

Chapter 2: The Creation of Law

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcomes from the ILEX syllabus:

- 3 Understand how an Act of Parliament is created
- 4 Understand the meaning of delegated legislation
- 5 Understand how the doctrine of judicial precedent operates

2.1 Introduction

There are three main sources of English law. These are sometimes referred to as “authorities” or “legal authorities”. Each is known by more than one name, and these are used interchangeably throughout most law courses. These are:

- **legislation**: this is written law that is made by a body that has a constitutional power to make law; this source of law can be divided into:
 - **Acts of Parliament**, also known as **statutes** or **primary legislation** – this type of legislation is made by Parliament, and it is discussed at **2.2–2.2.3**;
 - **delegated legislation**, also known as **secondary legislation** or **subordinate legislation** – this type of legislation is made by bodies to which Parliament has delegated law-making powers, and it is discussed at **2.3–2.3.2**; and
- **case law**, also known as **judge-made law** or **common law** – this is made in the courts, and it is discussed at **2.4–2.4.3**.

This chapter explains how each of these types of law is created. It will discuss:

- the consultation process that occurs before laws are drafted;
- the different types of Bill;
- how a Bill becomes an Act of Parliament
- what delegated legislation is, why it is used and how it is controlled;
- the use of decided cases as sources of law;
- the hierarchy of the English courts;
- the doctrine of judicial precedent.

This chapter concludes with a comparison of common law, equity and legislation.

2.2 Acts of Parliament

Acts of Parliament are, as their name suggests, laws made in Parliament. Every Act starts as a **Bill** (discussed in 2.2.2), which is written in formal parliamentary language so that, if it becomes law, it does not have to be re-drafted. In many cases, the Bill is drafted only after a **consultation process** (discussed in 2.2.1) has occurred, although there is no formal constitutional requirement for any consultation to take place.

An Act has a **short title** that includes:

- an indication of the subject-matter of the Act; and
- the year in which it was passed.

It also has a **Chapter number** – this indicates how many statutes had been passed in that year at the time it was passed.

Other important features of an Act of Parliament are:

- the list of **contents**, showing the scope and structure of the Act;
- the **long title** – this gives a description of the purpose(s) of the Act;
- the **date** when the **Royal Assent** was given; and
- the **words of enactment**, without which the Act would not have any validity.

As mentioned at 1.6.2, Acts are always divided into sections, and many also have Parts and/or Chapters to separate different topics. Many statutes have Schedules, giving details of related matters. It is normal now for an Act to be published with an Explanatory Note – this is not part of the Act itself, but is designed to give an overview of its operation.

Some Acts are passed to bring about **major reforms** to the **general law** of the land. The **Judicature Acts 1873–1875 (JA 1873–1875)** created the Supreme Court of Judicature (the High Court and the Court of Appeal), an entity that is still central to the English legal system. The collective name for these courts is now the **Senior Courts of England and Wales**, in order to avoid confusion with the Supreme Court, which was created by the **Constitutional Reform Act 2005** (this is discussed in 2.4.1).

Statutes can also bring about **major changes in particular areas** of law. In the 1920s a series of Acts, including the **Law of Property Act 1925**, the **Land Registration Act 1925**, the **Land Charges Act 1925** and the **Landlord and Tenant Act 1927** established a radically new system for the buying and selling of property, and this continued largely unchanged until the **Land Registration Act 2002**.

Statutes can be used to reflect **changing social attitudes**. In *Ghaidan v Mendoza [2004]*, the House of Lords upheld the decision of the Court of Appeal which, in 2002, had given legal recognition to a property right of a man in a stable homosexual relationship. The two men in the case had lived together from 1972 – at which time homosexuality was disapproved of by large sections of society – until the death of the first partner in 2001. Before the first partner's death, **HRA 1998** had come into force. The Court of Appeal interpreted the anti-discrimination provision as meaning that the surviving homosexual partner should be afforded the same right to inherit the tenancy of their shared home as a heterosexual partner would have had. This right was

subsequently included in the **Civil Partnership Act 2004**, which gave same-sex couples the opportunity to form legal relationships that give the parties most of the same rights as married couples – a situation that would have been completely unthinkable in Victorian times, when male homosexuality was a criminal offence that could lead to imprisonment.

Acts can also be used to **codify** the common law – that is, to put it into statutory form. The **Partnership Act 1890** was drafted to *declare and amend the law of partnership*, and specified that the common law rules that preceded it would remain in existence unless it expressly changed them.

Acts can be used to **consolidate** areas where previous legislation has become unwieldy. The **Equality Act 2010** brought together a number of statutes and regulations that prohibited discrimination against people on the basis of various protected characteristics.

An Act can be used to **amend** an earlier Act. This sometimes happens by the insertion into the older Act of new sections. These new sections are given numbers followed by upper-case (capital) letters, to avoid the need for re-numbering the whole of the Act. For example, the **Public Interest Disclosure Act 1998 (PIDA 1998)** was passed to protect “whistle-blowers” in the workplace. The Act does this by inserting new **ss43A–43L** into the **Employment Rights Act 1996 (ERA 1996)**. The new sections came into force in 1999, and offer statutory protection to employees who have made appropriate disclosures, in good faith, to an appropriate person or authority. An employee who wanted to claim this protection would do so under **ERA 1996**, not under **PIDA 1998**.

Some Acts become law amidst extensive publicity. One such Act is the **Banking Act 2009 (BA 2009)**, which was passed to enable the Treasury and the Bank of England to take unprecedented measures to save banks that appeared likely to collapse. Much less well-known is the **Co-operative and Community Benefit Societies and Credit Unions Act 2010**.

The “Queen’s Printer copy” – that is, the full text of the Act at the time it was enacted – of every Act passed since 1988 is available electronically at www.legislation.gov.uk. Some electronic databases, including LexisLibrary, provide the current text of all current UK Acts of Parliament, broken down by section numbers, and include notes as to when words were added, deleted or changed, and when sections came into force.

Document 2 of the **Appendix** contains excerpts from **BA 2009**, reproduced from various pages of the [legislation.gov.uk](http://www.legislation.gov.uk) website (**NB** The content of this Act is not part of the ILEX Unit 1 Unit Specification – it is included only as an **example** of some of the main features of an Act). It begins with the features identified above: its short title and Chapter number, followed by its long title, the date when it was granted Royal Assent and the words of enactment. There is then an excerpt from its Table of Contents, followed by selected sections of the Act. The excerpts show how the Act is divided into Parts, which include sub-headings, as well as section numbers. **s2** defines a “bank”, which is obviously a good starting point if the legislation is to achieve its intended purpose. **Part 8** defines other important terms and refers to statutory instruments (a form of delegated legislation) that may be made under the authority of this Act. Provision is made for the Act to be repealed by the Treasury, thereby delegating significant power and control to the Government Department responsible for banking. There are also references to other “orders” – a form of statutory instrument – that can be made under the Act: for instance, **s263(1)** provides

that the Treasury can, “by order”, decide when most of the Act should come into force. The last two sections specify the geographic extent of the Act and set out its short title, by which it is generally known.

2.2.1 Preliminary consultations

The idea for new legislation can come from a variety of sources. Government Ministers and civil servants may identify a political or practical objective, and these are often contained in the Queen’s Speech, which formally opens every new session of Parliament.

Another source of ideas for new legislation is the **Law Commission for England and Wales**, which is a full-time body established by the **Law Commission Act 1965**. Its duty is:

. . . to take and keep under review all the law . . . with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law . . .

The members of the Law Commission are appointed by the Lord Chancellor and must be judges, barristers, solicitors or law teachers. The Law Commission has the power to receive proposals for law reform, to undertake its own examination of areas of law and to submit proposals for law reform. Preparatory work done by the Commission on several important aspects of the criminal justice system was incorporated into the **Criminal Justice Act 2003**, which makes extensive changes to some aspects of the criminal justice system.

Historically, it was considered an insult to Parliament if any proposals for new statute law were not initially presented to Parliament. Since 2001, however, many Bills have been the subject of formal consultation before they are introduced in Parliament.

Government proposals may initially be published in a **green paper** – so called because the cover used to be green, although this is no longer the case – and there **may** then be a consultation period during which the Government seeks feedback and ideas from specialists and the general public.

The website of the Department of Business, Innovation and Skills (BIS) states that the Government follows a Code of Practice on consultation. The first page of the Code, part of which is quoted below, states that it is based on seven criteria.

“Criterion 1 When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2 Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

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