

The Queensland Legislation Handbook

Governing Queensland



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Introduction

The Queensland Legislation Handbook outlines relevant policies, recommendations, information, and procedures for the making of law in the form of Acts of Parliament or subordinate legislation.

The Queensland Legislation Handbook is part of the Governing Queensland suite of handbooks that supplies information about:

- the roles of Cabinet and the Executive Council (*Queensland Cabinet Handbook* and *Queensland Executive Council Handbook*)
- the roles and responsibilities of ministers and ministerial staff (*Queensland Ministerial Handbook*)
- the processes of drafting and approving laws (*Queensland Legislation Handbook* and *Parliamentary Procedures Handbook*).

The Queensland Legislation Handbook is particularly designed to help departmental policy or instructing officers work effectively with the Office of the Queensland Parliamentary Counsel (OQPC). This handbook outlines what is needed in drafting instructions for Acts of Parliament and subordinate legislation. Various other procedures associated with developing legislation are also included.

OQPC is responsible for drafting all Queensland government Bills and subordinate legislation (except exempt subordinate legislation) and drafts private members' Bills as required.

OQPC also drafts government and private member amendments for use during Parliament's consideration of a Bill. In providing these services, OQPC provides advice on alternative ways of achieving policy objectives and on the application of fundamental legislative principles.

This handbook is mainly about the production of government legislation and, for the sake of simplicity, only occasionally mentions the preparation of legislation for private members.

The Legislation website at www.legislation.qld.gov.au provides information about the publication of legislation and related legislative information by OQPC.

Correspondence about *The Queensland Legislation Handbook* should be addressed to:

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The Queensland Legislation Handbook can be accessed via the Department of the Premier and Cabinet's website at www.premiers.qld.gov.au in the Publications section (www.premiers.qld.gov.au/publications.aspx).

1 Context of legislation

This chapter considers legislation in its broadest context.

1.1 Legislation and the general law

Legislation is written against the background of the general law. The general law is the law that exists apart from legislation. The general law consists of the common law and the principles of equity, which are applicable in Queensland because of its history as a colony of the United Kingdom. The general law emerged from the history of the United Kingdom and did not rely on laws made by Parliament for its existence.

The general law is commonly referred to as judge made law because it is found in decisions of judges on particular cases brought before them. However, generally speaking, the contemporary role of a judge is essentially to declare the existing general law, not to make new law.

In Australia, only a Parliament may make legislation or authorise the making of legislation. However, because judges have the role of applying the laws of interpretation, if there is a dispute about the meaning of legislation, the judges decide the dispute.

1.2 Why legislation is needed

Under the general law, a person may obtain rights or be subject to obligations because of a particular legal relationship with another person. The relationship may arise because of agreement or because of a document made by a person conferring a power over the person's property on another person. It may be a legal relationship found to exist because of a civil wrong committed by a person. These relationships are essentially narrow in their ambit and can not be unilaterally created under the general law for all citizens or for all citizens of particular classes.

Only legislation, properly authorised and made, can unilaterally create or change rights and obligations of citizens generally, or change or affect the operation of the general law.

Legislation may also be an option chosen to present a policy in a particularly powerful way or to create a state of affairs that can only be further changed or brought to an end by legislation.

1.3 How legislation operates on a matter

Legislation may have its effect for a matter by:

- directly deciding the matter
- authorising someone else, that is, delegating the power to someone else, to make a law about the matter or decide the matter.

Legislation may incorporate another document by reference, whether or not the other document is itself legislation. Legislation may empower someone to make an instrument that is given effect to under the law. The instrument may be legislative in character or it may be administrative in character. The significance of its legislative or administrative character depends on the particular context.

The scheme of a particular piece of legislation consists of the directly applicable rules of conduct set out in the legislation and the way the legislation operates through other laws, legislation, documents, instruments and decisions. The way a scheme is constructed can depend on convenience of presentation, on practicality or on principles about the appropriateness of levels of power being used or delegated.

1.4 The power of the Parliament of Queensland

1.4.1 The plenary power

The Parliament of Queensland is authorised to make laws for the peace, welfare and good government of Queensland (*Constitution Act 1867*, section 2). This is a plenary or full power. However, the power is subject to the limits and guarantees found in the Commonwealth Constitution.

Most of Queensland's State constitutional framework is now set out in the *Constitution of Queensland 2001*. This Act consolidates much of Queensland's original constitutional legislation and contains signposts to constitutional legislation that was not consolidated in the Act because of procedural requirements.

The Parliament of Queensland consists of the Queen and the Legislative Assembly. Queensland is the only jurisdiction in Australia that does not have an upper house, with the Queensland Legislative Council having been abolished in 1922. In Queensland, the Queen's role in the Parliament is performed by the Governor.

The *Parliament of Queensland Act 2001* deals with the machinery of the Parliament of Queensland. Generally, legislation applying in Queensland must be made by, or authorised by, the Parliament of Queensland.

Commonwealth legislation also applies in Queensland and legislation of other Australian jurisdictions may apply in Queensland if it has extraterritorial effect. Very occasionally, older legislation of New South Wales and the United Kingdom may apply because of Queensland's colonial history. Relevantly, the *Australia Act 1986* (Cwlth and UK), section 1 provided that no Act of the Parliament of the United Kingdom passed after the commencement of the Australia Act extends to the Commonwealth, a State or a Territory.

1.4.2 Extraterritorial application of the plenary power

The plenary power can even have an effect outside Queensland if there is a sufficient connection with Queensland. Under the *Australia Act 1986* (Cwlth and UK), section 2(1), the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extraterritorial operation.

An important example of general provisions that have extraterritorial effect concerns the criminal law.

Sections 12(2) to (4), 13, and 14 of the Criminal Code apply Queensland criminal law to acts or omissions, and persons, outside Queensland if the preconditions expressed in the relevant section that connect the acts or omissions, and persons, to Queensland are met.

Also, the application of criminal law offshore from Queensland is dealt with by a cooperative scheme of legislation that relies on the extraterritorial power. Under this scheme, Australian jurisdictions have combined their extraterritorial powers to enact laws in the same terms applying the substantive criminal law of each State offshore from each State. The application of the laws of criminal investigation, procedure and evidence is also dealt with by the scheme. Provision is also made for an intergovernmental agreement dividing responsibility for administering and enforcing the law relating to maritime offences. See the *Crimes at Sea Act 2000* (Cwlth), the *Crimes at Sea Act 2001* (Qld) and corresponding legislation in other Australian jurisdictions.

For additional power to apply State law offshore, see the material about the offshore settlement under chapter 1.4.3.

1.4.3 Relationship with the Australian Constitution

The Queensland Parliament's plenary power is subject to the Australian Constitution. Under the Australian Constitution only the Commonwealth Parliament may make laws about a particular list of matters. Also, in relation to another list of matters, if the Commonwealth Parliament makes a law, the law overrides a State law on the same matter, and the State law is invalid to the extent it is inconsistent with the Commonwealth law.

Also, there are Commonwealth Acts that confer jurisdiction, rights and power on the state, subject to those Commonwealth Acts. For example, in a legislative framework commonly referred to as the 'offshore settlement', the two Commonwealth Acts mentioned below confer jurisdiction, rights and powers on the State in relation to offshore matters. The information set out in the next column is indicative only, and the relevant Acts must be read carefully to understand the limitations placed on the State by the Commonwealth Acts.

Coastal Waters (State Powers) Act 1980 (Cwlth)

This Commonwealth Act extends the legislative power of the State to the making of laws having effect offshore from the State and beyond the territorial limits of the State.

Coastal Waters (State Title) Act 1980 (Cwlth)

This Commonwealth Act directly vests in the State right and title to property in the sea-bed, and the space above the sea-bed, offshore from the State and beyond the territorial limits of the State.

The Queensland Parliament has, in the *Acts Interpretation Act 1954*, part 12, formally exercised power under the *Coastal Waters (State Powers) Act 1980* (Cwlth). This follows previous reliance on the declaration in the *Acts Interpretation Act 1954*, section 9(1)(a).

1.5 How Parliament makes legislation or authorises the making of legislation

1.5.1 Act of Parliament

The Parliament of Queensland makes legislation or authorises the making of legislation by enacting an Act. This means the Legislative Assembly passes a Bill for the Act and the Bill is given royal assent. On assent the Bill becomes an Act.

All persons are required to take note of, and comply with, an Act. If, according to its terms, a provision applies to a person, the person and all other persons may rely on, or are bound by, the provision.

An Act is essentially a sequence of provisions containing statements and rules.

1.5.2 Subordinate legislation

Generally speaking, subordinate or delegated legislation is legislation authorised by (made under) an Act of Parliament. This type of legislation can be made if the Parliament, by an Act, delegates the authority to make subordinate legislation to another body or person.

In Queensland, particular instruments made under Acts are 'subordinate legislation'. If an Act gives an instrument this label, the instrument must be tabled in the Legislative Assembly and can be disallowed by it. Subordinate legislation is a special subcategory of statutory instruments.

The most familiar example of subordinate legislation is a regulation made by the Governor in Council.

Chapter 6.1 gives more information about types of subordinate legislation.

1.6 Information about the following chapters

1.6.1 Act of Parliament

The appendix is a flow chart describing the process for making an Act of Parliament. The major stages shown on the flow chart correspond with chapters of this handbook as follows:

Appendix flow	Corresponding chart stages chapters of handbook
Policy development	Chapters 2 and 7
The draft	Chapter 3
The parliamentary process	Chapter 4
Royal assent	Chapter 5

1.6.2 Subordinate legislation

Chapter 6 of this handbook considers issues relevant to the development of subordinate legislation.

The information in chapter 3 about the drafting process, especially the information on the roles of instructing officer and drafter, also applies in the subordinate legislation context.

The consideration of fundamental legislative principles in chapter 7 includes issues specific to subordinate legislation.

1.7 Glossary

A glossary of terms commonly encountered in the Queensland legislative context is located at the end of this handbook.

2 Policy development of a government Bill

This chapter considers the policy information needed to draft a government Bill. For more information about policy development, see *The Australian Policy Handbook*,¹ and for information about the drafting process, see chapter 3 of this handbook.

2.1 The nature of policy

‘Policy’ is defined in various ways, including as a statement of government intent (see *The Australian Policy Handbook*).²

Policy may give rise to legislation if it needs to be declared or enforceable or, on rare occasions, if its presentation as legislation has significance. For example, the *Carers (Recognition) Act 2008*, in section 8, expressly states that it does not create legal rights.

2.2 Is a new law needed?

Policy may be implemented in many ways that may or may not require legislation. For example, it may be preferable to make agreements or industry codes of practice to implement a policy. There must be significant reasons before choosing to implement a policy through an Act of Parliament. These reasons may include:

- existing rights and obligations must be modified and this may only be done effectively by intervention of the Parliament
- permanency is necessary for the policy being implemented and this may only be achieved by an Act of Parliament
- the high level of importance given to the policy by the government means that an Act of Parliament is the appropriate way to present the policy to the community.

The following matters usually suggest that an Act should not be used to implement policy:

- the policy does not modify existing rights and obligations
- the policy is purely administrative in character
- the policy is not of sufficient significance to justify it being given permanency in an Act of Parliament.

The Queensland Cabinet Handbook requires that an Authority to Prepare a Bill submission needs to include justification about why legislation is required. Ensuring legislation is appropriately justified and proportionate to the desired policy outcome is particularly important in the context of the government’s target of reducing the regulatory burden on businesses and the community by 20 per cent overall by 2018. More information on this target and the initiatives the government is implementing to meet it may be found on the Office of Best Practice Regulation’s website at www.qca.org.au/obpr/rbr/.

It is advisable to consult with OQPC before Authority to Prepare approval is sought to ensure possible alternatives to legislation are identified and, if legislation is necessary, to ensure the regulatory burden is minimised, having regard to the required policy outcomes and the principles of good legislation.

2.2.1 Regulatory best practice principles

In developing a regulatory proposal, agencies must consider the Council of Australian Governments’ Principles of Best Practice Regulation (www.finance.gov.au/obpr/proposal/coag-requirements.html).

These regulatory best practice principles are embedded in the government’s regulatory impact statement (RIS) system established by guidelines approved by the Treasurer. The RIS system applies to the development of primary and subordinate legislation and quasi-regulation.

The Office of Best Practice Regulation in the Queensland Competition Authority has a focus on regulatory activities generally and, in particular, provides advice, assistance and training on the RIS process, including advice as to whether a RIS is required in a particular case. For more information, see www.qca.org.au/OBPR.

The Queensland Cabinet Handbook contains further information about the regulatory best practice principles, and requires that a submission proposing a regulatory option demonstrate consideration of the principles.

2.3 Does the State have power to make the law?

The State has very wide powers to make laws, including laws having extraterritorial effect if some connection with the State can be established, but the State’s powers are subject to the Australian Constitution. See chapter 1.4 for more information on the Parliament’s power.

2.4 Bill or subordinate legislation?

A Bill is an expression of government policy and should clearly deal with all matters of importance for the implementation of that policy. Matters of detail and matters likely to experience frequent change, for example fees, should generally be contained in subordinate legislation or authorised by the Governor in Council, a minister or a chief executive.

2.5 Portfolio Bills

Ministers often find it convenient to deal with amendments to a number of Acts they administer in a portfolio Bill. Portfolio Bills are particularly useful for the housekeeping amendments necessary to keep Acts up to date and for minor policy change. Nevertheless, it is open to a minister to use a portfolio Bill to introduce a range of new policy initiatives across a range of portfolio Acts, or to introduce a single significant policy change requiring the amendment of a number of Acts.

2.6 Sponsoring a Bill

Ministers generally sponsor Bills, but any member of the Legislative Assembly may sponsor a Bill.

2.7 Role of policy or instructing officers

A policy or instructing officer from the relevant department has the day-to-day responsibility for the development of a government Bill. During the development stage, the officer must gain a full understanding of what the proposed Bill is intended to achieve. The officer must become thoroughly familiar with the proposal's detail and its interaction with other laws. The officer must be ready to brief ministers about any difficulties in achieving policy objectives and to assist or appear before the relevant portfolio committee. The officer's role is more fully considered in chapter 3.4.

2.8 Establishing a practical timetable

Well-drafted laws are generally not conceived and drafted within a short period of time. A Bill, particularly a large, complex or controversial Bill, can take a long period to complete.

It may take a year or more for the policy for a medium-sized Bill to be developed (that is, from being originally conceived to obtaining Cabinet's approval to prepare the Bill). Large, complex or controversial Bills may take a very long time. While it may be a relatively swift task to identify the broad parameters of a Bill, it is a much lengthier task to identify the detail of a Bill in a way that ensures its objectives are achieved in a practical, effective and efficient way.

In establishing a timetable for putting into place a new legislative scheme, sensible provision must be made for every step of the process. This involves consideration of realistic time periods for:

- initial development of policy
- consultation, both within and outside government, as required (in particular as required by *The Queensland Cabinet Handbook*) and as otherwise considered appropriate
- departmental and ministerial approval of the Cabinet Authority to Prepare a Bill submission, including preparation of the drafting instructions for the Bill
- Cabinet approval of the Authority to Prepare a Bill submission

- drafting
- final consultation
- final drafting and preparation of the Bill for introduction, including preparation of the explanatory notes for the Bill
- departmental and ministerial approval of the Cabinet Authority to Introduce a Bill submission
- Cabinet approval of the Authority to Introduce a Bill submission
- passage through the Parliament, including referral to a portfolio committee for examination for a period up to six months
- subsequent commencement and implementation.

Provision of appropriate periods of time for all of these steps is essential for the effective and efficient progressing of the legislative scheme.

Experience suggests that, unless a Bill is given particular priority, the following time periods are realistic indicators of the time requirements for the drafting components of a Bill:

- for a small Bill (20 pages or less)—three months
- for a medium Bill (21–90 pages)—six months
- for a large Bill (over 90 pages)—12 months.

In allowing sufficient time for the drafting of the Bill, it must also be remembered that the priority given to the drafting of the Bill depends on the Bill's priority at a whole-of-government level.

Drafting time also depends heavily on the quality of the drafting instructions. Detailed, well-considered drafting instructions will repay the initial cost of time and resources in their preparation by minimising the drafting time needed to produce a final draft (see chapter 3).

Well-drafted laws, which can be expected to result from an appropriate preparation period, bring other rewards to government and the community generally. They are more easily understood and offer certainty in their application. This generally attracts a higher level of compliance because people better understand what the law requires of them. It also leads to less frequent litigation and less of a burden on the court system.

2.9 Obtaining appropriate advice

The preparation of well-drafted legislation requires input from skilled, experienced professionals. At the development stage, the carriage of the matter will generally be given to an experienced policy or instructing officer. That officer will routinely seek the input of skilled persons from other areas of the relevant department and, in appropriate cases, the specialist skills of a consultant.

Within the officer's department, there may be an internal policy or legal services unit that is able to provide advice from a departmental perspective.

Outside the officer's department, a number of central agencies may provide whole-of-government advice, some of which are listed below:

- The Department of the Premier and Cabinet's Policy Division provides whole-of-government policy advice on a wide range of matters including, for example, the development of sound legal frameworks that help government achieve its policy objectives.
- OQPC provides advice on the application of fundamental legislative principles, whether legislation is necessary and alternative ways of achieving policy objectives and other legislative issues that arise.
- The Department of Justice and Attorney-General provides advice on offences, on powers of police and other State officials, and on interaction with Commonwealth corporations legislation (see sections 2.11.4 and 2.11.14).
- The Crown Solicitor and other legal teams within Crown Law provide general and specialist legal advice, particularly on any matter affecting the state's liability.
- The Solicitor-General also provides legal advice, particularly on constitutional matters.
- The Office of Best Practice Regulation in the Queensland Competition Authority is the central point of contact for advice, guidance and training about reducing the regulatory burden and about the government's RIS system.
- The Treasury Department also provides advice on financial matters and National Competition Policy issues.

Obtaining appropriate advice at the development stage often removes difficulties that might mean the difference between gaining or not gaining Cabinet support for the objective.

It should also be noted that *The Queensland Cabinet Handbook* includes specific requirements for consultation with other departments and committees and the community. Some of these requirements are mentioned in chapter 2.11.

2.10 Considering fundamental legislative principles

Policy and legislative development should always occur within the broader framework of the principles of good legislation, including the fundamental legislative principles.

Fundamental legislative principles need to be considered in policy development for a government Bill. Fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, section 4(1)). The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

Chapter 7 deals separately with this topic.

2.11 Other matters needing consideration for thorough policy development

2.11.1 General application provisions

Generally

Legislation tends to be expressed as applying generally to all persons and things. This is sufficient for the vast majority of legislative purposes. However, there are some occasions when it may be necessary to make overarching statements about the application of the whole legislation. For example, an issue may arise about whether the legislation is to bind the State or another Australian body politic, or whether the legislation is to have extraterritorial effect.

Binding on the State or another Australian body politic

The instructing department must specifically consider and address whether or not the Bill is to bind the State (and the other states and the Commonwealth). *The Queensland Cabinet Handbook* requires that this matter be specifically addressed in the Authority to Prepare a Bill submission.

In Queensland, the *Acts Interpretation Act 1954*, section 13 provides that an Act does not bind the State unless express words are included for that purpose. However, clarity is required in legislation and case law suggests that the issue should be dealt with expressly or by necessary implication in each Act.

The state's ability to bind the other states and the Commonwealth is limited. For example, the Australian Constitution, section 114 provides:

A State shall not, without the consent of the Parliament of the Commonwealth, ... impose any tax on property of any kind belonging to the Commonwealth ...

If an ability to bind the Commonwealth or the other states to achieve a particular outcome is essential, legal advice on the validity of the proposal should be obtained at the earliest possible stage.

Extraterritorial application

If the nature of the legislation is such that the implementation of its policy will require persons and events outside the State to be covered by the legislation, then it is essential that this is made clear in the legislation.

The Criminal Code, sections 12(2) to (4), 13, and 14 and the *Crimes at Sea Act 2001* seek to ensure that the substantive criminal law of Queensland has an appropriate extraterritorial application.

However, other aspects of legislation may also require specific application to persons and circumstances outside the State generally or require provisions making it clear the legislation has effect offshore under the offshore settlement (see chapter 1.4.).

2.11.2 Commencement and expiry

An Act commences on the date of assent unless the Act expressly provides otherwise (*Acts Interpretation Act 1954*, section 15A). Often, an Act will include specific arrangements for its commencement, for example by specifically stating a commencement date for the whole Act or for particular provisions of the Act, or by providing for the commencement of the Act or particular provisions of the Act on a day to be fixed by a proclamation.

An Act or provision of an Act that has not commenced within one year of the assent day automatically commences on the next day, although a regulation may extend the period of one year by a further maximum period of one year (*Acts Interpretation Act 1954*, section 15DA). Legislation may not be commenced in a way that results in it having an effect different to that which Parliament intended when the legislation was enacted.

For practical reasons, the timetable for the commencement of provisions of an Act should be known at the earliest possible stage. If possible, the timetable for commencement should be stated in the Bill instead of being left to proclamation. Overlapping, complex, delayed and excessively separated commencement of provisions can make it difficult to understand what is the applicable law at a particular time.

The timely, efficient and accurate preparation of reprints of legislation also requires that the timing of the commencement of legislation be known as soon as possible and be kept as simple as possible.

Occasionally, because of particular policy considerations, Acts provide for their own expiry at some specified future time. This is referred to as a sunset clause. Expiry provisions are seen more frequently in subordinate legislation, usually arising out of the declaratory or transient nature of some subordinate legislation.

There are no statutory or other arrangements requiring OQPC to warn departments of the forthcoming automatic commencement of any Act or provision of an Act. Nor are there arrangements for warning of the forthcoming expiry of any Act. OQPC is required to give advice about the forthcoming expiry of subordinate legislation, but only in the context of staged automatic expiry under the *Statutory Instruments Act 1992*.

2.11.3 Consequential amendments

Research should be conducted on the impact of the proposed Act on existing legislation and other laws. All provisions of Acts and subordinate legislation requiring amendment as a consequence of the proposed Act should be identified.

2.11.4 Enforcement of provisions

A provision imposing a liability or obligation must make it clear how the liability or obligation is to be enforced. In particular, if it is proposed that a breach of a provision creates a liability to a penalty, that should be made clear. However,

it may not be necessary or desirable to create an offence if other legislation already covers the intended offence. In particular, if the Criminal Code provides for an offence, it is undesirable that another Act should erode its nature as a comprehensive code by providing for the same or essentially the same offence.

Appropriate provision needs to be made about the enforcement process to be followed. For example, for the prosecution of an offence, it should be clear whether the prosecution is to be on indictment or to be dealt with in summary proceedings.

Penalties in a Bill are presented as fines or, for more serious offences, terms of imprisonment. Fines are generally expressed as a specified number of penalty units. See the *Penalties and Sentences Act 1992*, section 5 for the value of a penalty unit. See that Act also for penalty options other than imprisonment or a fine.

Penalties must be internally consistent and also consistent with government policy and other legislation. They should reflect the seriousness with which the Parliament views a contravention of the provision to which the penalty attaches. Offences that are dealt with summarily, that is, simple offences, and indictable offences when dealt with summarily, should not ordinarily carry a penalty greater than two years imprisonment.

Penalties for a contravention of subordinate legislation should generally be limited to not more than 20 penalty units.³

In relation to enforcement matters generally, it should be noted that *The Queensland Cabinet Handbook* requires that the Department of Justice and Attorney-General be consulted about legislative proposals involving the creation of new offences or the giving of increased powers to police (see also chapter 2.11.7) or other State officials, and proposals affecting court or tribunal processes or resources. It should be noted, for example, that an increase in the maximum penalty for an offence may have an effect on court resources if that offence can no longer be dealt with summarily.

Depending on the nature of the legislation, it may be necessary to make express statements about the enforcement or non-enforcement of the legislation against children. In preparing legislation, it may be necessary to test the enforcement provisions in the legislation against the *Childrens Court Act 1992*, the *Youth Justice Act 1992*, the *Police Powers and Responsibilities Act 2000* and other legislation making special provision for children to gain an understanding of whether the proposed enforcement provisions are appropriate for children.

2.11.5 Forms

If forms are required for an Act, current legislative drafting practice is generally to provide for the forms to be administratively approved, rather than prescribed by the Act or subordinate legislation.

Administratively approved forms are generally approved by the chief executive of the department administering the legislation. These forms can be amended quickly if necessary.

Each administratively approved form is required to be given a unique number and approval or the availability of the form must be notified in the gazette (*Acts Interpretation Act, s 48*). If a form is approved under an Act for a particular purpose, the form may only require information or documents that are reasonably necessary for this purpose (*Acts Interpretation Act, s 48A(4)*). Further, if a form is approved under an Act, strict compliance with the form is not necessary and substantial compliance is sufficient (*Acts Interpretation Act 1954, s 48A(1)*).

2.11.6 National Competition Policy

The Treasury Department is responsible for the coordination of National Competition Policy implementation across departments. All legislative proposals for Cabinet consideration with competition policy implications or financial implications should be the subject of consultation with the relevant business group within the Treasury Department.

For further information, policy or instructing officers should refer to *The Queensland Cabinet Handbook*, and consult with relevant officers in the Treasury Department.

2.11.7 Police powers

A principal objective of the *Police Powers and Responsibilities Act 2000* is to consolidate all powers relating to police officers in one Act. Generally, any action to give additional powers to police officers should be by amendment of that Act.

2.11.8 Regulation-making power

The *Statutory Instruments Act 1992*, particularly in sections 21 to 31, provides for specific regulation-making powers. For example, section 22 provides that, if an Act authorises the making of statutory instruments, the power will include a power to make a statutory instrument with respect to any matter that is necessary or convenient for carrying out or giving effect to the Act. If regulations are intended that go beyond this power, it may be that additional regulation-making powers need to be expressly stated in the Bill.

2.11.9 When Act operates

An Act has prospective operation, unless a contrary intention appears. Retrospective operation of an Act requires considerable clarity of objective and expression. A retrospective operation is most easily accepted by a court if it has a beneficial effect for members of the community affected by the retrospectivity. If the intention is to have an adverse effect operating retrospectively, the policy objectives need to be particularly clear and capable of express provision in the Act.

Achieving retrospectivity in the criminal law in particular requires a considerable degree of express precision.

Retrospectivity is generally limited to matters of process and other incidental matters.

2.11.10 Statutory bodies and statutory office holders

If an Act establishes a statutory body, the nature of the body should be clear on the following points:

- whether or not the body represents the State
- how appointments to the body are made
- the status of employees of the body (for example, whether the *Public Service Act 2008* applies) and whether particular Acts of general application apply to the body, including, for example:
 - *Crime and Misconduct Act 2001*
 - *Financial Accountability Act 2009*
 - *Public Records Act 2002*
 - *Statutory Bodies Financial Arrangements Act 1982*
 - if the body is a corporation, the extent to which it is subject to the corporations legislation.

It is important to keep in mind the corporate or non-corporate nature of a body being established by, or dealt with in, legislation. If a body is non-corporate, it is not the practice to give it attributes normally reserved for bodies with legal personality. Responsibility for something done or omitted to be done, or power to take legal or significant action, is normally allocated only to someone or something with legal personality.

It is also important to ensure unnecessary statutory bodies, particularly corporate bodies, are not created. If the activity involved is a government activity and those concerned are able to act under the ordinary authority of the State, there needs to be a substantial justification for the creation of the statutory body. Creation of statutory bodies, when administrative arrangements would be sufficient, erodes the flexibility of executive government and causes unnecessary problems when administrative changes in responsibilities happen.

It can also be difficult for the community to understand where responsibility for something lies.

In preparing a provision authorising appointment of a member of a statutory body, issues concerning conflict of interest should be considered. If it is intended that the holder of an existing class of office may be appointed as a member of the statutory body and a conflict of interest arises between the two offices, it may be necessary to expressly authorise such an appointment and provide for ways to avoid the conflict.⁴

If it is proposed that criminal history checks must or may be made in relation to persons proposed to be appointed as members of a statutory body, appropriate provisions should be included authorising the public sector entities holding the required information (for example, the Commissioner of the Police Service) to be approached and to disclose the information.

Sometimes an Act provides for a new statutory office (as opposed to a new statutory body). An Act that creates an office must contain provisions securing the independence of the holder of the office to the degree appropriate to the office.

2.11.11 Time

The time factor should always be carefully considered when developing new or amending provisions.

For example, if a provision deals with a set of circumstances, some of which could happen before the provision commences and some after, it may be that a specific provision is needed to deal with the earlier circumstances. This is essential when introducing a criminal offence, penalty or process change. Existing processes that need to be examined with care when legislative change happens include any litigation, enforcement, appeal, review or administrative application processes. See also chapter 2.11.12.

Also, if the Bill requires a person to do something, when the thing is to be done needs to be stated. If no express statement is made, the thing is to be done as soon as possible, and as often as the relevant occasion happens—see the *Acts Interpretation Act 1954*, section 38(4). This can sometimes be impractical to administer.

2.11.12 Transitional and savings provisions

Proper consideration should be given to transitional and savings provisions. Some examples of matters to be considered include:

- the application of the existing legislation or the proposed legislation to cases that arose before the change
- rights or expectations a person may have under the existing legislation
- the extent to which things done under the existing legislation are to have effect under the proposed legislation.

Some occasions, when express transitional or savings provisions may be required, have been mentioned in relation to provisions taking account of the time factor (see chapter 2.11.11). Transitional provisions are also often required when amending or replacing schemes for the grant of any form of property, right, privilege, authority or licence, and in order to continue decisions, appointments or appeals or the right to decide, appoint or appeal.

The *Acts Interpretation Act 1954*, part 6, contains standard provisions applying to all legislative change. In deciding whether specific transitional or savings provisions should be prepared that replace or supplement the standard provisions, it is relevant to consider whether specific provisions would merely confuse the operation of the standard provisions, or whether there is good reason for including a specific provision. A difficulty with the standard provisions is that there is much case law about their interpretation.

If the impact of the legislative change on existing matters is sensitive or difficult to decide, specific transitional or savings provisions should be prepared.

If possible, subordinate legislation made under a repealed Act should not be carried over under a new Act. Even when the repealed Act and the new Act remain similar, changes to language and concepts can make administering and interpreting any subordinate legislation carried forward very difficult. If the new Act carries forward subordinate legislation made under the repealed Act, the new Act should provide that the subordinate legislation is repealed at a stated time.

2.11.13 Delegations

An Act commonly authorises an official to whom a power is given under the Act to delegate the power to another suitably qualified person. The actual delegation of the power is the subject of a separate instrument. However, if an amending Act will, in substance, vary a delegated power, including by adding to the power, the instructing officer should note this during the drafting process and prepare for any adjustment of delegations necessary for when the amending Act commences. It should not be assumed that an existing delegation, no matter how widely drawn, will still be effective to delegate the power as expanded or varied.

The *Acts Interpretation Act 1954*, section 27A provides for standard provisions about delegations.

2.11.14 Inconsistency with *Corporations Act 2001* (Cwlth)

If proposed legislation could be inconsistent with the *Corporations Act 2001* (Cwlth) and will require notification to, and approval of, the Legislative and Governance Forum for Corporations (previously the Ministerial Council for Corporations), *The Queensland Cabinet Handbook* requires that this should be the subject of consultation with the Department of Justice and Attorney-General.

2.11.15 National scheme legislation

The principal objective of national scheme legislation is to ensure a consistent national approach. All legislative proposals that involve, or may have an impact on, national scheme legislation should be referred to the parliamentary counsel for advice. For further information about drafting national scheme legislation, see the Parliamentary Counsel's Committee website at www.pcc.gov.au.

2.11.16 Liability of directors or executive officers of corporation for the corporation's offences

Proposed legislation should not make directors or executive officers of a corporation personally liable for offences committed by the corporation unless there is clear justification for so doing.⁵

If it is proposed to include a legislative provision imposing this liability, the Premier must first be consulted, after which the case for including the provision needs to be considered by Cabinet at Policy or Authority to Prepare stage. If a provision is included, it must not reverse the onus of proof. That is, it must not require a director or executive officer to prove that he or she did not authorise or permit the conduct of the corporation that constituted the corporation's offence.

The *Directors' Liability Principles* published by the Council of Australian Governments (COAG) should be considered in deciding if the imposition of this kind of liability, sometimes referred to as 'derivative liability', is justifiable in particular circumstances. The *Directors' Liability Principles* include the following:

- A corporation should, in the first instance, be held liable if it contravenes a statutory requirement.
- Legislation should not impose 'blanket' or 'general' liability on a director or executive officer of a corporation for the corporation's contravention of a statutory requirement.
- A director or executive officer of a corporation should be made personally liable for a contravention of a statutory requirement by the corporation only if:
 - there is a compelling public policy reason;
 - holding the corporation liable is not likely on its own to be sufficient to promote compliance with a statutory obligation; and
 - it is reasonable in all the circumstances for the director or executive officer to be made liable—for example, if the obligation on the corporation, and therefore the director or executive officer, was clear, the director or executive officer had the capacity to influence the conduct of the corporation in relation to the contravention and there were reasonable steps that he or she might have taken to ensure the corporation did not engage in the conduct constituting the contravention.
- In addition to the *Directors' Liability Principles*, COAG's publication *Personal Liability for Corporate Fault—Guidelines for applying the COAG principles* should also be considered.

3 The drafting process

This chapter considers the drafting process from the perspective of OQPC's involvement.

OQPC may be involved in the drafting process before an Authority to Prepare a Bill submission is approved by Cabinet, or another appropriate authority is obtained. However, the formal drafting process starts when there is Cabinet Authority to Prepare a Bill approval, or other appropriate authority, and drafting instructions are sent to OQPC. After the drafting is completed, a Cabinet Authority to Introduce a Bill submission should be lodged.

This chapter considers the drafting process at the following stages:

- before the Cabinet Authority to Prepare a Bill submission
- after the Cabinet Authority to Prepare a Bill approval is obtained
- preparation of drafts, including the roles of the instructing officer and the drafter and the importance of effective drafting instructions
- obtaining the Cabinet Authority to Introduce a Bill approval.

In carrying out its statutory role, OQPC's duty in relation to government legislation is to the government as a whole and not simply to individual ministers, departments or members—see *The Queensland Cabinet Handbook*. OQPC is attached to the Department of the Premier and Cabinet and reports to the Premier.

3.1 OQPC's involvement before Authority to Prepare a Bill approval

OQPC can be involved in the preparation of legislation before an Authority to Prepare a Bill approval is obtained from Cabinet. This involvement can include the following:

- The sponsoring department may discuss with OQPC the options for a legislative proposal before or during the department's preparation of the relevant submission. An important option to consider is whether legislation is necessary and, if it is, how the regulatory burden can be minimised, having regard to the required policy outcomes and to the principles of good legislation.
- When a Cabinet submission for Authority to Prepare a Bill is circulated, OQPC may provide a briefing note to the Policy Division of the Department of the Premier and Cabinet as part of the department's processes to brief the Premier on Cabinet submissions.
- There may be a special arrangement for OQPC to start drafting before Cabinet Authority to Prepare a Bill approval has been obtained.

3.1.1 Sponsoring department discussions with OQPC before finalising submission

Policy officers may discuss with OQPC proposals for legislation as part of the departmental process of identifying options for dealing with an issue, before preparing the Authority to Prepare a Bill submission or during the preparation of the submission.

OQPC's central role in preparing legislation for the government as a whole allows it to identify useful legislative schemes for consideration by the instructing officer, issues involving fundamental legislative principles, alternative ways of achieving policy objectives and other relevant matters.

3.1.2 Submissions circulated to OQPC for comment

Generally, a Cabinet submission for Authority to Prepare a Bill is circulated to OQPC. OQPC considers the drafting instructions accompanying the submission and comments on any aspect relevant to the drafting process.

In particular OQPC comments on any potential inconsistency with fundamental legislative principles suggested by the submission or attached drafting instructions. Other comments may be about the condition of the drafting instructions and the inconsistency between the instructions and Queensland Government policy.

If appropriate, OQPC prepares a briefing note for possible referral of its views to the Premier. The briefing note is given to the Policy Division of the Department of the Premier and Cabinet. Also, a copy of the note is sent to the instructing officer.

3.1.3 Drafting before Cabinet has approved a submission for Authority to Prepare a Bill

The general rule is that drafting of a Bill does not commence until Cabinet has authorised, by Cabinet decision, the Bill's preparation.

The reasons for this are essentially practical, for example, whether it is appropriate to bring drafts into existence before the government as a whole has had an opportunity to direct the process and whether it is an effective use of resources to draft legislation not approved by Cabinet when there may be legislation already approved by Cabinet that has not been finalised.

However, there are exceptions to the general rule. The Premier may authorise drafting to start at an earlier time. If it is inconvenient to obtain the Premier's authorisation, the Director-General or some other senior officer of the Department of the Premier and Cabinet may provide written authorisation. The parliamentary counsel may also arrange for an earlier start.

3.2 Authority to Prepare a Bill approval

Generally, OQPC receives a copy of each Cabinet decision giving approval for the preparation of a Bill. However, *The Queensland Cabinet Handbook* states a department must forward the drafting instructions for the Bill to OQPC within two working days of receiving Cabinet decision. If changes to the drafting instructions are necessary, the limit extends to five working days. Keeping to these time limits is especially important when the submission states the Bill is 'Essential for passage'.

Drafting will usually start when a drafter is allocated to draft the Bill after receipt of the Cabinet decision and the drafting instructions by OQPC. A letter is sent by OQPC to the sponsoring department advising the drafter's name.

3.3 Drafting process

The drafting process involves translating policy into a legally effective scheme. The process should allow the drafter to understand the policy and prepare a legally effective scheme by working with the instructing officer. It is a creative process and a draft-by-draft process.

3.3.1 The drafting process is creative

The drafter translates the policy contained in the drafting instructions into legislative form. The drafter is not a mere scribe and performs a role that affects the legislation's final form. The drafting process must allow the drafter:

- to understand the drafting instructions and the policy
- to consider the legislative, and general law, framework in which the legislation is to operate
- to provide advice about alternative ways of achieving policy objectives and the application of fundamental legislative principles
- to draft the legislation using current legislative drafting practice
- to discuss revisions with the instructing officer
- to make changes and finalise the legislation.

3.3.2 The drafting process is a draft-by-draft process

When a draft is prepared by the drafter, it will be given to the instructing officer for consideration and comment.

The instructing officer's role includes giving constructive comments on the draft. Accordingly, the instructing officer must read and check the draft to ensure it gives effect to drafting instructions and to point out any problems with the draft. After receiving a draft, the instructing officer should:

- read the draft carefully to make sure he or she understands it
- test the draft against scenarios to make sure it gives effect to policy and does not have any unintended consequences

- check the draft for consistency to make sure it is internally consistent and, if appropriate, consistent with related legislation and the general law
- check the authority to draft the legislation, usually a Cabinet decision giving Authority to Prepare a Bill, to ensure all matters included in the draft are covered by the authority.

If there are matters the instructing officer wants the drafter to consider, the instructing officer should provide comments on them. The drafter will assume the instructing officer is satisfied with the parts of the draft on which he or she does not comment.

If a particular provision does not work or does not give effect to the policy, the instructing officer should raise the problem with the drafter, explaining the issue fully, and include an example demonstrating the problem. Attempting to redraft the provision, or returning the draft marked with suggested changes but without explanation, is far less useful to the drafter than a clear outline of the problem, presented in a way that is easy to understand.

Comments by the instructing officer may be given at a meeting or by email or phone. However, comments given orally about significant issues need to be confirmed in writing.

Once the drafter receives the comments, the drafter will revise the draft to take account of the comments and then provide the revised draft to the instructing officer for consideration and comment. The process will be repeated a number of times.

When the draft is almost finalised, OQPC's internal quality assurance processes take place. Another drafter, who is usually more senior, will review the draft. Any concerns will be discussed with the instructing officer and appropriate changes made. This review by a senior officer may be repeated and the parliamentary counsel will also be given the opportunity to look at the proposed Bill. An OQPC legislation officer also takes over the control of the electronic version of the Bill and prepares the Bill for final supply. This is an editorial and publishing role.

Once the drafter and instructing officer agree the Bill is settled and ready for the department to submit to Cabinet by way of an Authority to Introduce a Bill submission, the instructing officer will prepare other necessary Cabinet documents including, for example, the proposed explanatory notes.

3.4 Role of instructing officer in providing effective drafting instructions

The instructing officer is a key player in the drafting process. Both the time required to draft and the quality of the drafting depends on the quality of the drafting instructions and the communication skills of the instructing officer. An instructing officer needs to be familiar with political and administrative considerations, the legislative context and the things required to be dealt with in legislation. The officer needs to work with the drafter to achieve the common goal of preparing legally effective legislation that gives effect to the appropriate authority for the legislation within the whole-of-government context. Considering fundamental legislative principles is an essential part of the process.

3.4.1 Role of instructing officer

An instructing officer must be able to explain the aims of a legislative proposal to the drafter, give the drafter the information necessary to enable the drafter to draft legally effective legislation that implements the policy, and make decisions on issues arising during drafting. To maximise use of resources, the instructing officer must have sufficient understanding, and full authority, to give instructions.

If there are a number of policy officers involved in a Bill, for practical reasons there should be only one instructing officer responsible for coordinating instructions.

For the purposes of instructing, an instructing officer should be familiar with:

- *The Queensland Cabinet Handbook*
- *The Queensland Executive Council Handbook*
- the Code of Practice for Public Service employees assisting or appearing before Parliamentary Committees
- the *Acts Interpretation Act 1954*
- the *Legislative Standards Act 1992*
- the *Reprints Act 1992*
- the *Statutory Instruments Act 1992*
- current legislative regimes within their department
- similar regimes administered by other departments and in other jurisdictions
- fundamental legislative principles
- recent drafting trends in Queensland.

In the context of the Government's target of reducing the regulatory burden on businesses and the community by 20 per cent by 2018, an officer must think creatively about non-legislative approaches and, if legislation is necessary, legislative approaches that minimise the regulatory burden while achieving the required policy outcomes and being consistent with the principles of good legislation.

Drafting instructions template

An electronic annotated template for drafting instructions for a Government Bill is available on the GovNet Law page at govnet.qld.gov.au/law. An electronic annotated template for drafting instructions for a private member's Bill is also available on the GovNet Law page at govnet.qld.gov.au/law. Use of these templates will assist with preparing effective drafting instructions, but is not compulsory.

3.4.2 Effective drafting instructions return direct benefits

Drafting instructions often form the initial and most important contact with OQPC. Investment of time and effort in preparing quality drafting instructions yields better quality legislation within a shorter period. The instructing officer responsible for the instructions might find it useful to seek comment from the department's Cabinet Legislation and Liaison Officer (CLLO).

Initially, preparing effective drafting instructions may take an instructing officer extra time and effort. However, experience has shown there are direct benefits for the instructing department that more than justify the time and effort. Benefits to the department include:

- a complete first draft can be prepared more quickly
- the number of drafts is minimised
- fewer issues needing resolution arise during the drafting process
- legislation of a high standard is completed in the shortest possible period
- the Cabinet submission for Authority to Prepare a Bill will be more comprehensive.

3.4.3 Drafting instructions—general requirements

Drafting instructions should state:

- the general purpose, objective or philosophy behind the legislative proposal
- the main or basic concepts ('Who and what are we talking about?')
- the main rules or objectives ('What is the main or basic thing we are trying to do?')
- other rules or objectives ('What other things are necessary to make the main or basic thing work?')
- the way the rules or objectives work together ('Are the things that we are doing consistent and compatible with each other?').

In addition, instructions should identify, at least in general terms, rules or objectives that are proposed to be implemented using subordinate legislation. This allows the drafter to bring to the instructing officer's attention at an early stage any possible concerns about the proposed split of matters between the relevant Act and subordinate legislation under the Act.

The instructions should identify the persons or things to which the legislation is to apply. Instructions should cover all aspects of the scheme from the big picture to matters of relatively minor detail.

A way to measure the effectiveness of drafting instructions is to ask:

- Are they clear, concise, accurate and comprehensive?
- Do they clearly identify:
 - what has to be done?
 - why it has to be done?
 - when it has to be done by?

3.4.4 Drafting instructions—specific requirements

Drafting instructions in writing

The instructing department must give initial drafting instructions in writing. OQPC will only accept oral instructions in exceptional circumstances.

Proposals fully developed

For instructions to enable optimal drafting, all aspects of proposals contained in them should be fully developed. Occasionally, time constraints mean that drafting must start while some facets of the policy are still being developed. In those circumstances, matters still undergoing consideration or subject to change should be clearly identified.

Clarity and consistency

Drafting instructions written in plain English and in narrative form enable the instructing officer's intentions to be more easily understood. Specialised or technical terms should be explained. However, unless it is necessary, specialised or technical jargon should be avoided. Words should be used consistently throughout the instructions to avoid misunderstanding or misinterpretation.

Appropriate format

There is no set format for drafting instructions but a template can be found on the GovNet Law page at govnet.qld.gov.au/law to assist in addressing the issues mentioned below. To make it easier to refer to particular provisions in the instructions when issues are being discussed, the drafting instructions should:

- be dated
- use numbered paragraphs
- have numbered pages.

Other material to be included

The instructing officer's name, address, telephone number and email address should be clearly identified in the instructions. This information will then appear on the cover page of drafts of the Bill. However, when the Bill is printed for introduction to Parliament, the government printer will deliver the department's copies of the Bill to the address provided by the departmental CLLO.

Instructing officers should also tell drafters if they work part-time, or if there are significant periods of time in which they plan to be absent. This will enable the drafter to prioritise workloads. If the instructing officer works part-time, the contact details of an alternative instructing officer should also be given to OQPC.

Authority and priority

The instructions should clearly identify the authority to draft the Bill. This will usually be a Cabinet decision approving a submission for Authority to Prepare a Bill.

The instructions should indicate the priority that has been given to the legislation and, in particular, when the legislation is to be introduced. *The Queensland Cabinet Handbook* deals with the government's legislative program. The handbook describes how the program is formulated, how the volume of legislation is controlled, and how the program is monitored.

Principal objectives

The instructions should state the principal objectives to be achieved by the legislation, that is, what has to be done and why it has to be done. It may be necessary to attach background papers. Also, it may be helpful to give examples of the problems the legislation is intended to overcome.

Legislative environment

The drafting instructions should identify the legislation that needs to be amended, and any other legislation that is relevant to the proposed legislation. They should also indicate the relationship between the proposed legislation and the existing legislation.

If the proposed legislation affects legislation of other departments, the following should also be included in the drafting instructions:

- a list of the other departments
- whether those departments have been consulted
- whether consultations will take place in the future.

The drafting instructions should also mention any other legislative proposals that relate to the legislation, whether or not they are already before the Legislative Assembly. They should also mention any aspect of the legislation that is politically sensitive.

Copies of relevant legal opinions (for example, from the Solicitor-General or Crown Solicitor) should be attached. Relevant court decisions should also be mentioned.

Other matters that should be considered are set out in chapter 2.11 and chapter 7.

Departmental drafts

OQPC does not require, nor does it encourage, departments to provide drafting instructions by way of draft legislation (a 'departmental draft').

Departmental drafts can cause unnecessary problems. The drafter may interpret the words used in the draft in a way different from that intended. Without clear explanation, the drafter may not fully appreciate the precise nature and extent of the legislative proposal.

If a department prepares a departmental draft and agrees on its terms with relevant stakeholders, serious problems can arise because of the significant differences between the departmental draft and the draft introduced into the Legislative Assembly.

A departmental draft can be particularly inappropriate for minor amendments to existing legislation or drafts based on well-established precedents (for example, commencement proclamations) because the issues may appear deceptively simple.

The above comments are not intended to stop departments, by arrangement with OQPC, supplying instructions in the form of a marked update of existing legislation when there is no possibility of misunderstanding, for example, if all that is involved is an update of fees in a fee schedule. However, ordinarily, there is no substitute for comprehensive drafting instructions in narrative form.

3.5 Role of drafter

The drafting process is designed to allow the drafter to perform the drafter's primary role of ensuring the proposed legislation achieves the policy objective in a legally effective way. The drafter must also draft in plain English using OQPC's current legislative drafting practice, take account of Acts of general application, provide advice about fundamental legislative principles and comply with processes designed for quality assurance.

3.5.1 Plain English

Plain English involves the deliberate use of simplicity to achieve clear, effective communication. It is commonly considered to be the best technique for effective communication in legislation.

The plain English approach to legislation is based on the idea that laws should be as simple as possible so the ordinary person in the community can understand them. Further, the ordinary person is regarded as the ultimate user of the law rather than bureaucrats and lawyers. A law that is easy

to understand is less likely to result in disregard of the law or dispute.

Plain English does not involve the simplification of a law to the point it becomes legally uncertain. In particular, care needs to be taken that legal uncertainty is not created by dispensing with terms that have an established legal or technical meaning. Plain English may involve balancing simplicity and legal certainty to ensure the law is easily understood and legally effective.

Plain English is not achieved only by using simple language. Other devices are used to guarantee clear communication. For example, legislation can simply, accurately and unambiguously state its intent by the inclusion of purpose clauses, preambles, clauses stating key concepts or definitions, or explanatory provisions. Using simple drafting devices to organise, orient and explain legislation can help establish its context, relevance and meaning.

3.5.2 Acts of general application—*Acts Interpretation Act 1954, Statutory Instruments Act 1992 and Legislative Standards Act 1992*

The *Acts Interpretation Act 1954*, the *Statutory Instruments Act 1992* and the *Legislative Standards Act 1992* are Acts of general application that form the foundation of the Statute Book. Therefore, instructing officers must be familiar with these Acts.

The *Acts Interpretation Act 1954* was originally known as the Acts Shortening Act. It contains provisions that apply generally to all legislation. Being familiar with these provisions will result in clearer and more concise drafting.

The *Statutory Instruments Act 1992* clarifies the law about statutory instruments, particularly in relation to the power to make statutory instruments. The expression 'statutory instrument' is defined in detail in the *Statutory Instruments Act 1992*, section 7. Statutory instruments include subordinate legislation.

The *Legislative Standards Act 1992* establishes OQPC as an independent statutory office, states OQPC's functions and provides guidance for the application of the fundamental legislative principles.

3.5.3 Examination for compliance with fundamental legislative principles

Under the *Legislative Standards Act 1992*, section 7(g)(ii) and (h)(ii), OQPC is required to advise on the application of fundamental legislative principles. Chapter 7 of this handbook deals with fundamental legislative principles.

From 1996 to 2012, the former Scrutiny of Legislation Committee was required to report to the Legislative Assembly on the application of fundamental legislative principles to Bills and subordinate legislation. The Committee delivered numerous reports addressing fundamental legislative principles during this time.

The role of the former Scrutiny Committee now belongs to various portfolio committees, each of which continues to report on fundamental legislative principles. OQPC regularly considered the former Scrutiny Committee's conclusions and now considers reports by portfolio committees. Advice provided by OQPC during the drafting process about the application of fundamental legislative principles is commonly based on earlier comments by the former Scrutiny Committee and the portfolio committees.

Government employees can access the [Fundamental Legislative Principles Index](#) and database at flp.govnet.qld.gov.au, which is updated and maintained by OQPC.

3.5.4 Quality assurance checks—the final process

Drafting is a team project that involves OQPC officers, the instructing officer and sometimes other officers from the instructing department or even another department. The OQPC officers include:

- the drafter who has primary responsibility for drafting the legislation (commonly referred to as the 'D1')
- another, usually more senior, drafter who performs an oversight and quality assurance role (the 'D2')
- legislation services officers who perform a support, editorial and publishing role.

The quality assurance check by the D2 at the end of the drafting process involves a number of considerations. These include:

- whether the rules of law in the draft are effective and sufficient
- the inherent quality of the policy from a legal professional viewpoint
- whether the draft incorporates a whole-of-government perspective
- the draft's consistency with the authority for the preparation of the Bill
- the draft's consistency with fundamental legislative principles
- the overall quality of the draft as part of the Statute Book.

The editorial and publishing check aims to achieve:

- consistency of language both within the legislation and with other Queensland legislation
- consistency of formats, styles and expressions
- accurate flow of words and sentences, including the flow of subsections into paragraphs, subparagraphs and subsubparagraphs
- correct numbering of provisions, including inserted provisions
- correct cross-references within the legislation and correct references to other legislation

- textual accuracy of amendments of other legislation to ensure that, when the directions for amendment take effect, the legislation being amended will read sensibly
- appropriate pagination.

Many of the editorial and publishing matters can only be fully considered after the final, or near final, draft of the Bill has been settled by the drafter and instructing officer. Accordingly, the drafting timetable must leave adequate time for these tasks. The overall quality of legislation can be seriously undermined if the time for carrying out any of the tasks relating to quality assurance control is truncated.

3.6 Authority to Introduce a Bill approval

After a Bill is prepared and settled within OQPC and approved by the sponsoring department and minister, it is ready to be submitted to Cabinet for approval for introduction.

In the Cabinet submission for Authority to Introduce a Bill, further authority must be sought if the existing Authority to Prepare a Bill approval does not fully cover the final draft of the proposed legislation. For example, further authority will be needed if a draft takes a different turn from that originally envisaged in the drafting instructions as a result of encountering a problem with the original concept or dealing with an additional issue.

Generally, each Authority to Introduce a Bill submission is circulated to OQPC. If appropriate, OQPC prepares, for possible referral of its views to the Premier, a briefing note, usually about any inconsistency with fundamental legislative principles. The briefing note is forwarded to the Policy Division of the Department of the Premier and Cabinet and also to the instructing officer.

After Cabinet has approved the introduction of the Bill, OQPC should not be given further instructions to change the approved Bill. However, *The Queensland Cabinet Handbook* does permit the making of minor amendments to the Bill without Cabinet approval if they relate to minor technical or stylistic matters that do not change the intent or context of the Bill as approved by Cabinet.

3.7 Other relevant matters

3.7.1 Consultation—draft stage

Timing of consultation drafts should be discussed early in the drafting process. OQPC can insert watermarks into a draft indicating it is, for example, a 'working draft' or 'consultation draft'. A draft Bill's cover page, containing information about the drafter and instructing officer and other information, must be removed before the draft Bill is circulated outside the government. Also, the cover page should be removed before a draft Bill is attached to a Cabinet submission.

Other government departments should be consulted about draft legislation if:

- the legislation makes consequential amendments to the other department's legislation
- the Authority to Prepare a Bill approval expressly requires the consultation
- consultation is necessary to comply with the consultation requirements outlined in *The Queensland Cabinet Handbook*.

The Queensland Cabinet Handbook deals with consultation with persons or organisations external to government (including employers, unions, community groups and special interest groups) as well as with government departments.

3.7.2 Explanatory notes

The department (usually the instructing officer) is responsible for preparing accompanying documents required for the introduction of a Bill, such as the explanatory notes and the minister's parliamentary explanatory speech.

Under the *Legislative Standards Act 1992*, section 22, a minister who presents a government Bill to the Legislative Assembly must circulate to members explanatory notes for the Bill. Section 23 of that Act sets out the information that must be included in the explanatory notes. Current practice is for the explanatory notes to accompany the Bill on its introduction to Parliament. *The Queensland Cabinet Handbook* requires the explanatory notes to accompany the Authority to Introduce a Bill submission.

The instructing officer should start preparing the explanatory notes in sufficient time to ensure the notes are ready in final form when required. Explanatory notes should explain the legislation and not merely repeat or paraphrase its provisions. The instructing officer should exercise considerable care in preparing explanatory notes because they may be used by courts to assist in the interpretation of legislation (*Acts Interpretation Act 1954*, section 14B).

Well-reasoned and comprehensive explanatory notes can also help the portfolio committee examining the legislation to reach a better-informed judgment about issues concerning the policy the Bill is giving effect to, the application of fundamental legislative principles and sufficiency of the explanatory notes.

More detailed information on explanatory notes is available in the *Guidelines to the preparation of explanatory notes*. Agencies are required to adopt the templates set out in those guidelines to ensure a consistent approach across government.

3.7.3 Cabinet time requirements

The instructing officer is also responsible for observing all relevant Cabinet time requirements. These are dealt with in *The Queensland Cabinet Handbook*.

3.7.4 Drafting private members' Bills

Under the *Legislative Standards Act 1992*, section 10, opposition or independent members can ask OQPC to draft Bills or amendments. Their communications with OQPC are subject to legal professional privilege—see the *Legislative Standards Act 1992*, section 9A.

While the matters outlined in this chapter have been directed towards Bills originating in government departments, the substance of the information also applies to private members' Bills. In particular, the instructing member can expect OQPC to provide advice on fundamental legislative principles and, if applicable, advice on achieving policy objectives by alternative means. Again, clear and comprehensive drafting instructions will help the drafter prepare quality legislation in the shortest possible time.

The document called *Information for Private Members about having Bills and Amendments drafted* (available on the Parliament House intranet site) may assist private members and their staff in preparing drafting instructions. The Chamber and Procedures Office at Parliament House can help members locate this document. The Chamber and Procedures Office's contact details are available on the Parliament House intranet site.

Drafting instructions template—private member's Bill

An electronic annotated template for drafting instructions for a private member's Bill is available on the GovNet Law page at govnet.qld.gov.au/law. Use of the template will assist with preparing effective drafting instructions but is not compulsory.

4 The parliamentary process

This chapter examines the passage of a Bill through the Legislative Assembly. It focuses on government Bills in ordinary circumstances, and is aimed mainly at helping departmental officers responsible for the progress of a Bill. For more detailed information on Queensland parliamentary processes, see *The Queensland Parliamentary Procedures Handbook* and the Legislative Assembly's standing rules and orders.

4.1 Parliament of Queensland

The Parliament of Queensland is the State's paramount law-making body. It consists of the Queen and the Legislative Assembly. In Queensland, there is no second legislative chamber (or upper house). The Queen's role in the Parliament of Queensland is carried out by her representative in Queensland, the Governor. The Queen may carry out her role if personally present in Queensland though, to date, this possibility has remained hypothetical.

The Legislative Assembly's composition and legislative powers are provided for in the *Constitution of Queensland 2001*, chapter 2, part 1 and the *Constitution Act 1867*, sections 1 and 2. It operates in accordance with the standing rules and orders authorised by the *Parliament of Queensland Act 2001*, section 11.

4.2 Timing of the introduction of a Bill

The introduction of a government Bill into the Legislative Assembly is governed by an administrative process. Firstly, Cabinet considers a Cabinet submission for Authority to Introduce a Bill. If it decides a Bill should be introduced, it gives its approval to do so by a formal Cabinet Decision. Members of the Legislative Assembly belonging to the party or parties constituting the government of the day also provide their input about whether a Bill should be introduced.

It is then the Leader of the House, after consultation with the minister introducing the Bill, who authorises supply of the Bill and indicates when the Bill is to be introduced into the Legislative Assembly. The sponsoring department also advises OQPC that the Bill may be printed and copies are supplied to the staff of the Table Office of Parliament House in readiness for introduction.

It is this combination of administrative processes that authorises the supply of the Bill to the House. OQPC is the agency that arranges for the government printer to print the Bill and supply it to the House. OQPC is electronically linked to the government printer and Parliament House. An electronic copy of the Bill is contemporaneously supplied to the government printer for printing and to the Table Office of Parliament House.

When the Bill is printed, the government printer delivers copies of the Bill to the departmental instructing officer in accordance with details supplied by OQPC.

The timing of introduction of Bills is a matter for the Leader of the House. Bills are usually introduced soon after they receive the approval of Cabinet and government members, unless the Legislative Assembly is not sitting or there is a delay because further drafting or consultation is required.

4.3 Explanatory notes

At about the same time as OQPC forwards the Bill to the government printer for printing and supply to the House, the department should advise the government printer to print the explanatory notes the department has prepared for the Bill and email OQPC an electronic copy for the Legislation website.

4.4 Message from the Governor

The *Constitution of Queensland 2001*, section 68, requires a message from the Governor for particular types of Bills. The section is as follows:

68 Governor's recommendation required for appropriation

- (1) The Legislative Assembly must not originate or pass a vote, resolution or Bill for the appropriation of—
 - (a) an amount from the consolidated fund; or
 - (b) an amount required to be paid to the consolidated fund;that has not first been recommended by a message of the Governor.
- (2) The message must be given to the Legislative Assembly during the session in which the vote, resolution or Bill is intended to be passed.

This ensures the government maintains control over budgetary measures.

Practically, it is OQPC that requests a Governor's message from State Affairs within the Department of the Premier and Cabinet and State Affairs arranges for the Governor's message to be obtained. The signed message is then forwarded to the Clerk of the Parliament.

4.5 Presentation and first reading

The Leader of the House coordinates the legislative program brought before the Legislative Assembly. The specific timing of a Bill's presentation is arranged by the Leader of the House in liaison with other ministers in charge of legislation and with the Clerk of the Parliament.

A Bill is introduced by the sponsoring minister or member—

- informing the Parliament of their intention to introduce a Bill and reading the long title of the Bill; and
- immediately tabling a copy of the Bill and any explanatory notes; and
- nominating which portfolio or other committee will consider the Bill; and
- delivering an explanatory speech.

Generally, the explanatory speech summarises the main provisions of the Bill but avoids detailed exposition of clauses (unless the Bill is very short). This speech is similar in nature to the speech formerly known as the second reading speech. After introducing the Bill, the minister or member moves “That the Bill be now read a first time” and the question is put without amendment or debate.

A Bill is referred to a portfolio committee unless—

- the Bill is declared to be an urgent Bill (so that it may be expedited through all stages); or
- the Bill is an annual appropriation Bill; or
- the House orders.

The Standing Rules and Orders of the Legislative Assembly, chapter 22 and *The Queensland Parliamentary Procedures Handbook* contain important detail about the general procedure for the introduction of a Bill.

4.6 Bills referred to portfolio committees

A portfolio committee to which a Bill is referred examines the Bill and decides whether to recommend that the Bill be passed. The portfolio committee considers the policy to be given effect by the Bill, the application of fundamental legislative principles and compliance with the requirements to prepare explanatory notes. It may recommend amendments to the Bill. Ordinarily, a portfolio committee must finally report to the Legislative Assembly on a Bill within six months after the referral.

To the extent practicable, a portfolio committee operates in a public and transparent way. It usually engages with stakeholders, holds public hearings and publishes relevant submissions and expert/technical advice (except if prejudicial to any person).

Public service employees, statutory office holders and officers and employees of government entities may be required to assist or appear before a portfolio committee. The *Code of Practice for Public Service employees assisting or appearing*

before Parliamentary Committees contains information relevant to this task.

The published reports of the former Scrutiny of Legislation Committee and of the portfolio committees are a useful source of information about fundamental legislative principles and their application.

Consultation with OQPC before responding to portfolio committee comments about the application of fundamental legislative principles is required:

- if the portfolio committee has an issue with the drafting of any provision, in particular when the committee expresses concern as to whether the legislation is unambiguous and drafted in a sufficiently clear and precise way, as mentioned in the *Legislative Standards Act 1992*, section 4(3)(k)
- if amending legislation in line with the portfolio committee's comments may have an impact on precedent-based provisions in use generally across the Statute Book, including the legislation of other departments.

OQPC's advice is subject to legal professional privilege and the instructing officer should advise OQPC if it is intended to mention the advice in response to the portfolio committee.

Important details about Bills referred to portfolio committees are set out in the Standing Rules and Orders of the Legislative Assembly chapter 23 and *The Queensland Parliamentary Procedures Handbook*.

4.7 Amendments during consideration in detail

After a Bill is introduced, it may be necessary to amend the Bill because, for example, it is necessary to add new provisions, correct defects not identified before introduction, or make changes in response to the recommendations of a portfolio committee or other reaction to the Bill after its introduction.

The Legislative Assembly deals with amendments to the Bill when it moves to the stage of consideration in detail. Because the Assembly ordinarily moves immediately to this stage from the second reading stage, amendments during consideration in detail are ordinarily prepared well before the debate for the second reading starts.

Amendments during consideration in detail are ordinarily prepared and supplied to the Table Office of Parliament House by OQPC. This happens whether the amendments are being proposed by the sponsoring minister or any other member. The drafter of the Bill at OQPC is usually allocated the task of preparing the amendments to ensure an effective and efficient service is provided. However, there is no requirement for OQPC to prepare the amendments, and members may prepare their own amendments.

Within government, an amendment during consideration in detail proposed by the Bill's sponsoring minister may require further approvals by Cabinet. It should also be noted that all departments are now required to prepare supplementary explanatory notes for amendments to a Bill intended to be moved during consideration in detail by the sponsoring minister, if it is practicable to do so.

The Queensland Parliamentary Procedures Handbook should be consulted for important detail about what is, and what is not, permitted to be included in amendments during consideration in detail.

When OQPC is authorised to supply a Government amendment during consideration in detail, an electronic version is supplied to the Table Office and to the government printer for printing and delivery to the Table Office and distribution to members. Non-government amendments are supplied to the Table Office only for printing and distribution to members.

The department supplies OQPC with an electronic version of the supplementary explanatory notes for publication on the Legislation website.

4.8 Second reading

The Leader of the House is responsible for the government's daily program of business, including the government's legislation, and therefore is responsible for the timing of a Bill's second reading. The Leader of the House sets the notice paper for each day's sitting.

The sponsoring minister or member moves that the Bill be read a second time.

It is sometimes necessary for the minister to table an erratum to the explanatory notes presented with a Bill to correct an error or other inaccuracy. For this purpose, the department arranges for the government printer to print the erratum document and deliver copies to the Table Office of Parliament House in accordance with its requirements. After the document is tabled, the department is also responsible for supplying OQPC with an electronic version for publication on the Legislation website. The supply of supplementary explanatory notes to accompany amendments during consideration in detail is separately considered in chapter 4.7.

Important detail about requirements for the second reading and related procedures are set out in the Standing Rules and Orders of the Legislative Assembly chapter 25 and *The Queensland Parliamentary Procedures Handbook*.

Debate on the second reading is a free ranging debate and may address the principles of the Bill, the portfolio committee's examination and report and any amendments recommended by the committee.

Proposed amendments during consideration in detail are sometimes foreshadowed in this debate. Also, the minister might foreshadow amendments when, at the end of the debate, he or she sums up the debate and comments on contributions from other members.

At the end of the debate, the Speaker puts a question 'That the bill be now read a second time'. Relevant amendments may be proposed to the question. If agreed to, the second reading takes place, with the Clerk of the Parliament again reading the Bill's short title.

The Standing Rules and Orders of the Legislative Assembly chapter 25 and *The Queensland Parliamentary Procedures Handbook* give more detail about this stage of the Bill's passage through the Legislative Assembly.

4.9 Consideration in detail stage

After the Bill's second reading, the Legislative Assembly moves into a stage of considering the Bill in detail. For this stage, the Speaker takes the chair at the Table of the House. The Assembly considers the text of the Bill, one clause or group of clauses at a time, and any schedules, and makes any amendments that are moved by a member and agreed to by the Assembly.

If the Bill has a preamble, the preamble is considered after the passing of the clauses and any schedules.

Important details about this stage are set out in the Standing Rules and Orders of the Legislative Assembly, chapter 26 and *The Queensland Parliamentary Procedures Handbook*.

4.10 Third reading and long title

After the Bill has been considered in detail (and possibly amended during that stage), the sponsoring minister, with leave, proposes a motion that the Bill be read a third time. When the motion is agreed to, the Bill is read a third time by the Clerk of the Parliament reading aloud its short title.

After the third reading, the Bill's long title is then agreed to, and the Bill is then said to have been passed by the Legislative Assembly, even though it does not become a law of Queensland until it receives assent from the Governor. After a Bill's third reading, no further questions can be put.

Important details about this stage are set out in the Standing Rules and Orders of the Legislative Assembly, chapter 27 and *The Queensland Parliamentary Procedures Handbook*.

4.11 Cognate debates

Two or more related Bills are sometimes dealt with together as cognate Bills. This requires the Legislative Assembly's agreement to a motion for the suspension of standing and sessional orders that would otherwise require the Bills be dealt with separately. For example, for two related Bills, the Assembly might authorise:

- the one question being put in regard to the second readings
- the consideration of the Bills together at the consideration in detail stage
- the one question being put for the third readings and titles.

4.12 Record of Proceedings

Each day's Record of Proceedings, the official daily record of the Legislative Assembly's proceedings as compiled by the Clerk of the Parliament and commonly known as Hansard, includes a summary of the progress of any Bill before the Legislative Assembly on that day, including the votes on any matter relating to the Bill. The Record of Proceedings is usually published within a day of the proceedings it records. It is produced in hard copy form by the government printer and placed on the website of Parliament House. The Record of Proceedings is used by the Clerk of the Parliament and OQPC to prepare copies of the Bill as passed by the Legislative Assembly.

4.13 Attendance by departmental officers and OQPC drafter (other than for portfolio committee)

A Bill's sponsoring minister decides the extent to which officers of the minister's department attend at the House for any stage of the Bill's progress through the Legislative Assembly. Attendance may involve sitting in the seats made available to departmental officers outside the bar of the House and advising the minister as the debate proceeds. A policy or instructing officer may also be required to brief members of the Legislative Assembly or interest groups when the Bill is introduced or is about to be, or is being, debated.

The OQPC drafter may attend the consideration in detail stage of the Bill if requested to do so.

4.14 Private members' Bills and amendments during consideration in detail

Private members' Bills are generally handled by the Legislative Assembly in the same way as government Bills, except that they are debated during times set aside for General (private members') Business. Private members do not have a statutory obligation to provide explanatory notes for private members' Bills, but ordinarily do so. In relation to amendments during consideration in detail, the Legislative Assembly agreed to the following motion on 7 November 2001:

The House encourages all members who intend to move amendments to a Bill to circulate the proposed amendments in the House and where appropriate explanatory notes to these amendments.

There are special issues that arise if a non-government member asks OQPC to prepare amendments during consideration in detail for a Bill. The drafter deals with the member's request as a new and separate task, and can not divulge information about the member's proposed amendment to the government. The drafter, in providing a service to a non-government member, does not assume the role of policy adviser but does fulfil OQPC's function under the *Legislative Standards Act 1992* to provide advice on achieving the policy objectives by alternative means and on fundamental legislative principles.

5 Royal assent

The Clerk of the Parliament has responsibility for the process by which a Bill passed by the Legislative Assembly receives assent. After the Legislative Assembly passes a Bill for an Act, the Clerk advises OQPC to prepare a copy of the Bill in the form it took at its third reading, that is, including any amendments passed during consideration in detail. OQPC sends an electronic copy of the Bill to the Clerk for confirmation of its correctness. Once the Clerk has done this, the Clerk asks OQPC to supply copies of the Bill in two forms: the Bill as at its third reading and the Bill in parchment form.

As soon as possible after the Legislative Assembly's Record of Proceedings relating to a Bill becomes available to the parliamentary counsel, the parliamentary counsel by convention writes to the Attorney-General advising the Attorney-General that the Bill for the Act has been passed by the Legislative Assembly and that the Bill is to be presented to the Governor for assent. The letter advises that it is in order for the Attorney-General to sign an attached certificate.

The attached certificate, in the form of a letter for signature by the Attorney-General addressed to the Governor, informs the Governor that the Bill for the Act has been duly passed through all stages of the Legislative Assembly and that it is in order for the Governor to assent to the Bill.

The letter, and the draft certificate for signature by the Attorney-General, are delivered to the Clerk of the Parliament. The Clerk delivers the letter and attached certificate to the Attorney-General. The certificate, signed by the Attorney-General, accompanies the Bill delivered to the Governor for assent. (See *The Queensland Parliamentary Procedures Handbook*.)

As a practical reality, because the assent to a Bill must follow quickly after its passage by the Legislative Assembly, if there is any substantial issue about the constitutional validity of a Bill, the issue must be considered by the Attorney-General before the Bill is introduced into the Legislative Assembly. The process at that stage may also involve formal advice from the Solicitor-General and other senior lawyers, and consideration by Cabinet.

Once the Bill has received assent and has become an Act, the Clerk of the Parliament advises OQPC of details of the assent, including the Act's number, and requests that OQPC prepare a copy of the Act. The Act will include the Act's number and its date of assent. The Act commences to operate as a new law on the date of assent, subject to any commencement provision included in the Act. Chapter 2.11.2 gives more detail about Act commencement.

The Queensland Parliamentary Procedures Handbook notes that the process of having a Bill assented to can take up to two weeks. Urgent assent can be obtained in some circumstances. If it is necessary for a Bill to be assented to urgently, the chief executive of the sponsoring department must give the Clerk of the Parliament the earliest possible written notification and the reasons that urgent assent is required.

6 Subordinate legislation

This chapter deals with subordinate legislation, other than exempt subordinate legislation.

6.1 What is subordinate legislation?

Generally

Under the general law, the term ‘subordinate legislation’ is often used to refer to a legislative instrument made by an entity under a power delegated to the entity by the Parliament.

It can be necessary for legislative power to be delegated for any of the following reasons:

- to save pressure on parliamentary time
- the legislation is too technical or detailed to be suitable for parliamentary consideration
- to deal with rapidly changing or uncertain situations
- to allow for swift action in the case of an emergency.

Particular meaning under the *Statutory Instruments Act 1992*

This handbook, however, uses the term ‘subordinate legislation’ in a more particular sense, in accordance with the framework established by the *Statutory Instruments Act 1992*.

Under the *Statutory Instruments Act 1992*, subordinate legislation refers to a defined subset of statutory instruments.

A ‘statutory instrument’ is an instrument made directly or indirectly under an Act by an entity other than the Parliament. ‘Subordinate legislation’ refers to a statutory instrument that is classified as subordinate legislation under that Act. See sections 6 to 9 of that Act for more details.

There are many types of subordinate legislation. Some of the most common are:

- regulations made by the Governor in Council
- proclamations that provide for the commencement of provisions of an Act
- local laws
- rules
- by-laws.

Sometimes, whether a statutory instrument is classified as subordinate legislation depends on the provisions of the empowering Act. For example, an empowering Act may provide for a statutory instrument to be made by an entity (for example, a board), but require the instrument to be approved by the Governor in Council. Under the *Statutory Instruments Act 1992*, the instrument is subordinate legislation. Rules and by-laws can be instruments of this nature.

On the other hand, an empowering Act may provide for a statutory instrument to be made by an entity (for example the minister or the chief executive) with no requirement that it be approved by the Governor in Council. However, the empowering Act may declare the instrument to be subordinate legislation. If so, this instrument is also subordinate legislation under the *Statutory Instruments Act 1992*. Standards and notices can be instruments of this nature.

Significance of status as subordinate legislation

The significance of whether a statutory instrument is subordinate legislation lies in the fact that subordinate legislation:

- must be drafted by OQPC, unless it is exempt subordinate legislation (see chapter 6.2)
- is subject to the notification, tabling and disallowance provisions of the *Statutory Instruments Act 1992* (see chapter 6.13)
- is subject to scrutiny by the appropriate portfolio committee (see chapter 6.14).

6.2 Drafting subordinate legislation

OQPC drafts subordinate legislation, other than subordinate legislation that has been exempted from the requirement that it be drafted by OQPC (known as ‘exempt subordinate legislation’). In drafting subordinate legislation, OQPC provides advice to ministers, departments and agencies on:

- alternative ways of achieving policy objectives
- the application of fundamental legislative principles.

The authority to draft subordinate legislation ordinarily comes from a decision of Cabinet, or the relevant minister or chief executive. The principles for drafting a Bill outlined in chapter 3 also apply generally to the drafting of subordinate legislation. However, there are other fundamentals that must be taken into account when drafting legally effective subordinate legislation.

6.3 Subordinate legislation must be within power

Subordinate legislation must be within power, that is, within the scope of the Act under which it purports to be made. Subordinate legislation that is not within power is commonly referred to as being ‘ultra vires’ (beyond the power). To be lawful, subordinate legislation must have a sufficient connection with the Act under which it is made.

6.4 Unauthorised subdelegation

Related to the concept of ultra vires is the issue of unauthorised subdelegation. A subdelegation arises when legislative power is subdelegated by the person or body to whom the power has been delegated. Subordinate legislation that includes a subdelegation would be invalid if the empowering Act does not authorise the subordinate legislation to include the subdelegation. For example, unauthorised subdelegation would arise if an Act authorises the Governor in Council to make a regulation to deal with an issue, but the regulation the Governor in Council makes does not substantively deal with the issue itself and instead purports to allow a chief executive to deal substantively with the issue under a public notice.

6.5 General presumption that legislation will be prospective

Subordinate legislation generally commences on notification on the Legislation website, on a stated day after notification, or on the commencement of its authorising Act. There is a general presumption that legislation, whether an Act or subordinate legislation, will operate prospectively. Generally, the courts will override the presumption only if the empowering Act contains a provision authorising retrospective operation. The one exception is where the subordinate legislation expressly provides for the retrospective operation of a beneficial provision.

6.6 Retrospective operation of a beneficial provision

This retrospective operation of a beneficial provision is expressly permitted under the *Statutory Instruments Act 1992*, section 34. Section 34 defines ‘beneficial provision’ to mean a provision that does not operate to the disadvantage of a person (other than the State, a State authority or a local government) by decreasing the person’s rights or imposing liabilities on the person.

6.7 Power to make instruments

The specific powers contained in Acts to make subordinate legislation are supported by further powers in the *Statutory Instruments Act 1992*, in particular, sections 21 to 31 of that Act. Some examples follow:

- Section 22 enables subordinate legislation to be made with respect to any matter that is required or permitted to be prescribed by the authorising law or other law or is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law.
- Section 23 enables subordinate legislation to make provision for a matter by applying, adopting or incorporating (with or without modification) the provisions of an Act, statutory instrument or other law, or another document.

- Section 24 enables subordinate legislation to make provision for a matter by applying generally throughout the State or being limited in its application to a particular part of the State. Section 24 also enables subordinate legislation to make provision for a matter by applying generally to all persons and matters or being limited in its application to particular persons or matters or particular classes of persons or matters.
- Section 29 enables subordinate legislation to provide for the review of, or a right of appeal against, a decision made under the subordinate legislation.
- Section 30 enables subordinate legislation to require a form prescribed by or under the subordinate legislation, or information or documents (whether or not included in, attached to or given with a form), to be verified by statutory declaration.

An Act and the subordinate legislation under it should be a single set of rules. Generally, there should be no duplication in subordinate legislation of rules that are already stated in the Act and there should be no significant change in concepts or language. Any definitions in an Act will also apply to subordinate legislation made under the Act (*Acts Interpretation Act 1954*, sections 7 and 32AA).

6.8 Certification

Ordinarily, OQPC certifies subordinate legislation drafted by it, and supplies the subordinate legislation to the relevant department. OQPC will certify subordinate legislation only if it is satisfied that the proposed subordinate legislation:

- is lawful
- has sufficient regard to fundamental legislative principles.

If the subordinate legislation is to be made by the Governor or Governor in Council, OQPC supplies one blue copy and one white copy, and certifies each copy by placing a special stamp bearing a signed authority on the first page.

If the subordinate legislation is to be made by an entity other than the Governor or Governor in Council, but must subsequently be approved by the Governor or Governor in Council:

- OQPC firstly supplies one white copy, which is not certified.
- After the subordinate legislation has been made by the entity, OQPC supplies one blue copy and one white copy, both certified.

If the subordinate legislation is to be made by an entity other than the Governor or Governor in Council and there will be no subsequent Governor or Governor in Council involvement before notification, OQPC supplies one white copy, which is certified.

All copies are supplied on archival paper. The Executive Council Secretariat retains white certified copies it receives from a department. Blue certified copies eventually form part of the administering department's records. Under *The Queensland Cabinet Handbook*, proposed subordinate legislation that has not been certified by OQPC must be submitted to Cabinet.

6.9 Penalties

Subordinate legislation can not impose a penalty for contravention of one of its provisions unless authorised by the empowering Act. The former Scrutiny of Legislation Committee repeatedly stated that such penalties should generally be no more than 20 penalty units.⁶

6.10 Infringement notice offences

A department should liaise with the Department of Justice and Attorney-General if the department proposes to create an infringement notice offence. This is achieved by amending the *State Penalties Enforcement Regulation 2000*. Both the offence that the department administers and the fine for the offence must be prescribed in the regulation.

As a general guide, infringement notice fines prescribed in the *State Penalties Enforcement Regulation 2000* for an infringement notice given under the *State Penalties Enforcement Act 1999* should not be more than one-tenth of the penalty prescribed in the Act or the subordinate legislation to which the infringement notice fine relates. For example, if a provision of a regulation attracts a maximum penalty of 20 penalty units, the penalty under an infringement notice would ordinarily be prescribed at not more than two penalty units.

6.11 Explanatory notes

Under the *Legislative Standards Act 1992*, section 22, an explanatory note prepared by the administering department must accompany all subordinate legislation. Section 24 of that Act sets out the matters to be addressed in the explanatory note.

Administering departments are required to prepare an explanatory note for all types of subordinate legislation (and not just significant subordinate legislation). This is to ensure that Members of Parliament and the general public are able to understand the rationale for making the subordinate legislation. More detailed information on explanatory notes is available in the *Guidelines to the preparation of explanatory notes* and from departmental CLLOs. Agencies are required to adopt the templates set out in those guidelines to ensure a consistent approach across government.

Departments are now responsible for preparing and printing the Executive Council copy of the official text of explanatory notes for submission to the Executive Council with the certified copies of the subordinate legislation drafted and printed by OQPC.

However, OQPC is responsible for supplying the explanatory notes to the government printer and for publishing them with the subordinate legislation on the Legislation website after notification.

A week before each Executive Council meeting, the Executive Council Secretariat advises OQPC which subordinate legislation drafted by OQPC is expected to be considered at the meeting. The list is confirmed the day before the meeting and OQPC then allocates subordinate legislation numbers which are made available to CLLOs for inclusion in explanatory notes.

To ensure print, notification, delivery and publication deadlines are met, OQPC needs to receive from departments the final electronic version of explanatory notes, with subordinate legislation number included, by 2.00pm on the day the subordinate legislation is made unless other arrangements are made.

6.12 Notification

Under the *Statutory Instruments Act 1992*, section 47, subordinate legislation must normally be notified by the publication on the Legislation website of the subordinate legislation and the date of publication. In exceptional circumstances where this is temporarily not possible, the parliamentary counsel can decide to notify and publish initially in another way until normal publication is practicable.

See chapter 6.17 for information on the notification process.

6.13 Tabling and disallowance

The *Statutory Instruments Act 1992*, section 49(1) states that subordinate legislation must be tabled in the Legislative Assembly within fourteen sitting days after it is notified. Subordinate legislation ceases to be effective if it is not tabled in the Legislative Assembly (*Statutory Instruments Act 1992*, section 49(2)).

The *Statutory Instruments Act 1992*, section 50(1) provides that the Legislative Assembly may pass a resolution disallowing subordinate legislation tabled in the Assembly if notice of a disallowance motion is given by a member within fourteen sitting days after the tabling. Subordinate legislation ceases to have effect if it is disallowed by the Legislative Assembly (*Statutory Instruments Act 1992*, section 50(3)).

If the subordinate legislation is not tabled as required or is disallowed, it is taken never to have been made or approved. However, nothing done or suffered under the legislation before it ceased to have effect is affected. Also, if the subordinate legislation amended or repealed other legislation, the other legislation is revived (*Statutory Instruments Act 1992*, section 51).

See chapter 6.17 for information on the tabling process.

6.14 Parliamentary scrutiny

Under the *Parliament of Queensland Act 2001*, section 93, a portfolio committee examines subordinate legislation in its portfolio area and considers:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- the lawfulness of the legislation and
- compliance with requirements to prepare explanatory notes and guidelines approved by the Treasurer about regulatory impact statements.

A portfolio committee approaches its responsibilities to subordinate legislation in much the same way as it does with Bills, with one notable exception: the committee can directly oppose an objectionable provision in subordinate legislation by asking the Legislative Assembly to support a motion to disallow the provision under the *Statutory Instruments Act 1992*, section 50.

6.15 Interpretation

The *Statutory Instruments Act 1992* contains provisions about how to interpret subordinate legislation. It applies relevant provisions of the *Acts Interpretation Act 1954*, some in a modified form (*Statutory Instruments Act 1992*, part 4, divisions 1 and 2).

6.16 Expiry of subordinate legislation

The *Statutory Instruments Act 1992*, section 54 provides for subordinate legislation to expire on 1 September first occurring after the tenth anniversary of its making. This is designed:

- to reduce substantially the regulatory burden without compromising law and order and essential economic, environmental and social objectives
- to ensure subordinate legislation is relevant to the economic, social and general wellbeing of Queensland
- to otherwise ensure the part of the Statute Book consisting of subordinate legislation is of the highest standard.

The *Statutory Instruments Act 1992*, sections 56 and 56A set out grounds for the limited exemption of subordinate legislation from expiry. Subordinate legislation may be exempted from expiry for periods of not more than one year if:

- replacement subordinate legislation is being drafted
- the subordinate legislation is not proposed to be replaced when it expires at the end of the exemption period
- the empowering Act is subject to review.

Subordinate legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State may be exempted from expiry for periods of not more than five years.

The *Statutory Instruments Act 1992*, section 57 states the expiry provisions do not apply to particular subordinate legislation that requires a resolution of the Legislative Assembly before it may be repealed or before the status of land to which it applies may be changed. Also, the expiry provisions do not apply to other important subordinate legislation specifically identified in the Act.

OQPC gives affected departments at least one year's notice of the impending expiry of subordinate legislation and the Department of the Premier and Cabinet, as the administering agency, coordinates any required amendments to the *Statutory Instruments Regulation 2012* to exempt relevant subordinate legislation from expiry (*Statutory Instruments Act 1992*, section 55).

6.17 Printing, notification and tabling processes

OQPC is responsible for managing and coordinating the notification and publication of subordinate legislation (except exempt subordinate legislation) for the government as a whole, including formal notification on the Legislation website. Requirements for notification and tabling are governed by the *Statutory Instruments Act 1992*, part 6. To ensure these requirements are fulfilled, processes have been established between OQPC and departments, the Executive Council, the government printer and the Table Office of Parliament House.

In summary, the procedures for subordinate legislation going before the Governor or Governor in Council according to the usual schedule are as follows:

1. The administering department notifies the Executive Council Secretariat that subordinate legislation is to be signed by the Governor at the Executive Council meeting on a particular Thursday and submits the certified copy of the legislation and printed copies of the explanatory notes.
2. The Executive Council Secretariat advises OQPC in advance of each meeting which subordinate legislation is to be made at that meeting.
3. OQPC allocates subordinate legislation numbers and advises departments so those numbers can be included in the explanatory notes.
4. OQPC prepares the subordinate legislation for printing in the subordinate legislation series and also prepares the notification information for publishing on the Legislation website on Friday.
5. Following the Executive Council meeting on Thursday, departments email copies of the explanatory notes for subordinate legislation made at the meeting to OQPC by 2.00pm and OQPC then supplies all files to the government printer.
6. The government printer prints the subordinate legislation and explanatory notes ready for delivery to relevant administering departments and to the Table Office on Friday from 10.00am.

7. OQPC notifies subordinate legislation made the preceding day on the Legislation website by 10.00am on Friday and also publishes the legislation and explanatory notes on the website.
8. The Table Office automatically tables the subordinate legislation in the Legislative Assembly within fourteen sitting days of notification.
9. For subordinate legislation made by an entity other than the Governor or Governor in Council, for example, by a minister or board, and where there is no subsequent Governor or Governor in Council involvement, the administering department must liaise directly with OQPC to arrange notification. OQPC requires advice about the date the subordinate legislation was made and the date it is to be notified. The subordinate legislation is then printed, notified and tabled according to the procedures outlined in items 3 to 8 above.

It is sometimes necessary for the minister to table an erratum to the explanatory notes presented with subordinate legislation to correct an error or other inaccuracy. For this purpose, the department arranges for the government printer to print the erratum document and deliver copies to the Table Office of Parliament House in accordance with its requirements. After the document is tabled, the department is also responsible for supplying OQPC with an electronic version for publication on the Legislation website.

7 Fundamental legislative principles

This chapter, which is a companion to chapter 2, considers the policy information needed to draft a government Bill in relation to the particular issue of fundamental legislative principles. This chapter also considers fundamental legislative principles from the perspective of subordinate legislation.

7.1 Introduction

7.1.1 What are fundamental legislative principles?

Fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, section 4(1)). The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

7.1.2 Considering fundamental legislative principles

OQPC has a statutory responsibility to advise in relation to the application of fundamental legislative principles in drafting legislation (*Legislative Standards Act 1992*, section 7). The portfolio committees have a statutory responsibility to comment on the application of fundamental legislative principles to particular Bills and particular subordinate legislation (*Parliament of Queensland Act 2001*, section 93). The portfolio committees have replaced the former Scrutiny of Legislation Committee and adopted a similar approach and commentary.

Explanatory notes for Bills and significant subordinate legislation are required to contain a brief assessment of the consistency of the legislation with fundamental legislative principles and, if the Bill or subordinate legislation is inconsistent with fundamental legislative principles, the reasons for the inconsistency (*Legislative Standards Act 1992*, sections 23(1)(f) and 24(1)(i)).

This chapter provides some practical guidance on the application of the fundamental legislative principles. For more information on the application of fundamental legislative principles in the drafting of legislation, see the *OQPC Notebook* and *Principles of good legislation: OQPC guide to FLPS*, which are available on the Publications page of the Legislation website, or consult the publications of the portfolio committees and the Alert Digests of the former Scrutiny of Legislation Committee (www.parliament.qld.gov.au/en/work-of-committees/publications).

Government employees can also access the [Fundamental Legislative Principles Index](#) and database, that is updated and maintained by OQPC.

The *Legislative Standards Act 1992*, section 4(3) specifies some of the matters that should be considered in deciding whether legislation has sufficient regard to the rights and liberties of individuals. These are considered below

in chapters 7.2.1–7.2.11. Chapter 7.2.12 considers some other matters that are relevant to the rights and liberties of individuals.

The *Legislative Standards Act 1992*, section 4(4) and (5) specifies some of the matters that should be considered in deciding whether legislation has sufficient regard to the institution of Parliament. These are considered below in chapters 7.3.1–7.3.8. Chapter 7.3.9 considers some other matters that are relevant to the institution of Parliament.

Chapter 7.4 contains a practical application of fundamental legislative principles in an examination of inspectorial powers.

7.1.3 Modifying or abrogating fundamental legislative principles: the principle of legality

Before considering the content of fundamental legislative principles, it is important to understand how legislation affecting fundamental legislative principles will be interpreted by the courts.

The High Court has repeatedly stated that statutory provisions are not to be construed as modifying or abrogating important common law rights, freedoms, privileges or immunities in the absence of clear words or necessary implication to this effect.⁷ This common law presumption, or rule of statutory construction (‘the rule’), is considered to be an aspect of the ‘principle of legality’ that governs the relationship between parliament, the executive and the courts.⁸ The rule is of long standing and the Chief Justice of the High Court has recently reiterated that ‘[i]t can be taken to be a presumption of which those who draft legislation, regulations and by-laws are aware’.⁹

The type of common law rights, freedoms, privileges and immunities that are protected by the rule include the following—

- freedom from unwarranted imprisonment or detention¹⁰
- freedom of movement¹¹
- freedom of speech¹²
- vested proprietary interests¹³
- privilege against self-incrimination¹⁴
- legal professional privilege¹⁵
- access to the courts¹⁶
- procedural fairness¹⁷
- that legislation is not retrospective¹⁸
- that legislation does not oust the jurisdiction of the courts¹⁹
- that the crown does not have right of appeal²⁰
- rules of international law.²¹

This list is certainly not exhaustive and the High Court has indicated a willingness to expand the rule significantly. For example, in *X7 v Australian Crime Commission* [2013] HCA 29, a majority in the High Court recognised that the rule was

most frequently applied to legislation that may affect rights. However, the majority held that the rule also applied to legislation that could have an effect on a ‘defining characteristic of the criminal justice system’.²² In fact, the majority indicated that the rule would apply to any legislation that departed from the ‘general system of law’.²³

As the rest of this chapter is explored, it will be noted that many of the common law rights, freedoms, principles and immunities protected by the rule overlap with the fundamental legislative principles identified in the Legislative Standards Act. This makes sense, given that both the rule and the fundamental legislative principles have a common aim: to provide the foundation for a parliamentary democracy based on the rule of law.

The rule means that it is essential to know and understand fundamental legislative principles. It means that the legislature, when making laws, must squarely face two issues. Firstly, the legislature must decide whether there is adequate policy justification to override the fundamental legislative principles. Secondly, if the legislature does decide to override the principles, it will only be successful in achieving its intent if it uses express words or words of ‘necessary intentment’.²⁴ To achieve such overriding, the rule ‘will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to abrogate or restrict and has determined to do so.’²⁵

7.2 The rights and liberties of individuals

7.2.1 Does the legislation make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?

Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in a Bill without stating criteria for making the decision and providing for a merits-based appeal from the decision. Occasionally, this may be a two-tiered system with an internal review of the original decision-maker’s decision and a subsequent right of appeal to a court or tribunal. The decision-maker should be required to provide reasons for the decision, together with information on any review and appeal rights. See also the *Acts Interpretation Act 1954*, section 27B.

In relation to defining administrative power, other matters that the portfolio committees monitor include:

- the imposition of conditions on a licence or other statutory authority
- the imposition of suitability, eligibility and similar criteria for granting an appointment, place, position or other status
- the appropriate nature of a power to administratively grant an appointment, place, position or other status

- the appropriate nature of a power to give administrative directions generally or in unusual circumstances, for example, to persons and bodies ordinarily regarded as independent or to affect an established trust
- the limitation of the period within which prosecutions may be started for breaches of statutory duty.

In relation to appeals and reviews, other matters that the former Scrutiny of Legislation Committee monitored included:

- the power to use a power peremptorily, that is, without first giving an opportunity to those affected by the power to express a view
- the reduction of existing rights of review or appeal, or the provision of review or appeal rights with less than the usual process
- the appropriateness of a review or appeal that is based on political, as opposed to administrative or judicial, accountability.

7.2.2 Is the legislation consistent with principles of natural justice?

The principles of natural justice are principles developed from the common law.

Right to be heard

The principles require that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of a benefit, without the person being given an adequate opportunity to present the person’s case to the decision-maker.

Matters that the portfolio committees monitor include:

- the appropriateness of immediately suspending a person’s licence without the person being heard
- a lack of consideration of the views of third parties, that is, persons whose rights may be affected by action taken under legislation against another person
- concealment of confidential information from a person who loses a legislative authority on the basis of the information.

Absence of bias

The decision-maker must be unbiased.

The overall test of whether a decision-maker is biased is whether the relevant circumstances would give rise, in the mind of a party or a fair-minded member of the public, to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-maker.

For example, in the context of a legislative scheme conferring rights of appeal or review, the requirement to be unbiased will usually involve ensuring that the person who hears the review or appeal is separate from the original decision-maker.

Procedural fairness

The principles require procedural fairness, involving a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case.

The portfolio committees would be likely to have concerns about any process purporting to afford natural justice that is not transparent.

In relation to procedural fairness, other matters that the portfolio committees monitor include whether a person who is the subject of the decision will be provided with:

- adequate notice of when any hearing will take place
- adequate notice of any allegation being considered
- adequate notice of any particular requirements of the decision-maker
- a reasonable opportunity to present the person's case and to respond to any adverse material of which the decision-maker has informed itself.

The former Scrutiny Committee considered that whether legal representation is required at any hearing depends on all the circumstances.²⁶

7.2.3 Does the legislation allow the delegation of administrative power only in appropriate cases and to appropriate persons?

Generally, powers should be delegated only to appropriately qualified officers or employees of the administering department. This approach reflects the policy of the former Scrutiny of Legislation Committee.²⁷ The *Acts Interpretation Act 1954*, section 27A contains extensive provisions dealing with delegations.

Delegation to a person or body outside government is uncommon because, as noted by the former Scrutiny of Legislation Committee, it 'potentially circumvents the traditional means of accountability usually applicable to the public sector'.²⁸ As also noted by the former Scrutiny Committee, administrative decisions made within government are usually subject to accountability mechanisms such as those under the *Information Privacy Act 2009*, the *Right to Information Act 2009*, the *Judicial Review Act 1991*, the *Crime and Misconduct Act 2001* and the *Ombudsman Act 2001*. The appropriateness of placing limitations on a delegation of a power depends on all the circumstances, including the extent of the power, how use of the power may affect the rights or legitimate expectations of others, and whether particular expertise or experience is needed to exercise the power properly.

A power of subdelegation requires careful consideration and may be inappropriate on some occasions.²⁹

7.2.4 Does the legislation provide for the reversal of the onus of proof in criminal proceedings without adequate justification?

Generally, reversal of the onus of proof in criminal proceedings is opposed. However, justification for the reversal is sometimes found in situations where the matter that is the subject of proof by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult, or very expensive, for the State to prove.³⁰

Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidentiary means and the defendant would be particularly well positioned to disprove guilt.

A provision making a person guilty of an offence committed by someone else with whom the person is linked, and providing defences allowing the person to disprove connection with the offence, is an apparent reversal of onus of proof and must be justified. Common situations where these concerns have arisen are when executive officers of a corporation are taken to be guilty of offences committed by the corporation, or a corporation is taken to be guilty of offences committed by its executive officers. However, the onus of proof should not be reversed in provisions making directors and executive officers liable for contraventions by corporations. Further, these provisions are only justifiable in limited circumstances. See chapter 2.11.16 for information regarding the limited circumstances in which liability of directors and executive officers for statutory contraventions by corporations may be justified.

A provision should not provide that something is conclusive evidence of a fact, without the highest justification. However, frequently a provision may facilitate the process of proving a fact by providing for a certificate or something else to be evidence (not conclusive) of a fact, giving a party affected an opportunity to challenge the fact.

7.2.5 Does the legislation confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate. Strict adherence to the principle may not be required if the premises are business premises operating under a licence. However, residential premises should not, without the highest justification, be entered except with the occupier's consent or under a warrant.

The former Scrutiny of Legislation Committee examined powers of entry and commented adversely if appropriate safeguards were not provided.³¹

7.2.6 Does the legislation provide appropriate protection against self-incrimination?

This principle has as its source the common law rule that an individual accused of a criminal offence should not be obliged to incriminate himself or herself. In *Sorby v Commonwealth*,³² Gibbs CJ said:

It has been a firmly established rule of the common law, since the seventeenth century, that no individual can be compelled to incriminate himself (or herself). An individual may refuse to answer any question, or to produce any document or thing, if to do so 'may tend to bring him (or her) into the peril and possibility of being convicted as a criminal.

In Alert Digest No. 13 of 1999 at page 31, the former Scrutiny of Legislation Committee stated:

The committee's general view is that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if:

- the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed, and would be difficult or impossible to establish by any alternative evidentiary means; and
- the Bill prohibits use of the information obtained in prosecutions against the person; and
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).

If provision is made for denying the privilege provided by the self-incrimination rule, provision also needs to be made to grant appropriate immunity against the use of information gained, directly or indirectly, from forced disclosure. This also means that the usefulness of a provision denying the privilege is substantially reduced because the evidence produced can not be used in a court.

Abrogating the privilege should be contemplated only when it is more important to know the facts leading to the contravention than to prosecute the contravention. This may be the case if knowledge will allow action to be taken that may save lives or prevent injury in the future.

7.2.7 Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?

Strong argument is required to justify an adverse affect on rights and liberties, or the imposition of obligations, retrospectively.

Whether a statutory provision is in fact retrospective can often be difficult to decide. For example, difficulties occur where the provisions of an Act apply to an event that comprises several components, some of which happened before the Act's commencement and some after.

For subordinate legislation, the *Statutory Instruments Act 1992*, section 32 provides for the commencement of a

statutory instrument prospectively. Only section 34 provides otherwise. Section 34 allows a statutory instrument to expressly provide for beneficial retrospectivity, that is, retrospectivity that does not decrease a person's rights or impose liabilities on a person other than the State, a State authority or a local government. Subordinate legislation that purports to have an adverse effect can not be made without the authority of an Act.

The former Scrutiny of Legislation Committee brought to the attention of Parliament all provisions in Bills that have effect retrospectively.³³ While the committee generally opposed retrospective legislation, it conceded that on occasions retrospective legislation that is curative and validating may be justified.³⁴

7.2.8 Does the legislation confer immunity from proceeding or prosecution without adequate justification?

The former Scrutiny of Legislation Committee stated that one of the fundamental principles of the law is that everyone is equal before the law and should therefore be fully liable for one's acts or omissions.³⁵ However, it recognised that the conferral of immunity is appropriate in certain situations.

The former Scrutiny of Legislation Committee did not object to immunity being conferred on the following:

- public servants implementing announced policy, particularly when liability instead attaches to the State³⁶
- persons acting judicially or in roles similar to or associated with judicial process³⁷
- persons carrying out statutory functions³⁸
- whistleblowers or persons making disclosures similar to whistleblowing³⁹
- persons making disclosures to entities carrying out statutory functions.⁴⁰

The granting of immunity is most justifiable when there is a significant public interest in doing so. For example, the former Scrutiny of Legislation Committee considered that the granting of immunity may be in the public interest where it allows the government to gain necessary information about criminal behaviour relatively more significant than the behaviour protected by the immunity, or where it encourages the candid disclosure of unsafe conditions, processes or practices.⁴¹

7.2.9 Does the legislation provide for the compulsory acquisition of property only with fair compensation?

A legislatively authorised act of interference with a person's property must be accompanied by a right of compensation, unless there is a good reason (for example, the power to confiscate the profits of crime, or to confiscate property to investigate a criminal offence committed by a person and of which the person is subsequently convicted). An example of interference that should have an associated compensation provision is entry onto another's property with damage following.

7.2.10 Does the legislation have sufficient regard to Aboriginal tradition and Island custom?

For a detailed background to the original enactment of the 'Aboriginal tradition and Island custom' principle, see Alert Digest No. 1 of 1999 at pages 13–17, paragraphs 3.18–3.29.

The former Scrutiny of Legislation Committee monitored numerous matters relating to Aboriginal tradition and Island custom and to the interests of Aboriginal and Torres Strait Islander communities in general, including the need for legislation to take account of the following:

- the special nature of parental or kinship relationships in Aboriginal and Torres Strait Islander communities
- the special difficulties faced by Aboriginal and Torres Strait Islander people within formal court, tribunal or other process structures with decision-making powers
- the special needs of Aboriginal and Torres Strait Islander people within the criminal justice and corrective service systems.

The former Scrutiny of Legislation Committee also recognised the value of undertaking significant consultation with Aboriginal and Torres Strait Islander representative bodies on proposed legislation which might impact on Aboriginal tradition or Island custom.⁴²

7.2.11 Is the legislation unambiguous and drafted in a sufficiently clear and precise way?

The former Scrutiny of Legislation Committee's expectations were that legislation should:

- be user friendly and accessible so ordinary Queenslanders can gain an understanding of the laws relating to a particular matter without having to refer to multiple Acts of Parliament
- contain coherent provisions, addressing foreseeable matters⁴³
- be drafted in a style that is as simple as possible, consistent with the nature of the subject matter
- be structured in a logical, user-friendly and accessible way
- contain provisions that are precisely drafted.⁴⁴

7.2.12 Does the legislation in all other respects have sufficient regard to the rights and liberties of individuals?

The former Scrutiny of Legislation Committee consistently took the approach that the matters specifically listed in the *Legislative Standards Act 1992*, section 4(3) are not exhaustive of all matters relevant to an individual's rights and liberties.

The former Scrutiny Committee took an expansive approach in identifying rights and liberties. These include traditional common law rights, for example, the right of a landowner to the use and enjoyment of his or her land. They can also encompass, for example, rights that are only incompletely recognised at common law (for example, the right to privacy) and rights (especially human rights) that arise out of Australia's international treaty obligations.⁴⁵

The former Scrutiny Committee made comment about legislation in relation to the following broad principles:

- Abrogation of rights and liberties (in the broadest sense of those words) from any source must be justified, whether the rights and liberties are under the common law, statute law or otherwise.
- Restrictions on ordinary activities must be justified.
- Legislative intervention should be proportionate and relevant in relation to any issue dealt with under the legislation.
- Imposition of liability under legislation should provide for the following:
 - adequate definition of the basis for the liability, with reasonable defences
 - imposition of responsibility for the actions of others only with strong justification
 - an appropriate and fair onus and standard of proof
 - a single process for the liability, with all forms of double jeopardy being avoided as far as possible
 - equality under the law for all persons responsible for the events from which the liability arises.
- Treatment of all persons affected by legislation should be reasonable and fair.
- There should be a balance within legislation between individual and community interests.

7.3 The institution of Parliament

The definition of fundamental legislative principles found in the *Legislative Standards Act 1992* is derived from an understanding of our parliamentary system. As Sir Anthony Mason, then Chief Justice of the High Court, stated in *Australian Capital Television Pty Ltd v Commonwealth (No. 2)*:⁴⁶

(T)he very concept of representative government and representative democracy signifies government by the people through their representatives.

The most significant fundamental principle underlying our parliamentary democracy is that sovereign power is exercised on behalf of the people by their representatives in the Parliament. Consequently, legislation must have sufficient regard to the institution of Parliament.

7.3.1 Does the legislation allow the delegation of legislative power only in appropriate cases and to appropriate persons?

The greater the level of potential interference with individuals' rights and liberties, or the institution of Parliament, the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

Some of the delegations of power in Acts that the former Scrutiny of Legislation Committee expressed concern about were as follows:

- power to affect the operation of an Act, as decided by Parliament, by subordinate legislation made by someone else (see the material on Henry VIII clauses in chapters 7.3.3 and 7.3.7)
- unduly wide power to fill in legislative gaps by subordinate legislation⁴⁷
- vague or overgeneralised powers to make subordinate legislation⁴⁸
- creation of offences and imposition of penalties, other than minor offences or penalties, by subordinate legislation⁴⁹
- definition of rights of review or appeal by subordinate legislation.⁵⁰

Other powers that should not be delegated by conferring a power to make subordinate legislation include:

- the power to create a new tax⁵¹
- the power to confer jurisdiction on higher courts, particularly the Supreme Court.⁵²

7.3.2 Does the legislation sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly?

For the Parliament to confer on someone other than the Parliament the power to legislate as the delegate of the Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation.

The matter involves consideration of whether the delegate may only make rules that are subordinate legislation within the meaning of the *Statutory Instruments Act 1992*. With few exceptions, this Act ensures that subordinate legislation must be tabled before, and may be disallowed by, the Legislative Assembly.

The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary scrutiny.⁵³

In considering whether it is appropriate that delegated matters be dealt with through an alternative process to the subordinate legislation, the former Scrutiny of Legislation Committee took into account the following:

- the importance of the subject dealt with
- the practicality or otherwise of including those matters entirely in subordinate legislation
- the commercial or technical nature of the subject matter
- whether the provisions were mandatory rules or merely to be had regard to.⁵⁴

A legislative requirement that instruments that are not subordinate legislation must be tabled in the Legislative Assembly may allay the concern that subordinate legislation has not been used. However, any government department or agency using this mechanism would need to have in place an ongoing reliable system to ensure the tabling actually happens. The automatic system of tabling subordinate legislation (see chapter 6.17) was instituted because of inevitable and inadvertent failures to table subordinate legislation.

7.3.3 Does the legislation authorise the amendment of an Act only by another Act?

Henry VIII clauses should not be used. The former Scrutiny of Legislation Committee's 1997 report *The use of "Henry VIII Clauses" in Queensland Legislation* agreed on the following definition of a Henry VIII clause:

A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action.

A new Bill sometimes provides for a power to make transitional regulations for matters for which the Bill either does not make provision or does not make sufficient provision. Such a power is intended to provide a mechanism for dealing with unforeseen difficulties that may arise in the transition from the previous legal framework to the new framework to be established under the new Bill.

The former Scrutiny of Legislation Committee often reviewed transitional regulation-making powers against the background of its opposition to Henry VIII clauses.

However, the former Scrutiny Committee indicated in Alert Digest No. 10 of 1996 at page 14 that, in the context of urgent Bills, a transitional regulation-making power may have sufficient regard to the institution of Parliament if it is subject to:

- a twelve-month sunset clause
- a further sunset clause on all the transitional regulations made pursuant to the transitional regulation-making power.

The former Scrutiny Committee also expressed the view that the subjects about which transitional regulations may be made should be stated in the relevant Bill.⁵⁵

The former Scrutiny Committee also identified clauses that delegate power to exempt a person or thing from the operation of an Act as potential Henry VIII clauses. This is because, under the delegation, there may be, effectively, a power to substantially change the Act in its application to a person or thing without reference to the Parliament.

This is particularly so if the clause allows a person or thing to be exempted from all or any provisions of an Act, without further limitation.

In providing flexibility in the administration of an Act through exemptions, the Act should state the purpose of the exemptions and limit them to circumstances so specific that the Parliament may be assured an exemption will be appropriate. A power to exempt should not be included in an Act if an ordinary licensing scheme could achieve the same purpose.⁵⁶

7.3.4 For subordinate legislation, is the legislation within the power that, under an Act or subordinate legislation (the authorising law), allows the subordinate legislation to be made?

Subordinate legislation should be authorised by, and not inconsistent with, the provisions of the authorising law. Case law made by the courts largely covers the field of this topic.

However, two Acts of general application contain important provisions that may affect the making of subordinate legislation.

The *Statutory Instruments Act 1992*, part 4, division 3 contains provisions about statutory instruments. In particular, part 4, division 3, subdivision 2 makes express provision for matters that may be provided for in subordinate legislation.

The *Acts Interpretation Act 1954*, part 8 and schedule 1 contain provisions that aid in the interpretation of legislation. The dictionary in schedule 1 defines commonly used words and expressions that apply to subordinate legislation.

7.3.5 For subordinate legislation, is the legislation consistent with the policy objectives of the authorising law?

Even though there may (strictly speaking) be legal power to make particular subordinate legislation, the subordinate legislation should only be made if it is being made to pursue the policy objectives for which the Parliament agreed to pass the authorising law.

The use of a subordinate legislation-making power to make subordinate legislation for a policy objective not anticipated by the Parliament may amount to an abuse of the power.

7.3.6 For subordinate legislation, does the legislation contain only matter appropriate to subordinate legislation?

Although an Act may legally empower the making of particular subordinate legislation, there remains the issue of whether the making of legislation for the matter in question at the lower level of subordinate legislation is appropriate. It must be remembered that the most authoritative maker of legislation is the Parliament, which is elected directly by the community.

An Act's empowering provision may be broadly expressed, so that not every item of subordinate legislation that could be made under it is necessarily appropriate to subordinate legislation in every circumstance that arises.

Also, for example, an empowering Act may have been enacted at a much earlier time under different circumstances to the circumstances applying when the subordinate legislation is made. See chapter 7.3.1 for some specific occasions when the use of delegated legislation has been considered dubious.

It should always be remembered that when the Parliament delegates the power to make subordinate legislation, it retains the right to disallow particular subordinate legislation on any ground.

7.3.7 For subordinate legislation, does the legislation amend statutory instruments only?

In its report of November 1998 on the *Commissions of Inquiry (Forde Inquiry—Evidence) Regulation 1998*, the former Scrutiny of Legislation Committee drew attention to the operation of the *Statutory Instruments Act 1992*, section 7.

Under section 7(1), a statutory instrument is an instrument that complies with both section 7(2) and 7(3). Section 7(2) provides that the instrument must be made under:

- (a) an Act; or
- (b) another statutory instrument; or
- (c) power conferred by an Act or statutory instrument and also under power conferred otherwise by law.

Section 7(3) requires the instrument to be one of the types listed in section 7(3).

The report notes that an Act is not one of the types contained in the list in section 7(3), and further notes that the *Acts Interpretation Act 1954* provides that in an Act ‘amend’ includes, for an Act or a provision of an Act, amend by implication.⁵⁷

The former Scrutiny Committee consistently expressed the view that a subordinate instrument that amends an Act, whether it be the body of the Act or a schedule to the Act, is inconsistent with the fundamental legislative principle requiring that subordinate legislation has sufficient regard to the institution of Parliament.⁵⁸

The former Scrutiny Committee, in its report *The use of “Henry VIII Clauses” in Queensland Legislation*, said that if an Act is purported to be amended by a subordinate instrument in circumstances that are not justified, the committee will voice its opposition by requesting the Legislative Assembly to disallow that part of the instrument that breaches the fundamental legislative principle requiring legislation to have sufficient regard for the institution of Parliament.

The report discusses the relationship between Henry VIII clauses and the requirement that subordinate legislation should amend statutory instruments only.

7.3.8 For subordinate legislation, does the legislation appropriately subdelegate a power delegated by an Act?

Subordinate legislation should subdelegate a power delegated by an Act only—

- (a) in appropriate cases and to appropriate persons; and
- (b) if authorised by an Act.

Part of the rationale for this query is to ensure sufficient parliamentary scrutiny of a delegated legislative power. The material under chapter 7.3.2 is therefore equally relevant here.

When considering whether it is appropriate for matters to be dealt with by an instrument that is not subordinate legislation, and therefore not subject to parliamentary scrutiny, the former Scrutiny Committee took into account the importance of the subject dealt with and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation.⁵⁹

7.3.9 Does the legislation in all other respects have sufficient regard to the institution of Parliament?

The former Scrutiny of Legislation Committee consistently took the approach that the matters specifically listed in the *Legislative Standards Act 1992*, section 4(4) and (5) are not exhaustive of all matters relevant to the institution of Parliament.

The former Scrutiny Committee took an expansive approach in identifying matters in which the institution of Parliament must be protected.

The former Scrutiny Committee made comment about legislation in relation to the following broad issues:

- whether legislation providing for direct democracy processes such as citizens-initiated referendums erodes parliamentary democracy⁶⁰
- whether a power to delegate to the executive a power to confer office and other rewards on members of Parliament erodes the Parliament’s ability to control its own affairs⁶¹
- whether restrictions on candidature in elections undermine the institution of Parliament⁶²
- whether national scheme legislation erodes Parliament’s sovereign power because it is required of Parliament in compliance with executive agreements made between governments without the agreement of Parliament.⁶³

7.4 An example of the application of fundamental legislative principles—inspectorial powers

Fundamental legislative principles are particularly important when powers of inspectors and similar officials are prescribed in legislation, because these powers are very likely to interfere directly with the rights and liberties of individuals.

Rules currently established, by precedent, to achieve consistency with fundamental legislative principles include the following:

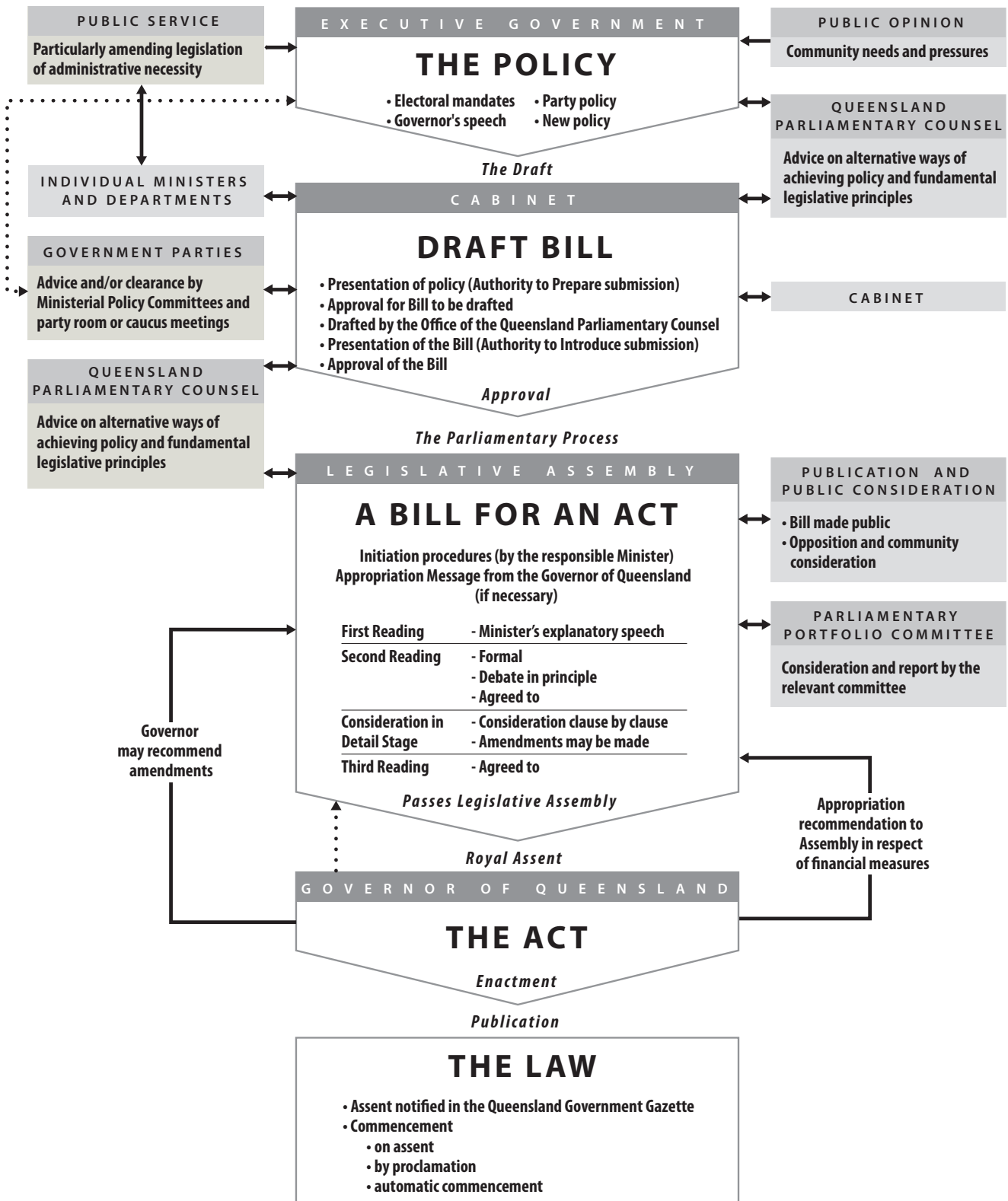
- An inspector must be issued with official identification documents and, when the inspector is exercising a power, the inspector must produce them to any person against whom the power is being exercised.
- Entry of any premises without consent is strictly controlled through limitations on the circumstances under which entry may be made and requirements for warrants.
- Entry without consent into anywhere a person lives requires the highest justification.
- The powers that may be exercised, particularly on entry of premises, must be specified as far as practical, and justifiable in proportion to the interference in rights and liberties involved.
- Powers of inspectors in particular legislation must be limited in ways that are appropriate to the objectives of the particular legislation and the persons against whom, and circumstances in which, the powers may be exercised.
- If it is an offence to obstruct or fail to obey, help, or provide information to an inspector, reasonable excuse must be provided as a defence.
- Property must not be interfered with or seized without particular justification.
- If property may be seized, the circumstances of its return must be specified and be fair, and the owner must be permitted reasonable access to it while it is seized.
- Provision must be made for notice to be given to the owner of property if it is damaged, and for payment of compensation unless there is particular justification for not providing compensation.

- There must be particular justification for the provision of power to force someone to provide information and documents, and care must be taken to define the circumstances and way in which the power is exercised.
- The privilege against self-incrimination must be specifically preserved, unless there is the highest justification for not doing so.
- If a person loses the privilege against self-incrimination under a provision, the person must be legally protected from the use against the person in criminal proceedings of evidence derived directly or indirectly from the loss of the privilege. The use of the evidence in other proceedings should also be prohibited unless there is a justification that is demonstrably proportionate to the impact of the loss of the privilege.

The Making of an Act of Parliament

The Legislative Process

(For ordinary non-urgent Government Bills having passage in the 'normal' way)



Glossary

Act. A law made by the Parliament, and known as an Act of Parliament. An Act comes into being when a Bill that has passed all three readings in the Legislative Assembly receives royal assent from the Governor. Sometimes referred to as primary or principal legislation.

Alert Digest. The name of the document in which the former Scrutiny of Legislation Committee reported to the Legislative Assembly on the committee's scrutiny of Bills and subordinate legislation. For Bills, the Alert Digest reported the committee's concerns on a case-by-case basis, and reported on any further consideration of those concerns following response from the Bill's sponsor. For subordinate legislation, the Alert Digest listed subordinate legislation with which the committee had concerns, and on the completion of the committee's inquiries, incorporated correspondence recording the committee's exploration of those concerns with the relevant minister.

amending legislation. Legislation amending other legislation.

amendment during consideration in detail. An amendment to a Bill, proposed during the consideration in detail stage of the Bill in the Legislative Assembly, for omitting words from, or inserting words in, the Bill.

assent. See royal assent.

Authority to Introduce a Bill approval. A decision of Cabinet on an Authority to Introduce a Bill submission, approving the introduction into the Legislative Assembly of the Bill the subject of the submission.

Authority to Introduce a Bill submission. One of the types of Cabinet submissions as provided for in *The Queensland Cabinet Handbook*. The submission asks Cabinet to approve that the Bill, in accordance with the draft accompanying the submission, be introduced into the Legislative Assembly as soon as possible. The proposed explanatory notes for the Bill should also accompany the submission.

Authority to Prepare a Bill approval. A decision of Cabinet on an Authority to Prepare a Bill submission, approving the preparation of the Bill the subject of the submission.

Authority to Prepare a Bill submission. One of the types of Cabinet submissions as provided for in *The Queensland Cabinet Handbook*. An Authority to Prepare a Bill submission explains the reasons for initiating a legislative proposal and its implications, and asks Cabinet to give approval for the preparation of a new Bill in accordance with the drafting instructions accompanying the submission.

Bill. Proposed primary legislation. It becomes an Act if passed by the Legislative Assembly and assented to by the Governor.

Cabinet. The members of the Legislative Assembly holding appointment as ministers. Cabinet is the decision-making centre of government. The Premier presides over Cabinet meetings, which are usually held on Mondays.

Cabinet legislation and liaison officer (CLLO). The liaison officer in each department responsible for the quality of documents provided by the department to Cabinet or the Executive Council, and for the administration of those documents. Also responsible for departmental management of the department's legislation program.

Clerk of the Parliament. The senior parliamentary officer and the chief executive of the Parliamentary Service. The Clerk of the Parliament is also known as the First Officer of the Legislative Assembly.

CLLO. See Cabinet legislation and liaison officer.

commencement proclamation. A proclamation commencing all or part of an Act. A commencement proclamation is used only if the Act provides for all or part of its provisions to start on a day fixed by proclamation.

consideration in detail stage. The stage in the passage of a Bill through the Legislative Assembly, between the Bill's second and third reading, when the Assembly considers the Bill in detail, that is, clause by clause and schedule by schedule. (See *The Queensland Parliamentary Procedures Handbook* for more detail.)

department. This term includes any entity (whatever called) that instructs OQPC on the drafting of legislation.

enact. Parliament's act in making a Bill into an Act.

erratum. An erratum to the explanatory notes presented with a Bill or subordinate legislation is a document tabled in the Legislative Assembly to correct an error or other inaccuracy in the notes. The document is tabled by the Bill's sponsoring minister or, in the case of subordinate legislation, administering minister and also published on the Legislation website together with the explanatory notes as originally tabled.

Executive Council. The body that advises the Governor on the exercise of powers by the Governor in Council. The Executive Council is made up of persons appointed as Executive Councillors who are, customarily, ministers. A meeting of the Executive Council requires a minimum of two Executive Councillors. The Governor presides at Executive Council meetings, which usually take place on Thursdays. (See *The Queensland Executive Council Handbook* for more detail.)

executive government. 1. The ministers appointed by the Governor to administer the laws of the State. 2. The ministers together with the departments of State.

exempt subordinate legislation. Subordinate legislation not required to be drafted by OQPC. See the *Legislative Standards Act 1992*, schedule 1, definition *exempt subordinate legislation* and section 7(e) for more detail.

explanatory notes. An explanation of the purpose and detail of proposed legislation. See the *Legislative Standards Act 1992*, section 22 for when explanatory notes are required. For detail about what is required for explanatory notes, see the *Legislative Standards Act 1992*, sections 23 and 24.

explanatory speech. The speech made by the member sponsoring a Bill (the relevant minister in the case of a government Bill) in introducing the Bill.

extrinsic material. Material that is relevant to legislation but not part of the legislation. Examples include explanatory notes and a second reading speech. In certain circumstances, it may be used to help interpret legislation. See the *Acts Interpretation Act 1954*, section 14B and the *Statutory Instruments Act 1992*, section 15 for more detail.

first reading. When the motion by the Bill's sponsoring minister that the Bill be read a first time is passed. For more detail about the first reading, and the stages of the passage of a Bill generally, see *The Queensland Parliamentary Procedures Handbook*.

fundamental legislative principles. Guiding principles relating to legislation that underlie a parliamentary democracy based on the rule of law. They include requiring legislation has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. See the *Legislative Standards Act 1992*, section 4.

government. A reference to the government is a reference:

- in the context of the Legislative Assembly—to the members recognised in the Legislative Assembly as forming the government
- otherwise—to the executive government of the State.

government Bill. A Bill sponsored in the Legislative Assembly by a minister in his or her role as a member of the government.

Governor. The Queen's representative in Queensland. The Governor is appointed by Royal Commission on the advice of the Premier. The Governor is responsible for approving actions of the executive government and assenting to Acts.

Governor in Council. The Governor acting with the advice of the Executive Council.

Henry VIII clause. A clause of an Act of Parliament that enables the Act to be expressly or impliedly amended by subordinate legislation or executive action. See the former *Scrutiny of Legislation Committee's 1997 report The use of "Henry VIII clauses" in Queensland Legislation*, paragraph 5.7.

House. This word is commonly used to refer to the chamber in which the members of the Legislative Assembly meet.

Leader of the House. The member of the government in the Legislative Assembly whose responsibilities include ensuring the government's legislative program is introduced into the Legislative Assembly, and dealt with there, in an appropriately timely way.

legislation. Written law made by the Parliament, or by a delegate of the Parliament such as the Governor in Council. Legislation can be contrasted with the common law and equity, which is found in court case law. Legislation is ordinarily found in the form of Acts and statutory instruments.

Legislation website. The Queensland Legislation website www.legislation.qld.gov.au.

Legislative Assembly. The elected members of Parliament, sitting as the Legislative Assembly.

long title. See title.

member. An elected member of the Legislative Assembly.

minister. A person appointed by the Governor, on the advice of the Premier, to administer laws of the State. Ministers are customarily also made members of the Executive Council. The Premier is also a minister. The ministers collectively make up the government, and each minister is ordinarily responsible for a particular government department.

notification. The formal process of giving public notice that new subordinate legislation has been made. In the absence of a commencement provision, subordinate legislation commences on the day it is notified.

Office of the Queensland Parliamentary Counsel (OQPC). The office responsible for drafting Bills and subordinate legislation. The office is established under the *Legislative Standards Act 1992*, part 3.

OQPC. See Office of the Queensland Parliamentary Counsel.

order in council. An instrument made by the Governor in Council, ordinarily under an authority stated in an Act, that identifies itself as being an order in council. Provisions for the making of orders in council are not usually found in recent Acts, their place having largely been taken by regulations (for instruments of a legislative nature) and gazette notices (for instruments of an administrative nature).

Parliament. The Queen and the Legislative Assembly. The Queen's role in the Parliament of Queensland is performed by her representative in Queensland, the Governor, although the Queen may perform her role when personally present in the State.

plain English. The writing of legislation in plain English involves the use of language, presentation, structure and style that makes the legislation easily read and understood. It also seeks to ensure legislation is free of unnecessary complexity and difficulty.

portfolio. The administrative and legislative responsibilities assigned to a minister under the *Constitution of Queensland 2001* and the *Public Service Act 2008*.

portfolio committee. A Parliamentary portfolio committee established under the *Parliament of Queensland Act 2001* that is responsible for examining each Bill and item of subordinate legislation in its portfolio area to consider:

- (a) the policy to be given effect; and
- (b) the application of fundamental legislative principles; and
- (c) for subordinate legislation—its lawfulness.

A portfolio committee also has responsibility to monitor the operation of explanatory notes and, for subordinate legislation, staged automatic expiry and the regulatory impact statement system. See particularly the *Parliament of Queensland Act 2001*, section 93.

Premier. The leader of the government. The Premier is a minister and is the chair of Cabinet.

private member's Bill. A Bill sponsored in the Legislative Assembly other than by a minister in his or her role as a member of the executive government.

proclamation. An instrument made by the Governor, usually under an authority stated in an Act, that identifies itself as being a proclamation. In Acts, provisions for the making of proclamations are usually limited to the making of proclamations for commencing provisions of Acts that did not commence on royal assent.

Queensland (or State). 1. The land and waters within the boundaries of Queensland. 2. The body politic of Queensland.

regulation. An instrument made by the Governor in Council, under an authority stated in an Act, that identifies itself as being a regulation. Apart from proclamations for commencing uncommenced provisions of Acts and rules of court, a regulation is the form of subordinate legislation usually provided for in Acts in cases where the subordinate legislation is to be made by the Governor in Council.

regulatory impact statement (or RIS). A statement required to be prepared about proposed subordinate legislation before the subordinate legislation is made if the subordinate legislation is likely to impose appreciable costs on the community or a part of the community. See the *Statutory Instruments Act 1992*, part 5.

reprint. A reproduction of legislation prepared by OQPC under the *Reprints Act 1992*. If legislation has been amended, a reprint of the legislation shows the legislation as amended. Section 7 of the *Reprints Act 1992* allows changes to be made to the legislation using the editorial changes listed there. Changes under section 7 are not permitted to change the effect of a provision (*Reprints Act 1992*, section 8), but legislation as reprinted using the editorial powers has effect as if the changes made to it had been made expressly by other legislation (*Reprints Act 1992*, section 9).

retrospective operation. Legislation has retrospective operation if, once it is made, it can at law be said that it took effect at a point in time before the time it was made.

RIS. See regulatory impact statement.

royal assent (or assent). Signification by the Governor in the Queen's name of assent to a Bill becoming an Act. This is the final step in the enactment of primary legislation.

Scrutiny of Legislation Committee. A former statutory committee established under the *Parliament of Queensland Act 2001* with responsibility to examine all Bills and subordinate legislation to consider the application of fundamental legislative principles and to consider the lawfulness of subordinate legislation. Now see portfolio committee.

second reading. When the question put by the Speaker after the second reading debate that the Bill be read a second time is accepted. This precedes consideration in detail. For more detail about the second reading, and the stages of the passage of a Bill generally, see *The Queensland Parliamentary Procedures Handbook*.

short title. The short name given to a Bill or Act, usually by its first clause or section, consisting of a name and the year of enactment.

significant subordinate legislation. 1. Under the *Legislative Standards Act 1992*, significant subordinate legislation is subordinate legislation for which a regulatory impact statement must be prepared under the *Statutory Instruments Act 1992*. 2. For administrative purposes, however, proposed subordinate legislation is also treated as significant subordinate legislation (and therefore also required to be the subject of a formal Cabinet submission) if it affects a politically sensitive policy area, if it involves major government expenditure for which Cabinet approval has not previously been sought or if it has not been certified by OQPC. See *The Queensland Cabinet Handbook*.

sponsor. The sponsor of a Bill in the Legislative Assembly is the person having primary responsibility for the introduction and passage of the Bill through the Assembly. For most Bills, this is a minister (although any private member can also sponsor a Bill), and the minister can be referred to as the Bill's sponsoring minister. Also, the department administered by the minister is commonly referred to as the Bill's sponsoring department.

State. See Queensland.

Statute Book. All legislation taken as a body of law.

statutory instrument. In general terms, a document made under the authority, directly or indirectly, of an Act. For more detail, see the *Statutory Instruments Act 1992*.

subordinate legislation. A statutory instrument that under the operation of the *Statutory Instruments Act 1992* is subordinate legislation. For a general explanation, see chapter 6 of this handbook. Most subordinate legislation is in the form of a regulation, rule, by-law, ordinance or statute (for example, a University statute).

sunset clause. A clause included in legislation that causes the legislation or part of the legislation to be repealed at a specified future time.

(to) table. The formal process of placing documents such as Bills, subordinate legislation and explanatory notes on the table of the Legislative Assembly for discussion.

third reading. When the question put by the Speaker after consideration in detail is accepted. (For more detail about the third reading, and the stages of the passage of a Bill generally, see *The Queensland Parliamentary Procedures Handbook*.)

title (or long title). The words appearing at the start of an Act, before the formal words of enactment, that describe briefly the Act's purview. The title or long title is to be distinguished from the short title or any preamble.

uniform legislation. Legislation made in conjunction with other jurisdictions with the intention of making the law uniform between the jurisdictions. Sometimes referred to as national scheme legislation.

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- 1 C Althaus, P Bridgman and G Davis, *The Australian Policy Handbook* (Allen & Unwin, Australia, 4th ed, 2007).
- 2 C Althaus, P Bridgman and G Davis, *The Australian Policy Handbook* (Allen & Unwin, Australia, 4th edn, 2007).
- 3 Policy No. 2 of 1996 of the Scrutiny of Legislation Committee, in Alert Digest No. 4 of 1996 at pages 6–7, deals with the delegation of legislative power to create offences and prescribe penalties.
- 4 See PD Finn, ‘Public officers: some personal liabilities’ (1977) 51 *The Australian Law Journal* 313 at page 317.
- 5 Following Cabinet’s decision of 24 June 2013.
- 6 The Scrutiny of Legislation Committee’s Policy No. 2 of 1996 on the delegation of legislative power to create offences and prescribe penalties, in Alert Digest No. 4 of 1996 at pages 6–7.
- 7 For example, *Potter v Minahan* (1908) 7 CLR 277; *Bropho v The State of Western Australia* (1990) 171 CLR 1; *Coco v The Queen* (1994) 179 CLR 427; *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309; *Attorney-General for the State of South Australia v The Corporation of the City of Adelaide* [2013] HCA 3.
- 8 *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309 at 329 per Gleeson CJ.
- 9 *Attorney-General for the State of South Australia v The Corporation of the City of Adelaide* [2013] HCA 3 at [42] per French CJ.
- 10 *Williams v The Queen* (1986) 161 CLR 278; *Al-Kateb v Godwin* (2004) 219 CLR 562; *Plaintiff M47-2012 v Director-General of Security* [2012] HCA 46.
- 11 *Kruger v Commonwealth* (1997) 190 CLR 1.
- 12 *Attorney-General for the State of South Australia v The Corporation of the City of Adelaide* [2013] HCA 3.
- 13 *Clissold v Perry* (1904) 1 CLR 363.
- 14 *X7 v Australian Crime Commission* [2013] HCA 29.
- 15 *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.
- 16 *Magrath v Goldsborough Mort & Co Ltd* (1932) 47 CLR 121.
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- 22 *X7 v Australian Crime Commission* [2013] HCA 29 at [87] per Hayne and Bell JJ (Kiefel J agreeing).
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- 26 Alert Digests No. 1 of 2002 at page 22, paragraphs 19–21; No. 8 of 2001 at pages 18–19, paragraphs 10–14; and No. 9 of 2000 at page 6, paragraph 30.
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- 30 Alert Digest No. 2 of 1997 at pages 12–13, paragraph 1.60.
- 31 For example, Alert Digest No. 13 of 1997 at page 19, paragraph 4.15.
- 32 (1983) 152 CLR 281 at 288.
- 33 The Scrutiny of Legislation Committee Annual Report 1997–1998 at page 7, paragraph. 2.14.
- 34 Alert Digest No. 3 of 1999 at page 25, paragraphs 4.17–4.18.
- 35 Alert Digest No. 1 of 1998 at page 5, paragraph 1.25.
- 36 Alert Digest No. 4 of 2001 at page 7, paragraph 16.
- 37 Alert Digests No. 1 of 2003 at page 3, paragraphs 21–23; No. 6 of 2002 at pages 31–32, paragraphs 35–44, and at page 48, paragraphs 27–28; No. 3 of 2002 at page 16, paragraphs 15–18; and No. 11 of 1999 at page 11, paragraphs 4.20–4.21.
- 38 Alert Digest No. 4 of 1999 at page 16, paragraphs 2.8–2.14.
- 39 Alert Digests No. 6 of 2003 at pages 27–8, paragraphs 34–42; and No. 1 of 2000 at page 5, paragraphs 37–42.
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- 43 The Scrutiny of Legislation Committee Annual Report 1998–1999 at page 6, paragraph 2.14.
- 44 The Scrutiny of Legislation Committee Annual Report 1999–2000 at page 7, paragraph 2.14.
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- 46 (1992) 177 CLR 106 at page 137.
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- 53 Alert Digest No. 3 of 1996 at pages 5–6, paragraphs 2.3–2.9.
- 54 Alert Digests No. 1 of 2002 at page 2, paragraph 10; No. 8 of 2001 at pages 15–16, paragraph 6; No. 9 of 2000 at pages 24–25, paragraphs 48–56; and No. 4 of 1999 at page 10, paragraphs 1.65–1.67.
- 55 Alert Digests No. 7 of 1997 at pages 13–14, paragraphs 2.50–2.55; No. 5 of 1997 at pages 10–11, paragraphs 1.53–1.62; No. 10 of 1996 at pages 17–18, paragraphs 4.17–4.24; No. 3 of 1996 at page 17, paragraphs 4.18–4.20; and No. 2 of 1996 at pages 19–20.
- 56 Alert Digest No. 5 of 2002 at pages 4–5, paragraphs 28–35.
- 57 Page 4, paragraphs 5.6 and 5.9–5.11 of the report.
- 58 The Scrutiny of Legislation Committee Annual Report 1997–1998 at page 11, paragraph 3.8; and the Scrutiny of Legislation Committee Annual Report 1996–1997 at page 11.
- 59 Alert Digest No. 4 of 1999 at page 10, paragraphs 1.65–1.67.
- 60 Alert Digests No. 3 of 1999 at page 5, paragraph 1.41; and No. 7 of 1998 pages 11–19.
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- 62 Alert Digests No. 3 of 2002 at pages 9–10; and No. 1 of 2002 at pages 18–19, paragraphs 3–14.
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