Foreword

Good government rests on transparent, thorough processes that guide Ministers, their advisors, and professional public servants in the effective completion of their duties. Governing Queensland is a suite of policy and administrative handbooks designed to explain in an open way the processes of government in this State. Details of Queensland Cabinet, Executive Council and Parliamentary processes are provided and important links between them are explored. Other handbooks describe policy and legislative development practices in Queensland government agencies. Another volume provides administrative and financial guidelines for ministerial offices and another provides direction for current and intending members of government boards.

Governing Queensland includes—

- the Queensland Cabinet Handbook
- the Queensland Executive Council Handbook
- the Queensland Legislation Handbook
- the Queensland Ministerial Handbook
- the Queensland Parliamentary Procedures Handbook
- the Queensland Policy Handbook

These handbooks are written firstly for Ministers, Members of Parliament, public servants and staff in Ministers’ offices, but they will be of interest to many other people who work with government agencies or who wish to influence government decisions. For serious students of government, Governing Queensland offers transparency about the policies and practices associated with our most important government institutions. Appropriately, as we enter a new age of electronic broadcasting, Governing Queensland is also available on compact disc and through the Queensland Government’s world wide web site.

Governing Queensland will strengthen the public service by requiring high quality processes supporting effective government, and encouraging better integration of policy development, planning, implementation and evaluation.

Governing Queensland describes the policy and legislative development processes that this government follows, and provides details of the processes involved and the responsibilities of key participants. Its publication marks another achievement by my government in encouraging transparent and accountable practices in support of a stronger, more participative democracy.

Peter Beattie MLA
Premier
Introduction


This handbook is published in a modern format designed to allow it to be read more easily. Summaries and notes in the wide margin should facilitate the swift preview of text and also provide checklists for users.

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

- policy development in government agencies;
- the roles of Cabinet and the Executive Council;
- the roles and responsibilities of Ministers and Ministerial staff; and
- the processes of drafting and approving laws.

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

The Office of the Queensland Parliamentary Counsel is responsible for the drafting of Acts of Parliament and most subordinate legislation in Queensland. It also provides advice on alternative ways of achieving policy objectives and on the application of fundamental legislative principles. In addition to its role in preparing government Bills and most subordinate legislation, when requested to do so, OQPC drafts Private Members’ Bills. In doing so, OQPC advises Members of the Legislative Assembly 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. For the sake of simplicity, this handbook only occasionally mentions legislation prepared other than for government.

This handbook also deals with the publication of legislation and legislative information by the Office of the Queensland Parliamentary Counsel.

This handbook is available via the Internet at: www.legislation.qld.gov.au.

Copies of this handbook can be purchased at GoPrint. A CD-ROM also can be purchased that holds all the Governing Queensland handbooks. Hyperlinks within the electronic text on the CD version allow users to move swiftly to related topics.

For purchases of the CD version, contact: GoPrint, Marketing and Sales Division, 371 Vulture Street, Woolloongabba, 4102, or via e-mail to: retail@goprint.qld.gov.au.

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Index
1.0 **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.

Although 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, 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 the judges have the role to apply 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 by its maker to present a policy in a particularly powerful way or to create a state of affairs that can therefore 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—

a. directly deciding the matter; or
b. 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 set out in the legislation and the way it 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

The Parliament of Queensland is authorised to make laws for the peace, welfare and good government of Queensland. This is a plenary or full power, and can even have an effect outside Queensland if there is a sufficient connection with Queensland.

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, it overrides a State law on the same matter.

The Parliament of Queensland consists of the Queen and the Legislative Assembly. In Queensland, the Queen’s role in the Parliament is performed by the Governor. However, while the Queen is personally present in Queensland, she is not precluded from exercising any of her powers and functions in respect of Queensland.

With some exceptions, legislation applicable in Queensland must be made by, or authorised by, the Parliament of Queensland. Other legislation applicable in Queensland may be Commonwealth legislation applicable under the Australian Constitution and legislation of other Australian jurisdictions that has appropriate extraterritorial effect in Queensland because of some particular connection with the other jurisdiction. Also, some older legislation of New South Wales and the United Kingdom may apply because of the State’s colonial history.

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1. Constitution Act 1867, s 2
2. The Australia Act 1986 (Cth and UK), s 2(1) provides—
   2. (1) It is hereby declared and enacted that 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.
3. The Australia Act 1986 (Cth and UK), s 7
4. The Australia Act 1986 (Cth and UK) provides—
   1. No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.
1.5 How Parliament makes legislation or authorises the making of legislation

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 it 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. What is achieved by the Act depends on the interpretation of the Act’s provisions.

Subordinate legislation

Generally speaking, subordinate or delegated legislation is legislation the making of which is authorised by an Act of Parliament. The Act must delegate authority to a body or person to make the subordinate legislation.

Authorisation from Parliament is therefore central to the consideration of the validity of particular subordinate legislation.

In this context, it is helpful to understand that the word "legislation" usually means a statutory instrument of legislative character.

In Queensland, some particular instruments or types of instruments made under Acts are specially defined by Acts to be "subordinate legislation". If an Act gives an instrument this label, it means that it must be tabled before the Legislative Assembly and can be disallowed by it.

The most familiar example of "subordinate legislation" is a regulation made by the Governor in Council. However, many other statutory instruments are expressly declared to be "subordinate legislation" by the Statutory Instruments Act 1992 or the Act that authorises them to be made.

1.6 Information about the following chapters

The appendix is a flow chart describing the legislative 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  
chart stages  

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Chapters 2 to 5 are mainly about legislation made as an Act (primary legislation). Chapter 6 is about subordinate legislation. Chapter 7 concerns both Acts and subordinate legislation.

1.7 Departments and agencies

Government departments are commonly involved in the development of legislation, but so also, from time to time, are separate agencies of government. To help readability, the term ‘department’ has generally been used in this handbook but may be taken to include agency where appropriate.

1.8 Glossary

A glossary of terms commonly encountered in the Queensland legislative context is located at the end of this handbook.
2.0 **Policy Development of a Government Bill**

This chapter considers the policy information needed to draft a government Bill.\(^5\) The drafting process for a government Bill is considered in chapter 3.

2.1 **The nature of policy**

‘Policy’ is defined in various ways\(^6\) including as the Government’s public response to issues or problems arising within the State.

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.\(^7\)

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 for choosing to implement a policy through an Act of Parliament. These reasons may include the following—

- existing rights and obligations must be modified and this may only be done effectively by unilateral intervention of the Parliament;
- a significant policy objective may be to ensure permanency for the policy to be implemented and this may only be achievable by an Act of Parliament;
- the high level of importance given the policy by the government may indicate that an Act of Parliament is the appropriate way to present the policy to the community.

The following matters suggest that an Act not be used—

- the proposal does not involve modification of existing rights and obligations;
- the policy may be purely administrative in character and therefore should not achieve permanence through an Act of Parliament;
- the policy may not be of sufficient significance to justify it being given permanency in an Act of Parliament.

An Authority to Prepare a Bill submission must include justification for legislation as the most appropriate means of proceeding.\(^8\)

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5. For more information on policy development, see the Queensland Policy Handbook.
6. See the Queensland Policy Handbook.
7. See, for example, the repealed Medicare Principles and Commitments Adoption Act 1994 which, by section 4, expressly stated that it did not create legal rights.
8. See the Queensland Cabinet Handbook.
2.3 Does the State have power to make the law

The State has very wide powers to make laws, but the State’s powers are subject to the Australian Constitution. Also, it is clear that a law having extra-territorial operation must have some connection with the State to be valid.9 The more tenuous the connection, the more likely the law will be challenged on consistency grounds.10

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 house-keeping amendments necessary to keep Acts up-to-date. Portfolio Bills allow some scope for policy change, but generally do not contain major new policy initiatives.

2.6 Statute Law (Miscellaneous Provisions) Bills

Statute Law (Miscellaneous Provisions) Bills are useful for minor amendments of a house-keeping nature across the Statute Book as a whole. A Statute Law (Miscellaneous Provisions) Bill is generally introduced and carried by the Leader of the House. Matters are suitable for inclusion in a Statute Law (Miscellaneous Provisions) Bill only if they are concise, minor and non-controversial. Because of the low priority of these Bills, amendments should be included only if they are not required to be passed within a strict timetable.

2.7 Sponsoring a Bill

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

2.8 Role of policy or instructing officers

A policy or instructing officer from a 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 and must be ready to brief Ministers about any difficulties in achieving policy objectives. The officer’s role is more fully considered at 3.4.

2.9 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.

A medium sized Bill may be in its development stage, that is, from the time it is originally conceived to the time an Authority to Prepare is given by Cabinet, for a year or more. 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 scheme, sensible provision must be made for every step of the process. This involves consideration of realistic time periods for the following—

- initial development of policy;
- consultation;
- Ministerial and Cabinet approval;
- drafting;
- passage through Parliament; and
- 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 for drafting alone tend to emerge as a matter of fact—

- for a small Bill (20 pages or less)—3 months;
- for a medium Bill (21—90 pages)—6 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 legislation is drafted in a program decided by the Bill’s priority at a whole-of-government level.

Drafting time also depends heavily on the condition 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.11

Well-drafted laws, that can be expected to result from an appropriate preparation period, bring other rewards to government
and the community generally. They are easily understood, offer certainty in their application and generally attract a higher level of compliance because people understand what the law requires of them.

2.10 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 officer’s 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 examples follow.

The Department of the Premier and Cabinet’s Policy Coordination 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, alternative ways of achieving policy objectives and other legislative issues that arise. The Crown Solicitor provides general and specialist legal advice, particularly on any matter affecting the State’s liability. The Solicitor-General also provides legal advice, particularly on substantial constitutional matters. The Treasury Department 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.

2.11 Considering fundamental legislative principles

Fundamental legislative principles are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.\(^\text{12}\) The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

OQPC has a statutory responsibility to advise in relation to the application of fundamental legislative principles in drafting legislation.\(^\text{13}\) The Scrutiny of Legislation Committee has a statutory responsibility to comment on the application of fundamental legislative principles to particular Bills and particular subordinate legislation.\(^\text{14}\)

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\(^{12}\) Legislative Standards Act 1992, s 4(1)

\(^{13}\) Legislative Standards Act 1992, s 7

\(^{14}\) See the Parliamentary Committees Act 1995, s 22(1)(a).
The following examples or explanations of identified principles are
given to provide some practical guidance on the application of the
principles. For more information on the application of fundamental
legislative principles in the drafting of legislation,
advice is available from OQPC or by consulting the
Alert Digests of the Scrutiny of Legislation Committee.\textsuperscript{15}

The \textit{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 listed below in items 1 to 10.

The \textit{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 listed below in items 12 to 15.

**The rights and liberties of individuals**

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 2-tiered system with an internal review
of the original decision-maker’s decision and a subsequent right of
appeal to a court or tribunal.\textsuperscript{16} The decision-maker should be
required to provide reasons for the decision, together with
information on review/appeal rights.\textsuperscript{17}

2. **Is the legislation consistent with principles of natural justice?**

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

The principles require that something should not be done to a
person that will deprive the person of some right, or 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.

The decision-maker must be unbiased.

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.


\textsuperscript{16} See for example the \textit{Transport Planning and Coordination Act 1994}, part 5 (Review and appeals against decisions).

\textsuperscript{17} See also the \textit{Acts Interpretation Act 1954}, s 27B (Content of statement of reasons for decision).
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. Delegation to a person or body outside government is uncommon as it 'potentially circumvents the traditional means of accountability usually applicable to the public sector. For example, administrative decisions made within government are usually subject to accountability mechanisms such as those under the Freedom of Information Act 1992, the Judicial Review Act 1991, the Criminal Justice Act 1989 and the Parliamentary Commissioner Act 1974'.

The appropriateness of limitation on delegation depends on all the circumstances including the extensive nature of the power, how its use may affect the rights or legitimate expectations of others or appears to need particular expertise or experience.

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 is opposed. However, justification for the reversal is sometimes found in situations where the matter 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.

Generally, for a breach 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 breach of this principle and must be justified. Common situations where these concerns arise 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.

Under this principle, 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.

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, but the Scrutiny of Legislation Committee examines powers of entry and

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18 The Acts Interpretation Act 1954, s 27A contains extensive provisions dealing with delegations.

19 This approach also reflects the policy of Scrutiny of Legislation Committee—see Policy No 1 of 1996 in Alert Digest No 4 of 1996 at p 5.


21 See Alert Digest No 2 of 1997 at p 11.
can be expected to comment adversely if appropriate safeguards are not provided. Residential premises should not, without the highest justification, be entered except with the occupier’s consent or under a warrant.

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 (1983) 152 CLR 281 at 288, Gibb 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’.

The Scrutiny of Legislation Committee has commented 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 that 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)’.

Provisions denying the privilege are rarely necessary. If provided, provision also needs to be made to grant immunity against the use of information gained, directly or indirectly, from forced disclosure contrary to the privilege. 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. Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?

Whether a statutory provision is in fact retrospective can often be difficult to decide. For example, difficulties occur where the provisions of a Bill apply to an event that comprises several components, some of which happened before the Bill’s commencement and some after. A Bill should not contain any provision that, adversely and retrospectively, affects rights or liberties or imposes obligations.
8. Does the legislation confer immunity from proceeding or prosecution without adequate justification?

The Scrutiny of Legislation Committee has stated that one of the fundamental principles of the law is that every one is equal before the law, and should therefore be fully liable for one’s acts or omissions.\textsuperscript{24} However, it does recognise that the conferral of immunity is appropriate in certain situations. For example, the Committee is not opposed to members presiding over proceedings in the Land Court having the same privileges, protection and immunity as would apply to a Supreme Court Judge presiding in that jurisdiction.\textsuperscript{25}

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). An example of interference that should have an associated compensation provision is entry onto another’s property with damage following.

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

An Act enacted after 28 November 1994 affects native title only so far as the Act expressly provides. An Act ‘affects’ native title if it extinguishes the native title rights and interests or it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.\textsuperscript{26}

For a detailed background to the original enactment of the ‘Aboriginal tradition and Island custom’ principle, see Alert Digest No 1 of 1999, p 13.

11. Is the legislation unambiguous and drafted in a sufficiently clear and precise way.

12. Does the legislation allow the delegation of legislative power only in appropriate cases and to appropriate persons.

This matter is concerned with the level at which delegated legislative power is used.

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.

For example, in relation to a power to impose penalties under subordinate legislation, the heavier the penalty, the more likely it is that it should be imposed only by an Act of Parliament. Another example would be that a power to impose a significant new tax, or to change the jurisdiction of the Supreme Court, is likely to be only appropriate in an Act of Parliament.

\textsuperscript{24} Alert Digest No 1 of 1998 at p 5
\textsuperscript{25} Alert Digest No 11 of 1999 at p 11
\textsuperscript{26} Acts Interpretation Act 1954, s 13A
13. **Does the legislation sufficiently subject the exercise of a delegated legislative power to the scrutiny of 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.\(^{27}\)

14. **Does the legislation authorise the amendment of an Act only by another Act.**

Henry VIII clauses should not be used. See the Scrutiny of Legislation Committee’s report on Henry VIII clauses published in 1997.

The Scrutiny of Legislation Committee often reviews transitional regulation-making powers against the background of its opposition to Henry VIII clauses. However, the Committee has indicated 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 12 month sunset clause; and
- a further sunset clause on all the transitional regulations made pursuant to the transitional regulation making power.\(^{28}\)

The Committee has also expressed the view that the subjects about which transitional regulations may be made should be stated in the Bill.\(^{29}\)

The Committee has 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 Parliament.

This is particularly so if the offending 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 Parliament may be assured an exemption will be appropriate. Exemption power should not be included in an Act if an ordinary licensing scheme could achieve the same purpose.

15. **For subordinate legislation, is the legislation—**

- (a) within the power that, under an Act or subordinate legislation (the "authorising law"), allows the subordinate legislation to be made; and
- (b) consistent with the policy objectives of the authorising law; and
- (c) about matter appropriate to subordinate legislation; and
- (d) amending statutory instruments only; and

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27 Alert Digest No 3 of 1996 at p 5
28 Alert Digest No 10 of 1996 at p 14
29 Alert Digest No 7 of 1997 at p 13-14; Alert Digest No 5 of 1997 at p 10-11; Alert Digest No 10 of 1996 at p 13 and 14; Alert Digest No 3 of 1996 at p 17; Alert Digest No 2 of 1996 at p 19-20.
(e) subdelegating a power delegated by an Act only—
   (i) in appropriate cases and to appropriate persons; and
   (ii) if authorised by an Act.

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 requirements for warrants and limitation of circumstance;
• 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 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 the circumstances must 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.

2.12 Other matters ordinarily considered in the
drafting process

This paragraph provides more general information on matters
ordinarily considered in drafting a Bill.

The Cabinet Handbook states that ‘Legislation that has the potential
to bind the State must expressly declare whether or not it binds the
State. This matter should be specifically addressed in the submission
seeking Cabinet’s authority to prepare a Bill.’

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).

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 Commonwealth Constitution, section
114 provides—

A State shall not, without the consent of the Parliament, …
 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.

An Act commences on the date of assent unless the Act expressly
provides otherwise. Often, an Act will make express provision for
its commencement either by specifically stating a commencement
date or by providing for its commencement by proclamation.

An Act or provision of an Act that has not commenced within 1 year
of the assent day automatically commences on the next day.

For practical reasons, the timetable for the commencement into
effect 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.

Separate, complex, delayed and excessively separated
commencement of provisions can make it unacceptably difficult to
understand what is the applicable law at a particular time.
Research should be conducted on the impact of the proposed legislation on existing legislation and other laws. All provisions (both in legislation to be amended and in other legislation) requiring amendment as a consequence of the proposed Act should be identified.  

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 inserted about the enforcement process to be followed. For example, for the prosecution of an offence, it should be clear whether it is to be on indictment or 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.

Penalties must be internally consistent and 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.

Simple offences, and indictable offences prosecuted summarily, should not carry a penalty greater than 3 years’ imprisonment.

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

If forms are required for an Act, current legislative drafting practice is generally to provide for forms to be administratively approved, rather than prescribed by legislation. Approved forms are generally approved by the chief executive officer of the administering department. They have the advantages of being able to be amended quickly if a deficiency in the form becomes apparent and of reducing the Executive Council’s work. Each approved form is required to be given a unique number and approval or availability of the form must be notified in the gazette. Approval of forms is annotated in the Queensland Legislation Annotations under the relevant Act.

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 Policy Handbook and relevant officers in the Treasury Department.
A principal objective of the *Police Powers and Responsibilities Act 1997* 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 the Police Powers and Responsibilities Act.

The *Statutory Instruments Act 1992*, particularly in sections 21 to 31, provides for specific regulation-making powers. Consideration must be given to the extent of intended regulations so that any additional regulation-making power needed is expressly stated in the Bill.

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. It is limited to matters of process and other incidental matters. Criminal liability is not imposed retrospectively.

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

- whether or not it represents the State;
- whether particular Acts of general application apply to the authority, including, for example—
  - *Financial Administration and Audit Act 1977*
  - *Statutory Bodies Financial Arrangements Act 1982*
  - *Criminal Justice Act 1989*
  - *Equal Opportunity in Public Employment Act 1992*
  - *Libraries and Archives Act 1988*;
- whether the authority, if it is a corporation, is an exempt public authority under the Corporations Law.

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 attribute or allocate to it the types of incidents 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.
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, consideration should be given as to whether specific provision is needed to bring in or isolate the earlier circumstances. This is essential when introducing a criminal offence, penalty or process change.

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, reasonability is implied.38 That can sometimes be an impractical concept to administer.

Proper, timely consideration should be given to transitional and savings provisions. They are often required when replacing licensing schemes and for continuing appointments and appeals. Some examples of matters to be considered include the following—

- the application of the proposed Act to cases that arose before the change;
- the extent to which things done under the old legislation are to have effect under the proposed Act.

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

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38 See the Acts Interpretation Act 1954, s 38(4).
3.0 The Drafting Process

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

Before Cabinet Authority to Prepare a Bill or other appropriate authority is provided, OQPC may be involved in the drafting process. However, formally the drafting process starts when there is Cabinet Authority to Prepare a Bill or other appropriate authority and drafting instructions are sent to OQPC. Identifiable aspects of this process include the roles of the instructing officer and drafter. If there are well prepared drafting instructions, the drafting process proceeds smoothly within the shortest possible timeframe. After the drafting is completed, Cabinet Authority to Introduce the Bill should be sought. Other relevant matters are also considered under the heading of the drafting process.

This chapter considers the drafting process at the following stages—

• before the submission for Cabinet Authority to Prepare a Bill;
• after the Cabinet Authority to Prepare a Bill is received;
• preparation of drafts including the roles of the instructing officer and the drafter and the importance of effective drafting instructions;
• obtaining the Authority to Introduce a Bill;
• other relevant matters.

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. Further, because OQPC is attached to the Department of the Premier and Cabinet, the Minister to whom OQPC reports is the Premier.

3.1 OQPC’s involvement before Authority to Prepare

The following are some of the circumstances in which OQPC is involved in the preparation of legislation before an authority to Prepare is obtained from Cabinet—

• the sponsoring department may discuss with OQPC options for a legislative proposal before or during the department’s preparation of the relevant submission;
• when the submission for a Cabinet Authority to Prepare a Bill is circulated, OQPC may provide a briefing note to the Policy Coordination Division of the Department of 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’s Authority to Prepare has been obtained.

39 See the Queensland Cabinet Handbook.
**Sponsoring department discussions with OQPC before authority**

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 whole of government places it in a position to identify useful legislative schemes for consideration by the instructing officer, fundamental legislative principles issues, alternative ways of achieving policy objectives and other relevant issues.

**Submissions circulated to OQPC for comment**

Generally, an Authority to Prepare a Bill submission 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 breach of fundamental legislative principles suggested by the submission or attached drafting instructions.

Other comments may be about the condition of the drafting instructions, the inconsistency between the instructions and long standing Queensland government policy closely related to legislation and legal issues.

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

If the submission is a final submission, a copy is given to an officer of the Cabinet Secretariat for forwarding to the Leader of the House for the Leader’s information.

**Drafting before an Authority to Prepare has been obtained from Cabinet**

The general rule is that drafting a Bill does not commence until Cabinet has authorised the Bill’s preparation.

There are exceptions. 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 Premier and Cabinet may provide written authorisation. The Parliamentary Counsel may also arrange for an earlier start.

The issues involved 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.

3.2 Authority to Prepare a Bill

Generally, OQPC receives each copy of Cabinet Authorities to Prepare Bills. However, the Cabinet Handbook states a department must forward the drafting instructions to OQPC within 2-working days. If changes to the drafting instructions are necessary, the limit extends to 5-working days. Keeping to the timetable is especially important for proposed Bills classified as "Essential for passage". Frequently, the task will have been allocated to a drafter who will be expecting the instructions.

Drafting will usually start when a drafter is allocated to the task after receipt of the Authority to Prepare and the drafting instructions. 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.

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; and
- to consider the legislative framework in which the legislation is to operate; and
- to provide advice about alternative ways of achieving policy objectives and the application of fundamental legislative principles; and
- to provide advice about matters likely to be raised by the Scrutiny of Legislation Committee; and
- to draft the legislation using current legislative drafting practice; and
- to discuss revisions with the instructor; and
- to make changes and finalise the legislation.

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.

40 See chapter 4, and see also the Queensland Cabinet Handbook.
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—

(a) read the draft carefully to make sure he or she understands it; and
(b) test the draft against scenarios to make sure it gives effect to policy and does not have any unintended consequences; and
(c) check the draft for consistency to make sure it is internally consistent and, if appropriate, consistent with related legislation; and
(d) check the authority to draft the legislation, usually an Authority to Prepare submission to Cabinet, 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 including an example demonstrating the problem. Attempting to redraft the provision or returning the draft marked with suggested changes but no 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, by letter, fax, e-mail 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, a OQPC’s internal quality assurance process takes 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 it 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 it to Cabinet by way of an Authority to Introduce submission, the instructing officer will prepare other necessary Cabinet documents, for example, the proposed Explanatory Notes.
Also at that time OQPC will prepare a briefing note for delivery to the Department of the Premier and Cabinet about any significant departure from the original Cabinet Authority to Prepare and any remaining concerns about a point of law, a breach of a fundamental legislative principle or any other relevant matter.

3.4 Role of instructing officer in providing effective drafting instructions

The instructing officer is a key player in the drafting process and both the time taken 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 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 drafting within the whole-of-government context. In particular, when a drafter raises a possible breach of fundamental legislative principles, the instructing officer should realise that this is the drafter’s duty and an essential part of the process.

Role of instructing officer

An instructing officer must be able to explain the aims of a legislative proposal to the drafter, to tell the drafter all he or she needs to know to be able to draft legally effective legislation that implements the policy and to make decisions on issues arising during drafting. To maximise use of resources, the instructing officer must have sufficient understanding or seniority, and full authority, to give instructions.

Even though the CLLO provides an important contact point with OQPC, often the CLLO is not the instructing officer. Similarly, although there may be a number of policy officers involved in a Bill, for practical reasons, there should be only a single instructing officer responsible for coordinating instructions.

An instructing officer needs to be familiar with the following—

- Queensland Cabinet Handbook;
- Queensland Executive Council Handbook;
- Acts Interpretation Act 1954;
- Statutory Instruments Act 1992;
- Legislative Standards Act 1992;
- current legislative regimes within the department;
- similar regimes administered by other departments and in other jurisdictions; and
- recent drafting trends in Queensland.
**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 a better quality product within a shorter period. CLLOs can provide help in preparing drafting instructions. The instructing officer responsible for the instructions might find it useful to seek comment from the department’s CLLO.

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

- a complete first draft can be prepared more quickly; and
- the number of revising drafts is minimised; and
- fewer issues needing resolution arise in the drafting process; and
- further instructions are likely to be more timely and therefore focus is maintained; and
- legislation of a high standard is completed in the shortest possible period; and
- the Authority to Prepare submission to Cabinet will be more comprehensive.

**Drafting instructions — general requirements**

Written drafting instructions should state—

- the general purpose, objective or philosophy behind the legislative proposal; and
- the main or basic concepts (‘who and what are we talking about’); and
- the main rules or objectives (‘what is the main or basic thing we are trying to do’); and
- other rules or objectives (‘what other things are necessary to make the main or basic thing work’); and
- 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 instructor’s attention at an early stage any possible concerns about the proposed split between the relevant Act and subordinate legislation under the Act.

The instructions should identify the persons or things to whom the legislation is to apply. Instructions should cover all aspects of the scheme from the big picture to matters of relatively minor detail. This will prevent a situation in which the drafter has to make something up to fill a gap.
Drafting instructions— guidelines

To ensure a high standard of legislation, instructions should provide all the necessary information in a clear, concise and comprehensive form.

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

Complete, accurate and comprehensive drafting instructions will state—

• what has to be done; and
• why it has to be done; and
• when it has to be done by.

For instructions to provide optimum support of the drafting process, all aspects of proposals contained in them should have been resolved. In some cases, time constraints may mean that drafting must start while some facets of the legislation are still being developed. In those circumstances, matters still undergoing consideration or subject to change should be clearly identified.

Drafting instructions written in plain language and in narrative form enable the instructor’s intentions to be more easily understood.

Explain specialised or technical terms. However, avoid specialised or technical jargon, unless the jargon is necessary.

Use words consistently throughout the instructions to avoid misunderstanding or misinterpretation.

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

Departmental drafts can introduce 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. This comment is 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.
Also, on some occasions, a departmental draft can be helpful to the drafter if accompanied by comprehensive drafting instructions in narrative form. For example, when amendments are made to existing legislation, it may be helpful to include with the narrative drafting instructions a copy of the legislation marked up with proposed changes.

However, submitting a departmental draft is not a substitute for proper instructions. Delaying sending instructions simply to produce or polish a departmental draft must, in particular, be avoided. If time is short, submitting well-designed narrative instructions is more likely to expedite the drafting process than providing a departmental draft.

There is no set format for drafting instructions. However, to make references to the text easier when discussing particular issues, the drafting instructions should—

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

Include the name of the instructing officer, the officer’s address, contact telephone number, fax number and e-mail address. This information will appear on the cover page of drafts of the Bill. GoPrint will deliver the department’s copies of the Bill to the address shown. Identifying information stated clearly at the start or end of instructions is easiest to find. In addition, drafters can prioritise their workloads more easily if they know in advance of times the instructing officer plans to be absent.

If the instructing officer works part-time, it is highly desirable to nominate an alternative instructing officer and give OQPC his or her contact details.

State the authority to draft the Bill.

Indicate the priority that has been given to the legislation and, in particular, when the legislation is required.\textsuperscript{41}

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.

The drafting instructions should indicate the provisions of the existing legislation, including any legislation to be amended, that need to be understood. It also should indicate the relationship between the proposed legislation and the specific provisions of the existing legislation.

Mention any other legislative proposals that relate to the legislation, whether or not they are already before the Parliament.

Mention any aspect of the legislation that is politically sensitive.

\textsuperscript{41} The Queensland Cabinet Handbook deals with the Government’s legislative program. More specifically, matters covered there include the formulation of the program, guidelines for programming proposed Bills, controlling the volume of legislation and monitoring the program.
Attach copies of relevant legal opinions. These could include opinions from the Solicitor-General, Crown Solicitor or, if native title is an issue, the Native Title Services Directorate within the Department of the Premier and Cabinet. Relevant court decisions also should be mentioned.

The drafting instructions should also include instructions for other matters. Information about the matters are included in Chapter 2 as it is appropriate that these matters are considered when preparing the drafting instructions. The following is based on Chapter 2 and provides a useful checklist—

- Binding on the State;
- Commencement;
- Consequential amendments;
- Enforcement of provisions;
- Forms;
- Measures that restrict competition;
- Police powers and calling on police help;
- Regulation-making power;
- Prospective operation of Act;
- Statutory bodies;
- Time;
- Transitional and savings provisions.

### 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 based on Acts of general application and established presentation methods, provide advice about fundamental legislative principles, and comply with processes designed for quality assurance.

#### Plain English policy

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

Plain English 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 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 when dispensing with terms having established meanings for users of legislation. Plain English may involve a balance of simplicity and legal certainty to ensure the law is both easily read and understood and legally effective to achieve the desired policy objectives.
Plain English is not achieved only by using simple language. Other devices are used to guarantee clear communication. For example, there are many ways a law can simply, accurately and unambiguously expose its intent–purpose clauses, preambles, clauses stating key or basic concepts and definitions and explanatory provisions. Using simple drafting devices to organise, orient and explain legislation can help establish its context, relevance and understanding.


Drafters rely on the *Acts Interpretation Act 1954*, the *Statutory Instruments Act 1992* and the *Legislative Standards Act 1992* during the drafting process. Therefore, instructing officers should be familiar with these Acts.

The *Acts Interpretation Act 1954* contains provisions that apply generally to all legislation as aids in the interpretation of legislation. Taking advantage of the effect of these provisions results in clearer drafting.

The *Statutory Instruments Act 1992* brings together and clarifies the law about statutory instruments, particularly in relation to the power to make statutory instruments.

The *Legislative Standards Act 1992* establishes OQPC, states its functions and provides guidelines for the application of the fundamental legislative principles.

**Compliance with FLPs - examination**

Under of the *Legislative Standards Act 1992*, section 7(g)(ii) and (h)(ii), OQPC’s functions include advising on the application of fundamental legislative principles. The principles underlie a parliamentary democracy based on the rule of law. They require legislation to have sufficient regard to the rights and liberties of individuals and the institution of the Parliament.

Chapter 2 deals with those fundamental legislative principles that are stated as examples in the *Legislative Standards Act 1992*. However, fundamental legislative principles are an evolving set of principles for a parliamentary democracy and not a set of absolute rules.

OQPC is an internal control mechanism for fundamental legislative principles. The Scrutiny of Legislation Committee is an external control mechanism for them. The Committee is required to report to the Legislative Assembly on the application of fundamental legislative principles to Bills and subordinate legislation. OQPC regularly considers the Committee’s conclusions. Advice provided by OQPC during the drafting period about the application of fundamental legislative principles is commonly based on earlier comments by the Committee in its Alert Digests.

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43 The expression “statutory instrument” is defined in the *Statutory Instruments Act 1992*, s 7. It includes subordinate legislation.

44 See the *Legislative Standards Act 1992*, s 4(2). See s 4(2)–(5) for detailed examples of matters to which legislation should have regard.
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–

- a drafter who has primary responsibility for drafting the legislation (commonly referred to as the D1); and
- another drafter who performs a back-up and quality assurance role (the ‘D2’); and
- legislation officers who perform a support, editorial and publishing role.

An appropriate quality assurance check at the end of the drafting process can involve consideration at more than 1 level.

At the highest level, it may involve considering the following, subject to Cabinet’s Authority to Prepare–

- whether the rules of law in the draft are effective and sufficient;
- inherent quality of the policy from a legal professional viewpoint;
- whole of government perspectives;
- consistency with Cabinet’s Authority to Prepare;
- consistency with long standing Queensland government policy;
- consistency with fundamental legislative principles;
- the quality of the legislation as an instrument of policy implementation.

At an editorial and publishing level it may involve considering the following–

- consistency of language both within the legislation and with other Queensland legislation;
- consistent use of formats, styles and expressions;
- sense and flow of words and sentences, including the flow of subsections into paragraphs and subparagraphs;
- correct numbering of provisions, including inserted provisions;
- correct cross references within the legislation and correct references to other legislation;
- correctness of amendments of other legislation, including that they read in, and apply correctly, to the amended legislation;
- appropriate pagination and correct electronic coding.

Many of these matters can only be fully considered after the "final version" of the Bill is settled between drafter and instructing officer in terms of the Bill’s content. Therefore, time is needed after the final version is approved for quality assurance checking. The overall quality of legislation can be seriously undermined if the time for carrying out these tasks is truncated.
3.6 Cabinet Authority to Introduce

After a Bill is prepared and settled within OQPC and approved by the sponsoring department, it is ready to be submitted to Cabinet for approval for introduction. The Queensland Cabinet Handbook directs that all legislation proposed for passage during a session should normally be ready for introduction into Parliament within three sitting weeks of the commencement of that session.

In the Authority to Introduce a Bill submission, authority must be sought if the existing Authority to Prepare 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 the OQPC. If appropriate, OQPC prepares, for possible referral of its views to the Premier, a briefing note about any potential breach of the fundamental legislative principles and forwards it to the Policy Coordination Division of the Department of the Premier and Cabinet. If the submission is a final submission, a copy of the briefing note is also given to an officer of the Cabinet Secretariat located in that department for forwarding to the Leader of the House for the Leader’s information.

After the Authority to Introduce a Bill submission has been approved, OQPC should not be given further instructions unless they are about technical, stylistic or other minor matters and are consistent with policies previously approved by Cabinet. Further Cabinet approval is needed before policy changes can be made. 45

3.7 Other relevant matters

Consultation - draft stage

Timing of consultation drafts should be discussed early in the drafting process.

If proposed legislation affects other departments or their legislation, the instructor should include in the drafting instructions—

- a list of the other departments; and
- an indication of the extent to which the departments have been consulted; and
- an indication of any consultations that will take place in the future.

Other relevant government departments should be consulted about draft legislation if—

- the legislation makes consequential amendments to the other department’s legislation; or
- the Authority to Prepare submission expressly requires the consultation; or
- the legislation deals with matters in the circumstances outlined in the Queensland Cabinet Handbook.

45 See 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.

OQPC can insert watermarks into a draft indicating it is, for example, a ‘working draft’ or ‘consultation draft’. A draft Bill’s front 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 front page should be removed before a draft Bill is attached to a Cabinet submission.

**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 second reading speech.

Under the *Legislative Standards Act 1992*, section 22, a Minister who presents a government Bill to the Legislative Assembly must, before the resumption of the second reading debate, circulate to members explanatory notes for the Bill. Section 23 of that Act sets out requirements for the contents. Current practice is for the explanatory notes to accompany the Bill on its introduction. In any event, the Queensland Cabinet Handbook requires the notes to accompany the Authority to Introduce submission.

**Time frames**

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 are designed to explain the legislation and not merely repeat or paraphrase its provisions. The officer should exercise considerable care in preparing explanatory notes because they may be used by courts to interpret the legislation – see the *Acts Interpretation Act 1954*, section 14B (Use of extrinsic material in interpretation). More immediately, well reasoned and comprehensive explanatory notes can help the Scrutiny of Legislation Committee to reach a better informed judgement about fundamental legislative principles issues.

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

**Drafting private members' Bills**

Under the *Legislative Standards Act 1992*, section 10(3), Opposition or independent members can ask OQPC to prepare Bills or amendments. Their communications are subject to legal professional privilege.46

While the matters outlined in this chapter have been directed towards Bills originating in government departments, the basic thrust of the information still applies: the instructing member can

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46 See the *Legislative Standards Act 1992*, s 9A.
expect OQPC to fulfil its obligation to provide advice on achieving the policy objectives by alternative means and on FLPs: clear and comprehensive drafting instructions will help the drafter to prepare quality legislation in the shortest possible time.
4.0 The Parliamentary Process

The emphasis in this chapter is on the processes of the Legislative Assembly.

This chapter focuses mainly on ordinary government Bills in ordinary circumstances, and the information in it 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 Orders.

4.1 Parliament of Queensland

The Parliament is the State’s paramount law-making body. The Parliament of Queensland consists of the Queen and the Legislative Assembly. The Queen’s role in the Parliament of Queensland is carried out by her representative in Queensland, the Governor, although the Queen may carry out her role if personally present in Queensland.

The Legislative Assembly’s composition and legislative powers are provided for in legislation. It operates in accordance with the standing rules and orders authorised by the Constitution Act 1867, section 8.

4.2 Timing of introduction of Bill

There is an administrative process associated with the introduction of a government Bill into the Legislative Assembly. The Cabinet authorises the introduction of the Bill after considering an Authority to Introduce submission. Members of the Legislative Assembly belonging to the party or parties constituting the government of the day consider the introduction of the Bill before it is introduced. The Leader of the House indicates when the Bill is to be introduced into the Legislative Assembly. The relevant government department also advises that the Bill may be printed and copies supplied to the staff of the Parliament 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 GOPRINT to print the Bill and supply it to the House. OQPC is electronically linked to GOPRINT and Parliament House. An electronic copy of the Bill is simultaneously supplied to GOPRINT for printing and to the Table Office of Parliament House.

If the sponsoring department anticipates a large demand for a Bill, it should advise GOPRINT to ensure sufficient copies are printed. GOPRINT will deliver copies of the Bill, when printed, to the departmental instructor for the Bill at the address shown on the Bill’s cover page.
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 Parliament 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 GOPRINT for printing and supply to the House, the department should advise GOPRINT to print the explanatory notes the department has prepared for the Bill. As mentioned in chapter 3, explanatory notes are an important aspect of the Bill process.

4.4 Messages from the Governor

Because of the Constitution Act 1867, section 18, a message from the Governor is required for particular types of Bills. The section is as follows—

No money vote or Bill lawful unless recommended by Governor

18. It shall not be lawful for the Legislative Assembly to originate or pass any vote resolution or Bill for the appropriation of any part of the said consolidated fund or of any other tax or impost to any purpose which shall not first have been recommended by a message of the Governor to the said Legislative Assembly during the session in which such vote resolution or Bill shall be passed.

The effect of this is to ensure the government maintains control over budgetary measures.

At the request of OQPC, the State Affairs Branch of the Department of the Premier and Cabinet will arrange for a Governor’s message to be obtained when one is necessary. The signed message is forwarded to the Clerk of the House.

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.

On presentation, the Bill is read a first time without any question being put, that is, there is no motion and no debate. The Bill is read a first time by the Clerk of the House reading its short title aloud.

The Queensland Parliamentary Procedures Handbook contains important detail about the general procedure for the introduction of a Bill.
4.6 Second reading speech

After presentation of the Bill and its formal first reading, copies of the Bill are circulated to members in the Chamber. The Minister then moves that the Bill be read a second time. The Minister immediately speaks to the motion, giving the second reading speech for the Bill. Generally, the second reading speech summarises the main provisions of the Bill, but avoids detailed exposition of clauses unless the Bill is very short. At the conclusion of the speech, debate on the motion is adjourned, for 13 whole calendar days, unless the Bill is urgent.

Again, important detail about requirements for the second reading speech and related procedures are set out in the Queensland Parliamentary Procedures Handbook.

4.7 Role of Scrutiny of Legislation Committee

The Scrutiny of Legislation Committee is a standing parliamentary committee that reviews all introduced Bills and comments on their compliance with fundamental legislative principles. The Committee is set up under the Parliamentary Committees Act 1995, section 4.48

The Committee also examines the explanatory notes accompanying a Bill, both to help in its examination of the Bill, and also to consider the adequacy of the notes.

The Scrutiny of Legislation Committee issues Alert Digests in which it reports its conclusions to the Legislative Assembly. An Alert Digest is usually agreed on by the Committee on the Monday of a week in which the Assembly is sitting, and tabled in the House the following day.

If the Committee reports on a Bill, generally its report will appear in the Alert Digest of the next sitting week after the sitting week in which the Bill is introduced into the Assembly. However, the standard adjournment of the second reading debate of a Bill for 13 days gives the Committee more time if it needs it.

A subsequent Alert Digest will contain the Committee’s response to any correspondence the sponsoring Minister forwards to the committee as a result of the Committee’s comments on the Bill.

The Bill’s sponsoring Minister is usually given advance notice of the Committee’s likely comments on the Bill. Whether or not this happens, with prompt action there is usually enough time, before the Bill is debated in the House, for—

a. the Minister to respond to the Committee’s report; and
b. the Committee to respond to the Minister’s letter; and
c. both responses to be included in the subsequent Alert Digest.

The Committee’s Alert Digests are a common source of amendments proposed in the Legislative Assembly. Because of the potential for amendments, comments made by the Scrutiny of
Legislation Committee are usually the subject of discussion between the sponsoring Minister and the officers of the sponsoring department.

4.8 Amendments in committee

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

The Legislative Assembly deals with amendments to the Bill when it forms itself into the Committee of the Whole House (also called Committee of the Whole) after the second reading debate and the Bill’s second reading. Because the Assembly ordinarily moves immediately from the second reading stage to the committee stage, amendments in committee are ordinarily prepared well before the debate for the second reading starts.

Amendments in committee are ordinarily prepared and supplied to the Table Office of the House by OQPC. This happens whether the amendments are being proposed by the sponsoring Minister or any other member. This is because the amendments provided by OQPC may later need to be incorporated by OQPC in the Bill that is passed by the Assembly. However, there is no requirement for OQPC to prepare the amendments, and members may prepare their own amendments.

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.

An amendment in committee proposed by the Bill’s sponsoring Minister may have to proceed along the same process a Bill proceeds along in order to obtain Authority to Introduce, that is, it may require further approvals.

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

When OQPC is authorised to supply an amendment in committee, OQPC sends it to the Table Office of the House in electronic form for printing and distribution to members.

4.9 Some information about the resumption of the second reading debate

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 the resumption of a Bill’s second reading debate. The Leader of the House sets the notice paper for each day’s sitting.
The second reading debate of a Bill is a free ranging debate in the Legislative Assembly during which the Bill’s policy is debated generally. Proposed amendments in committee 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.

When the second reading debate is concluded, the question is put that the Bill be read a second time. If passed, the second reading takes place, with the Clerk again reading the Bill’s short title.

The Queensland Parliamentary Procedures Handbook gives more detail about this stage of the Bill’s progress.

4.10 Committee stage

After the Bill’s second reading, the Legislative Assembly resolves itself into the Committee of the Whole House to analyse the Bill. The Committee considers the text of the Bill, one clause, or group of clauses, at a time, and any schedules, and makes any amendments found acceptable to the Committee by amendment in committee.

If the Bill has a preamble, the preamble is considered after the passing of the clauses and any schedules. The Chair then reports to the Speaker of the House as to how the Committee of the Whole House dealt with the Bill.

4.11 Third reading and long title

When the Bill has been reported to the Assembly and, if amended in the committee stage, taken into consideration, 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 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.

4.12 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 2 related Bills, the Assembly might authorise—

• the one question being put in regard to the second readings; or
• the consideration of the Bills together at the committee stage; or
• the one question being put for the Committee’s report stage;
  or
• the one question being put for the third readings and titles.

### 4.13 Votes and proceedings

Each day’s Votes and Proceedings, the official daily record of the Legislative Assembly’s proceedings as compiled by the Clerk of the Parliament, include 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 Votes and Proceedings are usually published within a day of the proceedings they record. They are produced in hard copy form by GOPRINT and placed on the internet site of Parliament House. The Votes and Proceedings are used by the Clerk of the Parliament, and by OQPC, to prepare copies of the Bill as passed by the Assembly.

### 4.14 Attendance by department officers and OQPC drafter

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 department 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 will ordinarily attend the committee stage of the Bill if requested to do so.

### 4.15 Private members’ Bills and amendments in committee

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. There is no statutory requirement for explanatory notes to be provided for private members’ Bills.

There are special issues that arise if a non-government member asks OQPC to prepare amendments in committee for a Bill. The drafter deals with the member’s request as a new and separate task, and does 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.
5.0 Royal Assent

The Clerk of the Parliament has the responsibility of managing the process by which a Bill passed by the Legislative Assembly is processed for assent. When the Legislative Assembly passes a Bill for an Act, the Clerk advises OQPC to prepare a copy of the Bill in its form as at its third reading, that is, including any amendments. OQPC sends an electronic copy of the Bill to the Clerk for confirmation of its correctness. The Clerk confirms its correctness, and asks OQPC to supply copies of the Bill in 3 forms, namely, the Bill as at its third reading, the Bill in a form ready for Royal Assent, and the Bill in parchment form.

As soon as possible after the Legislative Assembly’s Votes and Proceedings relating to a Bill become 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 it 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, 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 draft certificate are delivered to the Clerk of the Parliament. The Clerk delivers the letter and attached draft certificate to the Attorney-General for the Attorney’s signature. The signed certificate accompanies the Bill delivered to the Governor for Assent.49

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 advises OQPC of details of the assent, including the number of what has now become the Act, and requests OQPC to prepare a copy of the Act. The Act will include the Act’s number and its date of assent.

49 See the Queensland Parliamentary Procedures Handbook.
6.0 Subordinate Legislation

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

6.1 What is subordinate legislation

Subordinate legislation is legislation made by an entity, for example, the Governor in Council, under power delegated by Parliament to the entity by an enabling provision in an Act.

Power is commonly delegated—

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

Subordinate legislation includes regulations, proclamations and other statutory instruments declared to be subordinate legislation by an Act or a regulation under the *Statutory Instruments Act 1992*. For an understanding of what instruments are subordinate legislation, see sections 6 to 9 of the *Statutory Instruments Act 1992* and the *Statutory Instruments Regulation 1992*.

6.2 Drafting subordinate legislation

OQPC drafts subordinate legislation, other than exempt subordinate legislation. In doing so, OQPC provides advice to Ministers, departments and agencies on—

- alternative ways of achieving policy objectives; and
- 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 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 of Act

Subordinate legislation must be within power, that is, within the scope of the Act it purports to be made under. Lawyers refer to subordinate legislation that is not within power as being *ultra vires* the Act. To be lawful, subordinate legislation must have a sufficient connection with the Act under which it is made.
6.4 Subdelegation

Related to the concept of *ultra vires* is the issue of unauthorised subdelegation. A subdelegation arises when legislative power is subdelegated by a person or body to whom the power has been delegated. For example, if a power under an Act empowers a person or body to make subordinate legislation about a particular subject matter, it is usually not lawful to subdelegate that power to another person or body.

6.5 General presumption legislation will be prospective

Subordinate legislation generally commences on notification in the gazette, 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. There is one exception.

6.6 Retrospective operation of a beneficial provision

The one exception is where the subordinate legislation expressly provides for the retrospective operation of a beneficial provision. This 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* to make the instruments. In particular, sections 21 to 31 of that Act make statements supporting the making of subordinate legislation. Some examples include the following—

- power enabling 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 or other law [s 22];
- power enabling subordinate legislation to make provision for a matter by applying, adopting or incorporating (with or without modification) the provisions of an Act, subordinate legislation or other law or another document [s 23];
• power enabling 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 or 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 [s 24];
• power enabling subordinate legislation to provide for the review of, or a right of appeal against, a decision made under the subordinate legislation [s 29];
• power enabling 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 [s 30].

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.

6.8 Certification

Before subordinate legislation is made, it must be certified by OQPC. OQPC will certify subordinate legislation only if it is satisfied that the proposed subordinate legislation—

a. is lawful; and
b. has sufficient regard to fundamental legislative principles.

If OQPC declines to certify subordinate legislation that is to be made by the Governor or Governor in Council, the instrument can not proceed to be made unless it is presented to Cabinet and Cabinet has agreed to its being made.

OQPC provides the administering department with the following certified copies of subordinate legislation—

• if the subordinate legislation is to be made by the Governor or Governor in Council—one blue copy and one white copy; or
• if the subordinate legislation is not to be made by the Governor or Governor in Council—one white copy.

6.9 Penalties

A penalty can not be imposed for a contravention of subordinate legislation unless it is authorised by the empowering Act.

Penalties for a breach of subordinate legislation should generally be limited to not more than 20 penalty units.\(^{50}\)
6.10 Infringement notice offences

Penalties prescribed in the Justices Regulation 1993 for an infringement notice given under the Justices Act 1886 should not be more than one-tenth of the penalty prescribed in the Act or the subordinate legislation to which the infringement notice penalty relates. For example, if a provision of a regulation attracts a maximum penalty of 20 penalty units, the penalty under an infringement notice should not be more than 2 penalty units.

6.11 Regulatory impact statements and explanatory notes

A regulatory impact statement ("RIS") must be prepared by the administering department for subordinate legislation that is "likely to impose appreciable costs on the community or a part of the community".51

A RIS must include the information listed in the Statutory Instruments Act 1992, section 44 and be expressed in clear and precise language. The content of the RIS is based on an assessment of the ways of achieving the policy objectives rather than on the policy objectives themselves. This will assist in deciding whether subordinate legislation was the best option. Section 44(g) of the Act ensures all benefits and costs are stated either quantitatively or qualitatively. If benefits and costs are not able to be quantitatively defined, they are to be included as a qualitative description of the impact of the proposed legislation in terms of benefits and costs.52

Section 45 of the Act provides that a notice about proposed legislation must be published so that stakeholders and the public are given the opportunity to comment on the proposal. If the proposed subordinate legislation is likely to have a significant impact on a particular group of people, special attention needs to be given to ensure that these people have access to and understand the purpose and content of the notice.53 The notice must allow at least 28 days for public comment on the proposed subordinate legislation.

An explanatory note prepared by the administering department must accompany all subordinate legislation for which a RIS is required.54 Section 24 of the Legislative Standards Act 1992 sets out the matters to be addressed in the explanatory note.

When arranging the printing, notification and tabling of subordinate legislation, OQPC arranges for the printing and tabling of any accompanying regulatory impact statement and explanatory note.

6.12 Notification

Subordinate legislation must be notified by—

a. publication in the gazette of a notice of the making of subordinate legislation and a place or places where copies are available; or

51 See the Statutory Instruments Act 1992, s 43.
52 'Benefits' include advantages and direct and indirect economic, environmental and social benefits. 'Costs' include burdens and disadvantages and direct and indirect economic, environmental and social costs (Statutory Instruments Act 1992, dictionary).
53 See the Statutory Instruments Act 1992, s 45(2).
54 See the Legislative Standards Act 1992, s 22.
b. publication in the gazette of the subordinate legislation.\textsuperscript{55}

Subordinate legislation drafted by the OQPC is usually notified in the gazette and published in the Subordinate Legislation Series.

### 6.13 Tabling and disallowance

Subordinate legislation ceases to be effective if it is—

a. not tabled in the Legislative Assembly;\textsuperscript{56} or

b. disallowed by the Legislative Assembly.\textsuperscript{57}

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.\textsuperscript{58}

### 6.14 Parliamentary scrutiny

The Scrutiny of Legislation Committee examines subordinate legislation and comments on—

- the application of fundamental legislative principles to the subordinate legislation; and
- the lawfulness of the subordinate legislation.\textsuperscript{59}

The 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 Parliament to support a motion to disallow the provision.\textsuperscript{60}

### 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.\textsuperscript{61}

### 6.16 Expiry of subordinate legislation

Section 54 of the Statutory Instruments Act 1992 provides for subordinate legislation to expire on 1 September first occurring after the 10th 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; and
- ensure subordinate legislation is relevant to the economic, social and general wellbeing of Queensland; and
- otherwise ensure the part of the Statute Book consisting of subordinate legislation is of the highest standard.

\begin{itemize}
  \item See the Statutory Instruments Act 1992, s 47.
  \item See the Statutory Instruments Act 1992, s 49.
  \item See the Statutory Instruments Act 1992, s 50.
  \item See the Statutory Instruments Act 1992, s 50.
  \item See the Statutory Instruments Act 1992, part 4, divisions 1 and 2.
\end{itemize}
Sections 56 and 56A of the Act 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 1 year if—

a. replacement subordinate legislation is being drafted; or
b. the subordinate legislation is not proposed to be replaced when it expires at the end of the exemption period; or
c. 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 5 years.

Section 57 of the Act 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 the status of land to which it applies may be changed and to other important subordinate legislation specifically identified in the Act.

6.17 Notification and tabling processes

OQPC is responsible for managing and coordinating the notification of subordinate legislation (except exempt subordinate legislation) for the whole of government. 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 departments, Executive Council, GOPRINT, the Table Office and OQPC.

In summary, those procedures are as follows:

- the administering department notifies the executive council secretariat that an instrument is to be signed by the Governor at the executive council meeting on Thursday;
- executive council secretariat advises OQPC;
- OQPC prepares the instruments for printing and also prepares the notification table for publication in the government gazette on Friday;
- GOPRINT prints the instruments for distribution on Friday, and the notification table appears in the gazette on Friday.

GOPRINT also sends copies of the instruments to departments and to the Table Office. The process of tabling instruments in the Legislative Assembly is automatic. Instruments are tabled within 14 days of notification in the gazette.

For instruments made or approved by an entity other than the Governor in Council, for example, by a Minister or board, the administering department must liaise directly with OQPC to arrange notification. OQPC requires advice about the date the instrument was made and the date it is to be notified. The instrument is then printed and notified according to the usual procedure.
7.0 Legislative Publications

This chapter describes the various legislative text (Bills, Acts, subordinate legislation) and legislative information that OQPC prepares and publishes and how to access them.

7.1 Legislative Standards Act

OQPC’s functions under the Legislative Standards Act 1992, section 7 include–

- preparing reprints of Queensland legislation and information relating to Queensland legislation and making arrangements for the printing and publication of Bills, Queensland legislation and information about Queensland legislation; and
- making arrangements for access, in electronic form, to Bills presented to the Legislative Assembly, Queensland legislation and information relating to Queensland legislation.

OQPC prepares and publishes the printed, authorised versions of legislation and information that helps the user to find and use legislation in its current and historical state. OQPC also maintains a legislation database and makes arrangements for electronic access to the database.

7.2 Official, authorised versions of legislation

Although Acts and subordinate legislation are judicially noticed, legislation also provides for official, authorised copies. Currently, a copy of Queensland legislation may be authorised under the Evidence Act 1977 or the Reprints Act 1992. Reprints are authorised under the Reprints Act. Other legislation is authorised under the Evidence Act.

The present system for authorising Queensland legislation involves the following 3 elements–

- the legislation appears in printed form;
- the legislation is printed by the government printer;
- the legislation is authorised by the parliamentary counsel.

Legislation released in electronic form is not authorised under the Evidence Act 1977 or the Reprints Act 1992.

7.3 Legislation - original text

When legislation is originally enacted, made or approved, it is published in pamphlet form.
Each year, OQPC also publishes all Acts and subordinate legislation made during the year in annual volumes. This ensures that the original text of all Queensland legislation is preserved for research purposes.

7.4 Legislation - current text

When legislation is amended, access to the updated text of the law after amendment is provided by reprints, which consolidate non-amending legislation and its amendments.

7.5 Printed publications

All printed publications are available for sale and subscription to the public from GoPrint, which is responsible for printing, selling, distributing and marketing Queensland legislation in printed form.

7.6 Electronic publications

OQPC maintains the Queensland legislation database. The database contains introduced Bills and their explanatory notes, reprints, and the original text of all Acts and subordinate legislation made since July 1991.

The database is made freely available to the public through OQPC’s internet site (www.legislation.qld.gov.au), the Australian Legal Information Institute (AUSTLII) site and the Commonwealth Government’s SCALEplus site.

Queensland legislation in electronic form is also available for purchase from a number of commercial providers, including GoPrint.

7.7 Bills

Printed

- Pamphlet

  GoPrint prints copies of Bills required for introduction into the Legislative Assembly.

  After introduction, copies of Bills are available for sale or subscription from GoPrint.

Electronic

- Electronic copies of introduced Bills are published on OQPC’s internet site, usually on the day of introduction.
Related information

- *Queensland Legislation Update Part 1*
  This weekly publication contains information about the passage of Bills through the Legislative Assembly. It also lists legislation proposed to be amended by introduced Bills.

- *Table of Bills*
  A table of introduced Bills on OQPC’s internet site includes the name of the Minister or Private Member who introduced each Bill, the date of introduction and whether the Bill has been assented to.

### 7.8 Explanatory notes for Bills

**Printed**

- *Pamphlets*
  Explanatory notes for introduced Bills are available for sale or subscription from GoPrint with a copy of the relevant Bill.

- *Annual volumes*
  The annual volume of explanatory notes for Bills has been published since 1991. An endnote is included for each explanatory note giving information about the passage of the Bill through the Legislative Assembly, including the date of the Minister’s second reading speech.

  Since 1995, the text of amendments made to Bills during their passage has also been included in the annual volume of explanatory notes.

**Electronic**

- Electronic copies of explanatory notes for Bills are published on OQPC’s internet site with introduced Bills.

  Explanatory notes are usually placed on the site on the day the relevant Bill is introduced.

### 7.9 New Acts – Acts as passed

**Printed**

- *Acts as passed – pamphlets*
  Copies of new Acts are available for sale or subscription from GoPrint after assent.
The Acts as passed service consists of numbered pamphlet copies of Acts enacted during the year.

The service is available through subscription.

Individual items published in the series may also be purchased separately from GoPrint.

- **Annual volumes**

  The annual volume of Acts contains the text of all Acts that received assent during the relevant year. As well, comprehensive tables at the front of each volume give information about Acts enacted, amended or repealed during the year.

  Endnotes to Acts published in the annual volumes include information about their passage through the Legislative Assembly.

**Electronic**

- Electronic copies of new Acts are published on OQPC’s internet site, usually within 1 working day of the assent day.

**Related information**

- **Queensland Legislation Update Part 1**

  This weekly publication contains information about Acts passed or amended, including date of assent and commencement details.

  The publication also contains a chronological table of all Acts passed during the year to date.

### 7.10 New subordinate legislation - subordinate legislation series

**Printed**

- **Subordinate legislation series – pamphlets**

  The *Statutory Instruments Act 1992*, section 48(2), requires copies of new subordinate legislation to be available on the day the subordinate legislation is notified or as soon as practicable after the notification day.

  OQPC and GoPrint arrange for new subordinate legislation to be available for sale on notification day.

  The subordinate legislation series consists of numbered pamphlet copies of all subordinate legislation drafted by OQPC. (The series does not include exempt subordinate legislation.)

  The series is available through subscription and is released, usually weekly, immediately after new subordinate legislation is made or approved.
Individual items published in the series may also be purchased separately from GoPrint.

- **Annual volumes**

  The annual volume of subordinate legislation contains the text of all subordinate legislation made during the year as part of the subordinate legislation series. As well, tables at the front of each volume give information about subordinate legislation made, approved, amended or repealed during the year.

  Endnotes to each item of subordinate legislation include notification and tabling dates.

**Electronic**

- Electronic copies of new subordinate legislation are published on OQPC’s internet site on the Monday following notification and publication in printed form (usually each Friday).

**Related information**

- **Subordinate legislation series tables**

  Tables of subordinate legislation are published weekly and monthly as part of the subordinate legislation series.

- **Queensland Legislation Update Part 1**

  This weekly publication contains information about new subordinate legislation, including date of notification and commencement details.

### 7.11 Regulatory impact statements and explanatory notes for subordinate legislation

**Printed**

- **Pamphlet**

  OQPC formats regulatory impact statements and explanatory notes and arranges for their publication with the relevant new subordinate legislation.

  Copies of regulatory impact statements and explanatory notes are included in the subordinate legislation series.

- **Annual volumes**

  Since 1995, the annual volume of subordinate legislation has also included the text of regulatory impact statements and explanatory notes that were prepared for significant subordinate legislation made during the year.
Related information

- *Queensland Legislation Update Part 1*

If a regulatory impact statement and an explanatory note have been prepared for an item of subordinate legislation, the weekly update table includes details under the short title of the new subordinate legislation.

### 7.12 Reprints

#### Printed

- *Queensland legislation reprints series*

The Queensland legislation reprints series started in June 1992. The series contains—

- reprints of Acts and subordinate legislation; and
- reprints of unamended legislation as well as consolidations of amended legislation.

Legislation published in the series is authorised under the *Reprints Act 1992*.

All current Queensland Acts have now been included in the series. Most current subordinate legislation made from 1992 and 104 items of current subordinate legislation made before 1992 have also been included.


The reprints series is available through subscription from GoPrint. New releases are issued each month.

Individual items published in the series may also be purchased separately from GoPrint.

#### Related information

- *Queensland Legislation Update Part 2*

Part 2 is issued with each release of reprints. It contains information about the current status of Queensland legislation reprints of both Acts and subordinate legislation.

The publication is free for reprints subscribers and may also be purchased from GoPrint by nonsubscribers.
Electronic

- Electronic reprints

The electronic reprints database contains copies of Queensland Acts and subordinate legislation that have been published in authorised, printed form in the Queensland Legislation Reprints series and electronically updated versions of the authorised, printed reprints.

Legislation in the current electronic reprints database is updated as soon as possible after amending legislation comes into force. New principal legislation is included in the electronic reprints database as soon as possible after commencement.

New and updated electronic reprints are published on OQPC’s internet site each Monday.

Authorised and electronic reprints are numbered consecutively, starting with ‘1’, so that users can identify the latest version of the legislation.

If an item of reprinted legislation is updated and released in unauthorised, electronic form only, the reprint number includes a roman letter. For example, an electronic item of legislation numbered ‘2C’, indicates that the last authorised, printed version – reprint no. 2 – has been electronically updated with subsequent amendments and 3 updated versions (2A, 2B, and 2C) have been released in unauthorised, electronic form only. Users requiring an authorised copy of the legislation would need the printed, authorised reprint no. 2 and the printed, authorised copies of the subsequent amending legislation.

Superseded and repealed electronic reprints are also published on OQPC’s internet site. These reprints provide access to Queensland legislation at earlier points in time.

Reprint version numbers appear on the front covers of authorised and electronic reprints.

7.13 Legislative information publications

OQPC produces a range of legislative information publications to assist users of Queensland legislation. These publications are available for sale and subscription from GoPrint. They are available in printed form only.

7.14 Queensland Legislation Annotations

The Queensland Legislation Annotations is the major legislative information publication produced by OQPC. It is the standard historical research tool for all users of legislation.
The publication contains comprehensive information about all current Queensland legislation. It gives details of the legislative history of Acts and subordinate legislation, including the following–

- commencement details;
- amendment details;
- information about the expiry of provisions;
- information about changeover dates and transfer dates;
- information about reprints published in the Queensland legislation reprints series;
- explanatory notes about the saving of subordinate legislation when the empowering Act is repealed.

Details of the administering Minister and information about forms are included.

The publication also contains information about repealed legislation.

### 7.15 Queensland Legislation Update

The Queensland Legislation Update is a service that provides up-to-date information about Queensland legislation.

- **Part 1**
  
  Part 1 is a weekly cumulative update to the Queensland Legislation Annotations. It contains information about the following–

  - Acts and Bills introduced, passed, enacted or amended;
  - subordinate legislation made, approved or amended;
  - legislation that has been repealed.

- **Part 2**

  Part 2 is issued monthly with each release of reprints. It contains information about the current status of Queensland legislation reprints of both Acts and subordinate legislation.

  It also includes information about amendments included in electronic copies of reprints that are released in unauthorised, electronic form only.
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