunal's jurisdiction is active in relation to appeals formerly heard by the Social Security and Child Support Appeals Tribunal, the Pensions Appeals Tribunals (England and Wales), the Mental Health Review Tribunal, the Care Standards Tribunal, the Criminal Injuries Compensation Panel, the Asylum Support Tribunal and the Special Educational Needs and Disability Tribunal.

The Tribunal is divided into three chambers representing the disparate topics in respect of which it has jurisdiction: the Social Entitlement Chamber; the Health, Education and Social Care Chamber; and the War Pensions and Armed Forces Compensation Chamber.

Government Department

A Government Department is not an entity with distinct legal personality. Most things that would be identified as Government Departments are as a matter of legal structure simply a group of civil servants employed to support, and exercise functions on behalf of, a particular Minister of the Crown.

A number of statutory definitions of Government Department are found, mostly designed to include things about which there might otherwise be doubt. So, for example, [section 4\(8\) of the Regulation of Investigatory Powers Act 2000](#) includes parts of the Scottish Administration, Northern Ireland departments (*q.v.*) and the National Assembly for Wales.

Great Britain

There is no statutory definition of the term “Great Britain” although it is used extensively in legislation.

The concept of Great Britain originated with the [Articles of Union 1706](#), which provided “That the two Kingdoms of Scotland and England, shall, upon the first Day of May next ensuing the Date hereof, and for ever after, be united into one Kingdom by the Name of Great-Britain ...”. The Articles were ratified by Acts of the Parliaments of Scotland and of England in 1707. Great Britain was then united with Ireland in 1801 to form the United Kingdom of Great Britain and Ireland.

A reference to Great Britain includes a reference to the outlying islands – the Isle of Wight, Anglesey, the Isles of Scilly, the Hebrides, and the island groups of Orkney and Shetland: but not the Isle of Man or the Channel Islands.

Guidance

Statutes commonly empower a Minister or regulatory body to give guidance to a specified authority about how particular functions are to be exercised.

Guidance is a form of quasi-legislation, and does not attract automatically any of the normal provisions about publicity, enforcement or other matters.

It is not issued by statutory instrument and will not therefore be subject to the rules on printing and publication in the [Statutory Instruments Act 1946](#). If it is to be made public, therefore, express provision will be made by the statute that confers the power to give it, either permitting or requiring publication, and possibly specifying the manner in which it may or must be published.

Guidance is never mandatory, in which sense it differs from directions which may be (although they are not always). That being so, it is necessary for the statute that confers power to give guidance to specify what its effect is to be. The normal approach is to require the body to whom guidance is addressed to have regard to it (see General Note: Have Regard To). If no express provision is made the courts will probably be prepared to imply a duty to have regard (on the grounds that without that the power to give guidance will generally be nugatory).

Guidance is not included in the list in [section 14 of the Interpretation Act 1978](#), which implies a power to amend, revoke and re-enact. It is likely, however, that the courts would be prepared to imply a power to vary or revoke, at least in a case where the context makes it unlikely (as it normally will) that Parliament could have expected a single set of guidance to last forever, without the flexibility to adapt to changing circumstances.

It is often unclear what degree of generality or specificity is permitted by a power to give guidance. As a general rule, a power to give guidance to a body about the exercise of its functions is likely to be construed as permitting only guidance of a general and strategic nature. There would probably have to be something express or clearly implied to permit guidance to attempt to interfere at an individual case-level.

HMRC

The [Commissioners for Revenue and Customs Act 2005](#) established the Commissioners and their staff as a single non-Ministerial Government Department to take the place of the two former Departments, the Inland Revenue and Customs and Excise.

The Act allows the Commissioners to appoint staff, who are known as Officers of Revenue and Customs. Many statutes confer powers directly on Officers of Revenue and Customs.

The Commissioners together with the Officers may be referred to together as the “Her Majesty's Revenue and Customs” ([section 4](#) of the 2005 Act, given general application by [Schedule 1 to the Interpretation Act 1978](#)).

HMRC is responsible for collecting the following taxes and duties: Capital Gains Tax; Corporation Tax; Income Tax; Inheritance Tax; National Insurance Contributions; Excise duties; Insurance Premium Tax; Petroleum Revenue Tax; Stamp Duty; Stamp Duty Land Tax; Stamp Duty Reserve Tax; and VAT. HMRC is responsible for paying out and administering Child Benefit, Child Trust Funds and Tax Credits. HMRC also has responsibility for certain aspects of UK border control, certain environmental taxes, enforcing the National Minimum Wage and receiving payments in respect of student loans.

There are a number of provisions on the statute book controlling what use HMRC may make of the information it acquires in the course of its functions (which includes, for obvious reasons, an enormous amount of information about individuals' financial and other private business). In particular, [section 18](#) of the 2005 Act imposes a general duty of confidentiality, subject to specific exceptions.

Have regard to

Many statutes require Ministers or others to “have regard to” a particular thing in exercising a function.

The proper meaning of a statutory requirement to have regard to something is along the lines of a requirement to consider it. It falls short of a requirement to make that thing the authority’s only priority, or top priority.

A requirement to have regard to guidance issued by a Minister, for example, falls short of a requirement to comply with it. It means that the guidance must be considered; but it can be disregarded where the circumstances of a case suggest that other considerations outweigh the guidance. The rules of administrative law require, in effect, that an authority departing from guidance to which it is required to have regard must have a clear and case-specific reason for the departure; something amounting to a general disagreement with the tenor of the guidance for all purposes would probably not be compatible with the duty to have regard to it.

A requirement to have regard to a specified list of factors means that the authority subject to the requirement must consider each factor separately – but it does not prevent the authority from going on to consider other factors also, even if those other factors combine to outweigh the factors specifically listed ([Dunnachie v Kingston-upon-Hull City Council \[2004\] UKHL 36](#)).

A requirement to have “particular regard” to specified matters does not require those matters to be given greater weight than others: again, it requires them to be considered separately and carefully ([Ashdown v Telegraph Group \[2001\] Ch 685 and \[2001\] EWCA Civ 1142](#)).

High Court

By virtue of [Schedule 1 to the Interpretation Act 1978](#) a reference in legislation to the High Court means—

- a) in relation to England and Wales, Her Majesty's High Court of Justice in England, and
- b) in relation to Northern Ireland, Her Majesty's High Court of Justice in Northern Ireland.

The High Court is now constituted under [section 4 of the Supreme Court Act 1981](#). Its general jurisdiction is conferred by section 19 of that Act, but largely by reference to its former statutory and common law jurisdiction.

High Court of Justiciary

The High Court of Justiciary is Scotland's supreme criminal court.

The High Court sits as a first instance trial court and also as an appellate court. It deals with the most serious crimes at first instance, including major crimes of violence and sexual offences. Cases are presided over by a single Judge and tried by a jury of fifteen men and women.

When sitting as an appellate court, the court consists of at least three Judges for appeals against conviction and two for appeals against sentence. The court hears appeals from the High Court, the Sheriff Courts and the District Courts.

The Lord Advocate may refer to the High Court a point of law arising in the course of a case: an opinion of the High Court will set a precedent for future cases.

The Lord President is the head of the court – [section 2 of the Judiciary and Courts \(Scotland\) Act 2008](#).

Isles of Scilly

The Isles of Scilly are 28 miles from Lands End in the southwest of Britain. There are five inhabited islands: St.Mary's, St.Agnes, Bryher, Tresco and St.Martins.

For purposes of statutory construction a reference to “England” includes a reference to the Isles of Scilly – [Interpretation Act 1978, Sch. 1](#).

The Isles form a single unit for local government purposes, with the Council of the Isles of Scilly being the smallest unitary UK local authority. A number of statutory definitions of “local authority” include the Council; while some local government legislation requires adaptation for the Isles – see, for example, [section 125 of the Local Government Act 2003](#).

Land

Every time statute refers to “land” the reader is required to remember that despite having a natural meaning the word also has a technical, and not particularly intuitive, meaning provided by [Schedule 1 to the Interpretation Act 1978](#) – “includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land”.

That meaning will have effect unless disapplied by the statute concerned expressly or by implication ([section 5 of the 1978 Act](#)); whether an express definition of “land” in the statute concerned will have effect instead of or alongside the Interpretation Act definition will be a matter of construction in the context of each case.

Laying before Parliament

A requirement to lay a document before Parliament is a requirement to lay it before each of the two Houses in accordance with their Standing Orders and directions – [Laying of Documents before Parliament \(Interpretation\) Act 1948, s. 1.](#)

In the case of the House of Commons, Standing Order 159 provides that for most statutory instruments required to be laid “the delivery of a copy of such instrument to the Votes and Proceedings Office on any day during the existence of a Parliament shall be deemed to be for all purposes the laying of it before the House”.

In the case of the House of Lords, Standing Order 71 provides that for most statutory instruments required to be laid “the deposit of a copy of the instrument with the Clerk of the Parliaments in accordance with this Order at any time during the existence of a Parliament when the House is not sitting for Public Business shall constitute the laying of it before the House”.

When Parliament has been dissolved (in order to trigger a General Election) nothing can be laid before Parliament because there is no Parliament. The result is that some statutory instrument business cannot continue during a General Election campaign. At all other times Parliament is in existence, even if neither House is sitting, and statutory requirements to lay documents can be satisfied.

Laying before National Assembly for Wales

A requirement to lay a document before the National Assembly for Wales is a requirement to lay it before the Assembly in accordance with its Standing Orders – Laying of Documents before [Parliament \(Interpretation\) Act 1948, s. 1A](#).

Standing Order 29 of the National Assembly deals with laying of documents. The Order requires compliance with guidance of the Presiding Officer.

The general rule laid down by Standing Order 29.5 is that “The receipt, by the Table Office, of any document ... on a working day during its agreed office hours (including receipt by electronic means) constitutes ... the laying of the document ...”

Standing Order 29.4 requires most documents laid to be laid in England and Welsh versions.

Laying before Northern Ireland Assembly

The [Laying of Documents before Parliament \(Interpretation\) Act 1948](#) does not apply to laying before the Northern Ireland Assembly. But one is probably forced to apply the same rule anyway, so that a statutory reference to laying anything before the Northern Ireland Assembly is to complying with any procedural rules of that Assembly as to how things are to be laid before it.

Standing Order 23 of the Assembly says—

“(1) Papers and Accounts which are to be presented to the Assembly shall be delivered to the Business Office of the Assembly and the listing of the same in the Journal of Proceedings of the Assembly shall constitute presentation for all purposes. Any papers or Accounts so placed shall be regarded as matters for the public domain.

(2) The above procedure shall also be followed when there is a statutory requirement to lay any document before the Assembly.”

Laying before Scottish Parliament

The Laying of Documents before [Parliament \(Interpretation\) Act 1948](#) does not apply to laying before the Scottish Parliament. But one is probably forced to apply the same rule anyway, so that a statutory reference to laying anything before the Scottish Parliament is to complying with any procedural rules of that Parliament as to how things are to be laid before it.

[Rule 10.1 of the Standing Orders of the Parliament](#) deals with the laying of statutory instruments and says—

- “1. Where, by virtue of any enactment, any instrument or a draft of any instrument made in the exercise of a power to make, confirm or approve subordinate legislation is required to be laid before the Scottish Parliament, the lodging of a copy of the instrument or the draft with the Clerk at any time when the office of the Clerk is open shall be treated for all purposes as being the laying of it before the Parliament.
2. The Clerk may require the person laying the instrument or draft instrument to provide such additional copies as he or she considers necessary.
3. Where any instrument or draft instrument is laid before the Parliament, the Clerk shall give members notice of that fact in accordance with Rule 10.9 and shall refer the instrument or draft instrument to the lead committee and to the Subordinate Legislation Committee for consideration, unless the Parliament, on a motion of the Parliamentary Bureau, decides that the instrument or draft instrument is to be considered by the Parliament.”

[Rule 14 of the Standing Orders of the Parliament](#) deals with the laying of other documents and says—

- “1. Where, under an enactment or otherwise, a report or other document is required or authorised to be laid before the Scottish Parliament, the lodging of a copy of that report or document with the Clerk shall be treated for all purposes as being the laying of it before the Parliament.
2. The Clerk may require the person laying the report or document to provide such additional copies as he or she considers necessary.
3. A report or other document may be laid before the Parliament at any time when the office of the Clerk is open.
4. No report or other document shall be laid before the Parliament unless it is required or authorised to be laid under an enactment or otherwise or it is laid by a member of the Scottish Executive.
5. The Clerk shall ensure that notice of any report or other document laid before the Parliament is published in the Business Bulletin. The notice shall give the title of the report or document.”

Levels of Certainty

Legislation often makes the exercise of a power conditional on a Minister or other person or body having a particular level of certainty about something: as in “the Secretary of State may make an order if satisfied that ...” or “a constable who suspects that a parcel is about to go bang may ...”.

Provisions of this kind use a variety of language: “thinks”, “considers”, “suspects”, “believes”, “in the opinion of”, “it appears to” and “is satisfied” being the most common.

It is not possible to be dogmatic about how each of these expressions is to be construed, partly because it depends on the context in which it is used and partly because there is no precise technical scale of meaning according to which they are used consistently by the drafters of legislation.

It is, however, possible to make some limited assertions, based partly on observable legislative drafting practice and partly on the natural English meaning of the words used.

In particular, it is possible to identify the two ends of the spectrum. A requirement to “suspect” something before acting is the lowest level, and a requirement to “be satisfied” is the highest.

Suspicion may be slight, and it may be based on evidence that would not necessarily persuade a court of law. But it must be real – that is to say a person exercising a power which is conditional on having a suspicion must be able to convince a court later that the person actually had the suspicion at the time, even if it turns out to be false and even if it was never so strong that it would have convinced a court. At least in the case of a Minister or any other person subject to the rules of administrative law, the suspicion must also be reasonable, which may mean that an actual but slight suspicion based, for example, on circumstantial or inherently unreliable evidence, might not suffice.

To be satisfied of something is more or less synonymous with being certain of it and is a high threshold. It requires a real certainty based on strong evidence. It does not, however, necessarily require the person concerned to be satisfied beyond reasonable doubt – the criminal burden of proof – rather than being satisfied on the balance of probabilities – the civil burden of proof.

Between the two extremes of suspicion and satisfaction lies a grey area in which it is impossible either to be precise about the meaning of any one term or to draw definitive conclusions from comparisons of different terms used in different places, even within a

single Act or instrument. Legislative practice does not exhibit the kind of consistency that would enable the drawing of firm conclusions based on comparative usage.

There is sometimes a suggestion that “thinks” is a lower threshold than “considers” or than certain other terms. This probably derives from the fact that in colloquial conversation a person will sometimes say “I think so” when he or she really means no more than “I have a slight suspicion” that something is the case. Depending on the inflection, indeed, “I think so” can sometimes actually be used to indicate doubt. But in legislative drafting “thinks” is simply a slightly more modern version of “considers” or “in the opinion of” – see [HL Deb 10th July 2003 c. 432](#).

The use of a condition “if it appears to the Secretary of State that X then Y” must be intended to require less than certainty, and to be a lower threshold than “if the Secretary of State is satisfied”: how much lower, however, will depend on all the circumstances.

Local authorities

There is currently a bewildering array of kinds of local authority, and of arrangements for local government in different places within the United Kingdom.

The term "local authority" is therefore not generally relied upon in legislation as sufficient without definition, and the different definitions vary widely in effect according to context and territorial application.

The widest class of local authorities includes: county or district council in England; London borough council; the Common Council of the City of London; the Sub-Treasurer of the Inner Temple; the Sub-Treasurer of the Middle Temple; the Council of the Isles of Scilly; a fire and rescue authority in England or in Wales; a port health authority in England or in Wales; a waste disposal authority; a county or county borough council in Wales.

For local government purposes, England is divided into different kinds of area: areas with non-unitary authorities; areas with unitary authorities; London boroughs; and National Parks.

Areas with non-unitary authorities – county and district councils – are administrative counties with a two-tier structure, consisting of a county council and a number of district councils. The two levels have different sets of responsibilities; for example, education is administered at the county level, local planning at the district level. These areas are also sometimes known as "shire counties".

Areas with unitary authorities have single-tier authorities, combining the functions of county and district councils. There are three kinds of area with unitary authorities: administrative counties; metropolitan districts; and non-metropolitan districts. Unitary authority areas are either administrative counties consisting of a single district, or districts of a county that has no county council. The council of a unitary authority is referred to as a "district council", "borough council", "county council", "city council", "metropolitan borough council" or "council".

Administrative counties are generally counties with one district and no county council.

Metropolitan districts are districts of a metropolitan county which used to have, but no longer has, a county council.

Non-Metropolitan districts are districts of a non-metropolitan county which no longer has a county council: the only example is presently Berkshire.

In Greater London the 32 London borough councils act as unitary authorities, but under the co-ordination of the Greater London Authority.

The National Assembly for Wales (known in Welsh as Cynulliad Cenedlaethol Cymru) was established in 1998. For local government purposes, Wales is divided into 22 unitary authorities: 9 counties, 3 cities, and 10 county boroughs.

The Council areas of Scotland form the local government areas of Scotland, all of which are unitary authorities.

Northern Ireland is divided into 26 local government districts, which are unitary authorities. Some of the districts have city status.

Lord Advocate

The Lord Advocate is the head of the system of public prosecution in Scotland (overseeing the Crown Office and Procurator Fiscal Service).

It is a political appointment with parallel ministerial functions (in a similar way to the Attorney General in England and Wales).

[Section 48 of the Scotland Act 1998](#) gives the Lord Advocate a degree of operational independence.

Though statute-based now, the office is of ancient origin.

Lord Chancellor

As a ministerial office the Lord Chancellor is an ancient institution. Until 2005 the Lord Chancellor had a triple role as Cabinet Minister, Speaker of the House of Lords and head of the judiciary.

[Part 2 of the Constitutional Reform Act 2005](#) made a number of changes in the arrangements for the Lord Chancellor. The House of Lords now has a Lord Speaker; and the Lord Chief Justice holds the office of President of the Courts of England and Wales and is Head of the Judiciary of England and Wales. A number of statutory functions continue to be vested in the Lord Chancellor, but the Lord Chancellor's Department has been replaced for all practical purposes by a Ministry of Justice under the leadership of a Secretary of State for Justice.

The present arrangements are that a single Cabinet Minister, who is a Member of the House of Commons, holds office both as Secretary of State for Justice and as Lord Chancellor.

See General Note: [Secretary of State](#).

Magistrates' courts

The [Magistrates Courts Act 1980](#) defines “magistrates’ court” as “any justice or justices of the peace acting under any enactment or by virtue of his or their commission or under the common law”.

The 1980 Act contains the principal legislation about the operation of the magistrates’ courts. The most important constitutional legislation about the magistrates and their courts is now the [Courts Act 2003](#).

[Section 7](#) of the 2003 Act makes provision for the Commission held by justices of the peace for England and Wales. Under section 8, England and Wales are divided into local justice areas.

Lay magistrates are “appointed for England and Wales by the Lord Chancellor by instrument on behalf and in the name of Her Majesty” under [section 10](#) of the 2003 Act. Lay justices are volunteers. People with a legal qualification may be appointed to the office of District Judge (Magistrates' Courts) under section 22, a full-time professional office.

[Section 6](#) of the 2003 Act abolished magistrates' courts committees and the office of justices' chief executive (which had itself replaced the earlier office of Clerk to the Justices).

Most criminal cases start in the magistrates' courts, and over 95% are handled there entirely. More serious offences pass from the magistrates’ courts to the Crown Court (*q.v.*). Either-way offences may stay in the magistrates’ courts, but the most serious offences are triable only on indictment – they also start in the magistrates’ courts, but only for procedural preliminaries.

Cases in the magistrates’ courts are heard either by three lay magistrates or by one District Judge.

See General Note: [Offences: Summary](#); [Offences: Triable Either Way](#).

Minister of the Crown

The starting point for the meaning of a reference to a Minister of the Crown is the holder of a ministerial office appointed by the Sovereign.

Almost all senior Ministers nowadays are holders of the office of Secretary of State, of which there used to be only two. The last non-Secretary of State to be the head of a large Government Department was the Minister for Agriculture, Fisheries and Food, which finally also became a Secretarial Department in 2002.

A statutory reference to “the Secretary of State” is a reference to “one of Her Majesty's Principal Secretaries of State” – [Interpretation Act 1978, Sch. 1](#).

Apart from the Secretaries of State, there are a number of other senior Ministerial Offices. Prime Minister is not technically a Ministerial Office and the person who performs the functions of Prime Minister is also appointed to another Office, generally First Lord of the Treasury. Chancellor of the Exchequer is a Ministerial Office and is the other most senior non-Secretarial Office. Then there are a number of offices the functions of which have ceased to have much if any significance, and which are used to appoint non-Departmental Ministers with specific roles, who are generally also in the Cabinet: these include Lord President of the Council, Lord Privy Seal and Chancellor of the Duchy of Lancaster. Lord Chancellor used to be a non-Secretarial Office of immense importance, but of recent years it has been combined with the Office of Secretary of State for Justice and has been divested of much of its separate significance.

A specific statutory definition of “senior Minister” is found in [section 20 of the Civil Contingencies Act 2008](#) – “(a) the First Lord of the Treasury (the Prime Minister), (b) any of Her Majesty's Principal Secretaries of State, and (c) the Commissioners of Her Majesty's Treasury”.

There are two principal ranks of junior Minister: of these, the Minister of State is the more senior and the Parliamentary Under-Secretary of State is the more junior. None of these are in charge of Departments, although a Minister of State may be responsible for a large and important area of work within a Secretarial Department, including one that was previously handled in a separate Department. It is rare but not unheard of for a Minister of State to be in the Cabinet. Originally, junior Ministers were not appointed by the Sovereign at all, but were chosen by the Minister in charge of each Department upon appointment. Now, however, all Ministerial Offices are chosen directly by the Prime Minister submitted to the Palace for appointment.

The Treasury is not a Minister; but statute often applies the definition of “Minister of the Crown” found in [section 8 of the Ministers of the Crown Act 1975](#) – “Minister of the Crown” means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council.”

The office of Parliamentary Private Secretary is not a Ministerial Office and does not make its holder a member of the Government. It is, in essence, a purely Parliamentary arrangement, whereby a back-bencher agrees to help a Minister in his or her Parliamentary duties. It is often a precursor to junior Ministerial appointment.

Ministers may be assigned duties administratively by the Prime Minister or by express statutory provision. Most statutory functions are nowadays conferred simply on “the Secretary of State” and not on a named Secretary, since the Departments and their titles change more frequently than was once the case. Functions may be transferred between Ministers by Transfer of Functions Order under the [Ministers of the Crown Act 1975](#).

See also General Note: [Secretary of State](#).

Mistakes in Acts

A typographical error in an Act of Parliament may be corrected by a correction slip issued by the Queen's Printer and incorporated in the version of the Act included in the annual volumes (if corrected in time) and on the internet website of the Office of Public Sector Information.

Where a mistake is found in an Act the courts will be prepared to correct the mistake if satisfied (1) what was intended, (2) that there is an error in achieving it, and (3) that the substance (although not necessarily the form) of what should have been provided is clear – [Inco Europe Ltd v First Choice Distribution \[2000\] 1 WLR 586 HL](#).

Further information will be found in *Craies on Legislation*, Chapter 15.

Money provided by Parliament

“Money provided by Parliament” is a reference to money issued out of the Consolidated Fund in accordance with a Consolidated Fund Act or Appropriation Act, each of which is founded on a Vote of the House of Commons.

Further information will be found in *Craies on Legislation*, Chapter 1.7.

See also General Notes: [Baldwin Convention](#); and [Sink Clauses](#).

National Assembly for Wales

Under [section 1 of the Government of Wales Act 2006](#): “There is to be an Assembly for Wales to be known as the National Assembly for Wales or Cynulliad Cenedlaethol Cymru (referred to in this Act as “the Assembly”)”.

The Assembly consists of constituency members and regional members.

The Assembly was initially established by the [Government of Wales Act 1998](#). Under that Act the Assembly had no power equivalent to the power of the Scottish Parliament to pass Acts, although it could exercise certain powers to make subordinate legislation by statutory instrument. The 2006 Act allowed the Assembly to pass legislation – in the form of Assembly Measures – on certain devolved matters such as health, education, social services, local government. Measures may be passed only in areas where the Assembly has legislative competence, conferred by or under the 2006 Act.

There is also provision in the 2006 Act for Acts of the Assembly, but that provision requires to be commenced following a referendum.

The Assembly also scrutinises subordinate legislation made by the Welsh Ministers (see General Note: [Welsh Ministers](#)).

Necessary; Necessary or expedient; Necessary or desirable

Legislation commonly makes the exercise of a power depend on whether the Minister or other person in whom the power is vested is satisfied that it is necessary or expedient for a particular purpose.

The threshold of necessity is a high one. Expediency is a much lower threshold, meaning much the same as desirable, a term that is employed in place of expediency in a number of modern provisions.

Parliamentary controversy sometimes arises about the low nature of “expediency” or “desirability” as contrasted to necessity – see, for example, the debate about the power to make retrospective legislation under the [Banking Act 2009](#) ([HL Deb 9th February 2009 cc. 952-953](#)).

What amounts to necessary, expedient or desirable for the purposes of particular legislation, and the factors to be taken into account in assessing it, depends on the context. For constructions of necessity and expediency in different contexts see *Stroud’s Judicial Dictionary*.

Northern Ireland Assembly

The Northern Ireland Assembly (including legislative competence and Acts and Measures).

Person

A reader of legislation might be excused for thinking that a reference to a person was a reference to things possessing legal personality. That would include companies, but it would exclude unincorporated associations, such as members' clubs.

But [Schedule 1 to the Interpretation Act 1978](#) provides that “‘person’ includes a body of persons corporate or unincorporate”.

The result is that a reference to things done by or to persons will include unincorporated associations and, notably, partnerships, unless there is a contrary indication (express or implied) in the particular context.

Where the word “individual” is used it means only natural persons.

Proportionality

Once not a concept much used in the law of the United Kingdom – or at least not known by that name – the idea of proportionality has entered our legal language through the influence of the European Communities, in whose jurisprudence it is a central concept.

“Inherent in the whole of the Convention is a search for the fair balance between the demands of the general interests of the community and the requirements of the protection of the individual’s human rights.” ([Soering v United Kingdom \(1989\) 11 EHRR 439, para 89](#)). The principle of proportionality, containing its own concept of procedural fairness, is concerned with defining that ‘fair balance’, however, this is a less stringent concept in English law than at the European level. In the determination of whether a particular limitation satisfies this issue of proportionality, the Privy Council held that the court would proceed on the basis of a threefold analysis, namely: “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.” ([De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing \[1999\] 1 AC 69](#)). (*Jowitt’s Dictionary of English Law*, 3rd Edition, 2010)

It is now not uncommon for UK legislation to use the notion of proportionality expressly, even in contexts that are not concerned with the implementation of Community obligations – see, for example, [section 41\(8\) of the Education and Skills Act 2008](#).

Scottish Parliament

The Scottish Parliament was established by [section 1 of the Scotland Act 1998](#).

[Section 28 of the Scotland Act 1998](#) gives the Scottish Parliament the power to pass laws in its area of legislative competence. The laws are called Bills while passing through the Scottish Parliament and become Acts of the Scottish Parliament when they complete the process and are given Royal Assent.

Despite being called Acts, laws made by the Scottish Parliament are subordinate legislation and not primary, because their authority derives from the [Scotland Act 1998](#). They amount to an exercise of power delegated from the Westminster Parliament, which remains supreme as a matter of the constitutional law of the United Kingdom and, in particular, continues to be competent to legislate for Scotland even in devolved matters.

The area of legislative competence of the Scottish Parliament – the range of matters in respect of which it is competent to legislate – is established by [section 29 of the Scotland Act 1998](#). The restrictions on what the Parliament may do are set out as follows—

“(2) A provision is outside that competence so far as any of the following paragraphs apply—

- (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland,
- (b) it relates to reserved matters,
- (c) it is in breach of the restrictions in Schedule 4,
- (d) it is incompatible with any of the Convention rights or with Community law,
- (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.”

The existence of these statutory restrictions means that an Act of the Scottish Parliament can be challenged on grounds of vires, again unlike an Act of the Westminster Parliament.

The details of what amount to reserved matters are complex: the following is an outline of the principal issues which are reserved and are therefore outside the competence of the Scottish Parliament. There are general reservations in respect of: the constitution; political parties; foreign affairs; defence and treason; and the public service. There are particular reservations in respect of aspects of: finance and the economy; home affairs; trade and industry; energy; transport; social security; professional regulation; employment; health; and media and culture.

Further information will be found in *Craies on Legislation*.

Secretary of State

A statutory reference to “the Secretary of State” is a reference to “one of Her Majesty's Principal Secretaries of State” – [Interpretation Act 1978, Sch. 1](#).

Most statutory functions are nowadays conferred simply on “the Secretary of State” and not on a named Secretary, since the Departments and their titles change more frequently than was once the case; but occasional references to particular Secretaries are found in modern legislation, particularly in subordinate or local legislation.

Functions may be transferred between Ministers (including Secretaries of State) by Transfer of Functions Order under the [Ministers of the Crown Act 1975](#). [Section 2](#) of that Act can also be used to make consequential provision in connection with the creation of a new Secretary of State.

There are presently the following 19 Secretaries of State:

- Secretary of State for Business, Enterprise and Regulatory Reform
- Secretary of State for Children, Schools and Families
- Secretary of State for Communities and Local Government
- Secretary of State for Communities and Local Government
- Secretary of State for Culture, Media and Sport
- Secretary of State for Defence
- Secretary of State for Energy and Climate Change
- Secretary of State for Environment, Food and Rural Affairs
- Secretary of State for Foreign and Commonwealth Affairs
- Secretary of State for Health
- Secretary of State for the Home Department
- Secretary of State for Innovation, Universities and Skills
- Secretary of State for International Development
- Secretary of State for Justice (and Lord Chancellor)
- Secretary of State for Northern Ireland
- Secretary of State for Scotland
- Secretary of State for Transport
- Secretary of State for Wales
- Secretary of State for Work and Pensions

The Prime Minister is not a Secretary of State; nor is the Chancellor of the Exchequer.

See also General Note: [Minister of the Crown](#).

Sink clause

Acts frequently include provision along the lines that all expenditure of the Secretary of State or another Minister under the Act is to be paid out of money provided by Parliament.

“Money provided by Parliament” is a reference to money issued out of the Consolidated Fund in accordance with a Consolidated Fund Act or Appropriation Act, each of which is founded on a Vote of the House of Commons.

The only alternative to money provided by Parliament is a direct charge on the Consolidated Fund, so that money can be issued without a Vote (used, for example, for the salaries of judges in order to preserve their independence from Parliament).

It is therefore generally unnecessary as a matter of law to provide for expenditure to be paid out of money provided by Parliament, since in the absence of express provision for a charge on the Consolidated Fund it is only out of Voted money that any expenditure under an Act could be paid.

The usual reason why a provision of this kind is included has nothing to do with the law, but arises out of a peculiarity of Parliamentary procedure. On introduction of a Bill into the House of Commons any provision which would give rise to a charge on public funds requires to be printed in italics, to indicate that its inclusion in the Bill is, so to speak, provisional, pending the passing of the necessary money resolution of the Commons approving the expenditure. Where the expenditure is spread throughout a number of provisions of the Bill that would require to be italicised, the inclusion of a “sink clause” along the lines set out above is a convenient way of “draining” the italics: the sink clause itself is italicised and the rest of the Bill can be printed in plain type.

Further information can be found in *Craies on Legislation*, Chapter 1.7.

See also General Note: [Baldwin Convention](#).

Skeleton Acts

A skeleton Act is one which, instead of making substantive changes in the law to achieve the purpose of the Act, confers powers to make those changes by subordinate legislation.

The balance between primary and subordinate legislation is always difficult to strike. The factors to be balanced include the importance of the full Parliamentary scrutiny that a Bill receives, on the one side, and the importance of flexibility to meet changing circumstances, on the other. A Bill or part of a Bill that appears not to be attempting to make the balance, but simply to delegate power wholesale, may be described as skeleton legislation.

While skeleton legislation is often controversial, much of it is found on the statute book. And the political controversy is sometimes balanced by support from interest groups for whom the flexibility gained by using subordinate legislation is the key factor.

Further information can be found in *Craies on Legislation*, Chapters 1.3 and 3.1.

Social security

This term traditionally refers to the complex system of welfare state payments available in respect of the occurrence of certain contingencies, such as pregnancy and birth, having dependent children, work-related injury or disease, unemployment, increasing age, financial need, and death. The term encompasses contributory and non-contributory benefits and means tested and non-means tested (or “universal”) benefits. The system is mainly administered by the Secretary of State for Work and Pensions, but part of it is administered by Her Majesty’s Revenue and Customs and housing benefit is administered by local authorities. Basic provision for most of the payments is to be found in the [Social Security Contributions and Benefits Act 1992](#), the [Tax Credits Act 2002](#) and the many sets of regulations made under those and other statutes. Administration and adjudication is also provided for in the [Social Security Administration Act 1992](#). Under the [Tribunals, Courts and Enforcement Act 2007](#) (and regulations and rules made under that Act) most (but not all) social security decisions are subject to a right of appeal to the social entitlement chamber of the First-tier Tribunal and from there, on a point of law, to the Administrative Appeals Chamber of the Upper Tribunal. (See *Jowitt’s Dictionary of English Law*, 3rd Edition, 2010).

A general reference in legislation to “social security” (as in, for example, [section 15\(2\) of the Education and Skills Act 2008](#)) would probably be construed as a reference to the system provided under the 1992 Acts, as well as to the following specific benefits—

- Attendance Allowance
- Back to Work Bonus
- Bereavement Allowance (which replaced Widow's Pension from 9th April 2001)
- Bereavement Payment (which replaced Widow's Payment from 9th April 2001)
- Carer’s Allowance (formerly Invalid Care Allowance before 1st April 2003)
- Child Benefit
- Child's Special Allowance
- Child Tax Credit
- Cold Weather Payments
- Council Tax Benefit
- Constant Attendance Allowance
- Disability Living Allowance
- Employment and Support Allowance
- Exceptionally Severe Disablement Allowance
- Guardian's Allowance
- Graduated retirement benefit
- Housing Benefit
- Incapacity Benefit

- Income Support
- Industrial Injuries Benefits (including industrial injuries pension, reduced earnings allowance, retirement allowance, constant attendance allowance and exceptionally severe disablement allowance)
- Invalidity Benefit (replaced for most purposes by Incapacity benefit from April 1995)
- Jobseeker's Allowance
- Maternity Allowance
- Payments out of the Social Fund
- Pensioner's Christmas Bonus
- Pension credit
- Pensions payable under the Industrial Death Benefit scheme
- Reduced Earnings Allowance
- Retirement Allowance
- Severe Disablement Allowance
- State pension
- Statutory Adoption Pay
- Statutory Maternity Pay
- Statutory Paternity Pay
- Statutory Sick Pay
- War Widow's pension
- Widowed Parent's Allowance (which replaced Widowed Mother's Allowance for most purposes from 9 April 2001)
- Widow's pension
- Winter Fuel payment
- Working Tax Credit

Statutory Instruments: Ancillary Provision

Powers to make subordinate legislation routinely confer express power to make a range of ancillary provisions. A typical power might expressly permit “incidental, consequential and transitional provision”, but there are many variations on the theme.

A common variation is to mention “supplemental” as well as “incidental” provision. The addition is probably nugatory – it will rarely if ever be possible to imagine provision that is not clearly “incidental” to the main substance of an instrument but that is clearly both “supplemental” to it and also sufficiently closely related to it to be reliably included within the contemplation of a power of this generality.

Consequential provision is likely to include provision altering references in documents that become outdated as a result of the substance of the instrument. But a power to make consequential amendment of Acts of Parliament cannot be implied by a mere general power to make consequential provision. It is, however, fairly often provided for expressly.

Transitional provision is a broad category, in essence including anything required to effect an orderly transition from the law as it was before the instrument was made to the law as it will be when the instrument comes into force. Typically this would include provision for cases or instances which arise before the instrument is made but require to be completed after it comes into force; and typical provision would be to require those cases to continue in accordance with the “old” law, or in accordance with the “new” law but subject to specified modifications.

Reference is sometimes found to “transitional or transitory” provision. But the reference to “transitory” provision will rarely, if ever, be required. “Transitory” simply means having effect for a limited time, and given that a power to make provision by statutory instrument includes power to revoke ([Interpretation Act 1978, s. 14](#)) there is no reason why an instrument should not at the outset limit its own duration, without express power to do so.

The courts will as a rule construe words of the generality of “incidental, transitional and consequential provision” narrowly against the Government; and it is therefore good practice for the enabling legislation to set out expressly any particularly surprising or intrusive things that the subordinate legislation is to be able to include.

Further information can be found in *Craies on Legislation*, Chapter 3.4.

Statutory Instruments: Different Provision for Different Purposes

Statutes conferring power to make subordinate legislation commonly permit it to make different provision for different purposes.

One might think this generally unnecessary, but it is one of those provisions which once included in one context may become dangerous to omit in others.

The ability to tailor provision according to its purpose might be thought to be an inherent part of the delegated legislative process; one might even think it would be unreasonable and therefore unlawful to act otherwise.

The problem is that one of the ways in which Ministerial action may be found to be unlawful on the grounds of unreasonableness (see *Wednesbury* reasonableness) is if it is found to be arbitrary: and making one set of rules for one set of cases and another for another raises at least an appearance of arbitrariness.

Therefore the practice has arisen of expressly allowing different provision for different purposes. And of course if Act A has express provision it becomes increasingly difficult for the drafter of Act B to assure Ministers that they can safely make differential provision without express power.

Of course, as is so often the case, the mere fact that this is necessarily case in very wide terms tends to make it unreliable for anything very surprising or innovative. So some Acts feel the need to go further and permit, for example, different provision for different local authorities, or something along those lines.

A minor variation on the theme is provision expressly permitting subordinate legislation to be made either generally or only for specific purposes. Logically, this is neither more nor less necessary in a given context than the permission to make different provision for different purposes. If I need express permission to treat big dogs and small dogs differently, I need express permission to legislate only for big dogs and exempt small dogs.

Statutory Instruments: Draft affirmative procedure

Statutes frequently provide that a statutory instrument may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

There is no rigid rule for determining which powers should be subjected to this form of Parliamentary scrutiny and which can be allowed to proceed under the negative resolution procedure (see General Note: Statutory Instruments: Negative Resolution) or without any fixed Parliamentary procedure at all. The choice is one for the Government to make initially in proposing the legislation conferring the power, and for Parliament to change or confirm as the legislation passes through its Parliamentary stages. As a general rule, anything particularly unusual, extreme or intrusive is likely to be thought to require draft affirmative procedure; in particular, a power to amend other Acts of Parliament is likely to be subject to the draft affirmative procedure.

Where a power is likely to need to be exercised in emergency, the draft affirmative procedure may not be appropriate. The requirement to obtain a resolution of each House means, in particular, that the power cannot be exercised during the long summer recess. Various ways of dealing with this exist, including provision allowing the Minister to make the subordinate legislation in emergency without laying a draft, in which it is normal also to provide that the legislation lapses if not approved by Parliament shortly after its return from recess.

Similar arrangements exist in the devolved legislatures for subordinate legislation relating solely to Scotland, Wales or Northern Ireland.

Further information can be found in *Craies on Legislation*, Chapters 6 and 7.

Statutory Instruments: General

Statute confers large numbers of powers to make orders, regulations, rules and other kinds of subordinate legislation and quasi-legislation. Some but not all of these are made through the mechanism of something called a statutory instrument. The name of the form of legislation is not conclusive – although regulations are generally made by statutory instrument and guidance is not, orders are particularly miscellaneous, some being made by statutory instrument and some being made wholly informally.

The significance of whether or not a piece of subordinate legislation is made by statutory instrument lies in whether or not the provisions of the [Statutory Instrument Act 1946](#), particularly about printing and publication, will apply to it. And it is in that Act that the rules are found for determining whether a piece of legislation is a statutory instrument. Section 1 of the 1946 Act defines a statutory instrument as any exercise of a power to make legislation where the power expressly requires exercise “by statutory instrument”, plus all Orders in Council.

So in an Act conferring power to make subordinate legislation by rule, regulation, order or anything else other than Order in Council, if the Act does not expressly require the legislation to be made by statutory instrument, any exercise of the power will be informal and outside the provisions of the 1946 Act. Express provision is commonly found in the provision which confers the power; but it is also common to have a single provision towards the end of an Act providing for all, or a specified class of, subordinate legislation made under the Act to be made by statutory instrument.

The principal result of a piece of legislation being made by statutory instrument is to engage the rules about printing and publication in the Statutory Instruments Act 1946, as a result of which almost all statutory instruments are published shortly after being made, both in hard copy and on the Office of Public Service Information website.

A lesser known, but potentially significant, effect of a power being expressed to be exercisable by statutory instrument is to engage the implied power to amend and revoke in [section 14\(b\) of the Interpretation Act 1978](#).

Almost all statutory instruments are scrutinised after being made by the Joint Committee on Statutory Instruments, which can report to the two Houses of Parliament any technical irregularity or issue which the Committee thinks worthy of note. An adverse report has no legal consequence, but may have political significance. There is also a House of Lords Select Committee which looks at the substance of statutory instruments (the Merits Committee) and reports to that House issues arising.

Statutory instruments can be challenged by way of judicial review in the same way as any other exercise or purported exercise of administrative power. An instrument may be challenged as being beyond the powers conferred by the parent Act (*ultra vires*) or on any of the standard grounds for challenge of administrative action (principally procedural irregularity, unfairness and unreasonableness).

For more information about the nature, process and application of statutory instruments see *Craies on Legislation*.

See also General Notes: [Statutory Instruments: Ancillary Provision](#); [Draft Affirmative Procedure](#); and [Negative Resolution](#).

Statutory Instruments: Hybrid Instrument Procedure

In the House of Lords only, a procedure exists for subordinate legislation affecting particular private interests similar to the Hybrid Bill procedure for Bills that affect private interests.

Nowadays, however, it is usual for the statute conferring power to make legislation that could attract the rules of hybridity expressly to disapply the hybrid instrument procedure.

Further information can be found in *Craies on Legislation*, Chapter 6.2.

Statutory Instruments: Negative Resolution (including ref to resolution of Commons only, or Welsh Assembly).

Sub-delegation

There is a general principle that the recipient of a delegated power is not entitled to effect a further delegation to someone else. In the context of subordinate legislation this becomes the presumption that an instrument made under power delegated power by Act of Parliament may not itself delegate power.

To illustrate, if Act A enables the Secretary of State to make provision prohibiting dogs from entering parks, the power cannot be exercised so as to prohibit entry by dogs “which the Secretary of State certifies as being nasty, dirty or smelly”, because that would be delegating to the Secretary of State the power to prohibit dogs informally and other than through objective criteria established by the instrument itself. Nor can the instrument make provision by reference to dogs which the Kennel Club certifies as nasty, dirty or smelly, because that would amount to a sub-delegation of legislative power to the Kennel Club.

The presumption against sub-delegation does not, however, prevent a statutory instrument from referring to some “real-world” event, such as a list of breeds prepared by the Kennel Club for some general purpose, where there is no reason to believe that the list would be prepared with reference to, or be influenced by, its effect on the statutory instrument.

The presumption against sub-delegation can be rebutted expressly or by clear implication. So, for example, a statutory instrument implementing European Community legislation under [section 2\(2\) of the European Communities Act 1972](#) is expressly empowered to make any provision of a kind that could be made by Act of Parliament, as a result of which instructions under section 2(2) may themselves delegate power (subject to express restrictions). And it is fairly common to find an Act expressly authorising an instrument made under it to confer a discretionary function or to confer jurisdiction on a court or tribunal.

Further information will be found in *Craies on Legislation*, Chapter 3.5.

Textual Amendment

A large and increasing proportion of primary legislation operates by amending the text of earlier legislation. The technique has also begun to be used increasingly in statutory instruments.

The notion is, of course, essentially a fiction, based on the idea that there is a master “statute book” which the legislature can instruct a master-editor to amend. There is no such thing in reality – even the Government’s Statute Law Database is no more than an attempt to reflect in a reliable way what the state of the law is as a result of enactments and amendments – it is not in any sense a “master” copy of the statute book with legal authority.

But although the practice rests on a fiction, and although it is sometimes decried by Parliamentarians who find it difficult to see the effect of a new law as it is being made where it operates wholly by reference to amendment of old law, the technique is nevertheless often the clearest way of changing the law for the purposes of the reader and end-user of the statute book. By the time readers come to consult the Act or instrument for practical purposes, Westlaw UK will have taken the effect of the amendments into the earlier text, leaving a single up-dated statement of the law for the user to absorb.

In other cases, the clearest approach for the reader is either to make free-standing legislation (which may replace or supplement the earlier legislation) or to “gloss” the earlier legislation – qualifying it in some way so that it is to be read subject to and with an eye on the new legislation.

It is not always beyond doubt whether Act A is intending to amend earlier Act B or merely to gloss it in some way. In particular, the phrase “references in Act B to X are to be read as references to Y” might or might not be intended to effect a textual amendment. Readers – and commercial editors in particular – must make a sensible guess at the legislative intention and the most helpful way of presenting the law to readers. So, for example, if Act A says “references in Act B to dogs are to be read as references to cats” it will probably be safe for the commercial editor to go through Act B striking out ‘dogs’ and inserting ‘cats’, and noting it as an amendment effected by Act A. But if Act A says “references in Act B to dogs are to be read as including references to aggressive cats within the meaning of this Act”, it will be safest merely to add a note to references in Act B and not to attempt to alter the text. The right and intended approach will not always be absolutely clear, and it is conceivable that different commercial editors would make different decisions: but when in doubt it will generally be safest, and most convenient for readers, to err on the side of using a note and leaving the text alone.

The same goes for other formulae, such as “are to be taken as ...”, “are to be treated as ...” and so on.

Amendments of the statute book are said to be “always speaking”. This means that if Act A amends Act B, the provision of Act A is not a mere trigger which effects an amendment and is then void of effect: it remains active, perpetually ensuring the state of the law that it expresses as an amendment of Act B. This doctrine is important when considering repeals – Act A should not be repealed unless and until the change of law which it makes is no longer wanted to have effect.

Further information about the techniques and effect of amendments will be found in *Craies on Legislation*, Chapter 14.3.

Upper Tribunal

A court of record established by Parliament under the [Tribunals, Courts and Enforcement Act 2007](#) to hear appeals from tribunals formerly heard by courts, Social Security and Child Support Commissioners. It also has supervisory powers in respect of certain tribunals and public authorities (including Government departments). In essence, the Upper Tribunal is the appellate body for the First-tier Tribunal (q.v.).

The Tribunal can hear judicial reviews of certain decisions in respect of which there is no statutory appeal.

Writing

The effect of a requirement that something be done in writing - email and so on (check Stroud). Writing - see [sections 8 and 9 of the Electronic Communications Act 2000](#) and the [Unit Trusts \(Electronic Communications\) Order 2009 \(SI 2009/555\)](#) (duplicate this note for Craies).

See also the [Interpretation Act 1978](#).

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