The Queensland Legislation Handbook

Governing Queensland

Queensland
Government

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Foreword

Legislation, properly authorised and made, is the most powerful way to protect, create or change the rights of citizens and to enforce, create or change their obligations. It is the most powerful way to underpin the achievement of policy. All those concerned in the development of Queensland legislation have a primary duty to ensure that it is of the highest standard.

The Queensland Legislation Handbook plays a major role in identifying the principles, processes and practices on which the achievement of legislation of the highest standard is based.

The handbook is compulsory reading for officers who are in any way associated with the development of legislation. I would also recommend the handbook to other people who wish to gain an appreciation of how legislation is developed, particularly from the perspective of the relationship between instructing officers and drafters.

The Queensland Legislation Handbook is just one of the volumes of Governing Queensland, which is the suite of policy and administrative handbooks designed to explain in a transparent way the processes of government in the State. The suite's handbooks strengthen the public service by requiring high quality processes supporting effective government, and encouraging better integration of policy development, planning, implementation and evaluation.

The handbooks in the suite that are most closely related to this handbook are The Queensland Cabinet Handbook and The Queensland Executive Council Handbook. Those two handbooks provide for much of the process needed to progress legislative proposals within government. Two other related handbooks in the suite are The Queensland Policy Handbook and The Queensland Parliamentary Procedures Handbook. Both of these handbooks have direct relevance to legislation, and deal with their special subject matters in considerable detail.

The Queensland Ministerial Handbook and Welcome Aboard: A Guide for Members of Queensland Government Boards, Committees and Statutory Authorities complete the suite.

Access the Governing Queensland suite of handbooks at www.premiers.qld.gov.au in the publications section.

Peter Beattie MP
Premier and Minister for Trade

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Introduction

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

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

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

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

OQPC is responsible for the drafting of government Bills and most subordinate legislation in Queensland and also drafts private members' Bills when required to do so. OQPC also provides advice on alternative ways of achieving policy objectives and on the application of fundamental legislative principles.

This handbook is mainly about the production of government legislation. For the sake of simplicity, this handbook only occasionally mentions legislation prepared other than for government.

OQPC's website at www.legislation.qld.gov.au provides information about the publication of legislation and legislative information by OQPC.

Correspondence about The Queensland Legislation Handbook should be addressed to:

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The Queensland Legislation Handbook can be accessed on the Internet via the Department of the Premier and Cabinet's website at www.premiers.qld.gov.au in the publications section, or purchased from the Government Printer, Goprint.

Goprint's contact details are: Goprint, 371 Vulture Street, WOOLLOONGABBA QLD 4102, Telephone (07) 3246 3399.

1 Context of legislation

This chapter considers legislation in its broadest context.

1.1 Legislation and the general law

Legislation is written against the background of the general law.

The general law is the law that exists apart from legislation.

The general law consists of the common law and the principles of equity, which are applicable in Queensland because of its history as a colony of the United Kingdom.

The general law emerged from the history of the United Kingdom and did not rely on laws made by Parliament for its existence.

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

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

1.2 Why legislation is needed

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

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

Legislation may also be an option chosen 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:

- directly deciding the matter

  or

- 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 the legislation operates through other laws, legislation, documents, instruments and decisions.

The way a scheme is constructed can depend on convenience of presentation, on practicality or on principles about the appropriateness of levels of power being used or delegated.

1.4 The power of the Parliament of Queensland

1.4.1 The plenary power

The Parliament of Queensland is authorised to make laws for the peace, welfare and good government of Queensland (*Constitution Act 1867*, s. 2). This is a plenary or full power.

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

The Parliament of Queensland consists of the Queen and the Legislative Assembly. 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 (*Australia Act 1986* (Cwlth and UK), s. 7).

The *Parliament of Queensland Act 2001* deals with the machinery of the Parliament 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. Relevantly, the *Australia Act 1986* (Cwlth and UK), section 1 provides that no Act of the Parliament of the United Kingdom passed after the commencement of the Australia Act extends 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.

1.4.2 Extraterritorial application of the plenary power

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

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

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

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

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

1.4.3 Relationship with the Australian Constitution

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

Also, there are Commonwealth Acts that confer jurisdiction, rights and power on the State, subject, of course, to those Commonwealth Acts. For example, in a legislative framework commonly referred to as the 'offshore settlement', the two Commonwealth Acts mentioned below confer jurisdiction, rights and powers on the State in relation to offshore matters. The statements of jurisdiction, rights and power set out below are indicative only, and for the many precise limitations placed on the State by the Commonwealth Acts, those Acts must be read carefully.

Coastal Waters (State Powers) Act 1980 (Cwlth)

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

Coastal Waters (State Title) Act 1980 (Cwlth)

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

1.5 How Parliament makes legislation or authorises the making of legislation

1.5.1 Act of Parliament

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

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

An Act is essentially a sequence of provisions containing statements and rules. What is achieved by the Act depends on the interpretation of the Act's provisions.

1.5.2 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 in the Legislative Assembly (that is, laid before the 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.

Chapter 6.1 gives more information about types of subordinate legislation.

1.6 Information about the following chapters

1.6.1 Acts

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

1.6.2 Subordinate legislation

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

The information in Chapter 3 about the drafting process, especially the information on the respective roles of instructing officer and drafter, may readily be applied in the subordinate legislation context.

The consideration of fundamental legislative principles in Chapter 7 includes issues specific to 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 Policy development of a government Bill

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

2.1 The nature of policy

'Policy' is defined in various ways, including as the government's public response to issues or problems arising within the State (see The Queensland Policy Handbook).

Policy may give rise to legislation if it needs to be declared or enforceable or, on rare occasions, if its presentation as legislation has significance. For example, the repealed *Medicare Principles and Commitments Adoption Act 1994*, in section 4, expressly stated that it did not create legal rights.

2.2 Is a new law needed?

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

- existing rights and obligations must be modified and this may only be done effectively by 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 to 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 to implement policy:

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

The Queensland Cabinet Handbook requires that an Authority to Prepare a Bill submission include justification for legislation as the most appropriate means of proceeding.

2.3 Does the State have power to make the law?

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

2.4 Bill or subordinate legislation?

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

2.5 Portfolio Bills

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

2.6 Statute Law (Miscellaneous Provisions) Bills

Statute Law (Miscellaneous Provisions) Bills are useful for minor amendments of a housekeeping nature ranging more widely across the Statute Book as a whole. A Statute Law (Miscellaneous Provisions) Bill is generally introduced and carried by the Leader of the House, since the Bill involves Acts administered by a number of different Ministers. 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 particular time.

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 in Chapter 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.

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

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

- initial development of policy
- consultation, both within and outside government, as required (in particular as required by The Queensland Cabinet Handbook) and as otherwise considered appropriate
- departmental and Ministerial approval of the Cabinet Authority to Prepare a Bill submission, including preparation of the drafting instructions for the Bill
- Cabinet approval of the Authority to Prepare a Bill submission
- drafting
- final consultation
- final drafting and preparation of the Bill for introduction, including preparation of the explanatory notes for the Bill
- departmental and Ministerial approval of the Cabinet Authority to Introduce a Bill submission
- Cabinet approval of the Authority to Introduce a Bill submission
- passage through the Parliament
- 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 the priority given to the drafting of the Bill depends on the Bill's priority at a whole-of-government level.

Drafting time also depends heavily on the 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 (see Chapter 3).

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

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 of which are listed below:

- The Department of the Premier and Cabinet's Policy Division provides whole-of-government policy advice on a wide range of matters including, for example, the development of sound legal frameworks that help government achieve its policy objectives.
- OQPC provides advice on the application of fundamental legislative principles, alternative ways of achieving policy objectives and other legislative issues that arise.

- The Department of Justice and Attorney-General provides advice on offences, on powers of police and other State officials, and on interaction with Commonwealth corporations legislation (see Chapters 2.12.4 and 2.12.14).
- 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.

It should also be noted that The Queensland Cabinet Handbook includes specific requirements for consultation with other departments and committees and the community. Some of these requirements are mentioned in Chapter 2.12.

2.11 Considering fundamental legislative principles

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

Chapter 7 deals separately with this topic.

2.12 Other matters needing consideration for thorough policy development

2.12.1 General application provisions

Generally

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

Binding on the State or another Australian body politic

The instructing department must specifically consider and address whether or not the Bill is to bind the State (and the other States and the Commonwealth).

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.

Indeed, The Queensland Cabinet Handbook requires legislation that has the potential to bind the State to expressly declare whether or not it binds the State, and also requires that this matter be specifically addressed in the Authority to Prepare a Bill submission.

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

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

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

Extraterritorial application

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

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

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

2.12.2 Commencement and expiry

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

An Act or provision of an Act that has not commenced within one year of the assent day automatically commences on the next day, although a regulation may extend the period of one year by a further maximum period of one year (*Acts Interpretation Act 1954*, s. 15DA).

Legislation may not be commenced in a way that results in it having an effect different to that which Parliament intended when the legislation was enacted.

For practical reasons, the timetable for the commencement 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. Overlapping, complex, delayed and excessively separated commencement of provisions can make it unacceptably difficult to understand what is the applicable law at a particular time.

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

Occasionally, because of particular policy considerations, Acts provide for their own expiry at some specified future time. (Expiry provisions are seen more frequently in subordinate legislation, usually arising out of the declaratory or transient nature of some subordinate legislation.)

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

2.12.3 Consequential amendments

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

2.12.4 Enforcement of provisions

A provision imposing a liability or obligation must make it clear how the liability or obligation is to be enforced. In particular, if it is proposed that a breach of a provision creates a liability to a penalty, that should be made clear. However, it may not be necessary or desirable to create an offence if other legislation already covers the intended offence. In particular, if the Criminal Code provides for an offence, it is undesirable that another Act should erode its nature as a comprehensive code by providing for the same or essentially the same offence.

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

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

Penalties must be internally consistent and also consistent with government policy and other legislation. They should reflect the seriousness with which the Parliament views a contravention of the provision to which the penalty attaches.

Offences that are dealt with summarily, that is, simple offences, and indictable offences when dealt with summarily, should not ordinarily carry a penalty greater than two years imprisonment.

Penalties for a contravention of subordinate legislation should generally be limited to not more than 20 penalty units. (Policy No. 2 of 1996 of the Scrutiny of Legislation Committee, in Alert Digest No. 4 of 1996 at pages 7–8, deals with the delegation of legislative power to create offences and prescribe penalties.)

In relation to enforcement matters generally, it should be noted that The Queensland Cabinet Handbook requires that the Department of Justice and Attorney-General be consulted about legislative proposals involving the creation of new offences or the giving of increased powers to police (see also Chapter 2.12.7) or other State officials, and proposals affecting court or tribunal processes or resources.

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

2.12.5 Forms

If forms are required for an Act, current legislative drafting practice is generally to provide for the forms to be administratively approved, rather than prescribed by the Act or subordinate legislation. Administratively approved forms are generally approved by the chief executive of the department administering the legislation. These forms can be amended quickly if a deficiency becomes apparent. Each administratively approved form is required to be given a unique number and approval or availability of the form must be notified in the gazette (*Statutory Instruments Act 1992*, s. 58).

2.12.6 National Competition Policy

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

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

2.12.7 Police powers

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

2.12.8 Regulation-making power

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.

2.12.9 When Act operates

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

Achieving retrospectivity in the criminal law in particular requires a considerable degree of express precision. The retrospectivity is limited to matters of process and other incidental matters. Criminal liability is not imposed retrospectively.

2.12.10 Statutory bodies and statutory office holders

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

- whether or not the body represents the State
- how appointments to the body are made
- the status of employees of the body (for example, whether the *Public Service Act 1996* applies)

- whether particular Acts of general application apply to the body, including, for example:
  - *Crime and Misconduct Act 2001*
  - *Equal Opportunity in Public Employment Act 1992*
  - *Financial Administration and Audit Act 1977*
  - *Public Records Act 2002*
  - *Statutory Bodies Financial Arrangements Act 1982*
- if the body is a corporation, the extent to which it is subject to the corporations legislation.

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

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

In preparing a provision authorising appointment of a member of a statutory body, issues concerning conflict of interest should be considered. If it is intended that the holder of an existing class of office may be appointed as a member of the statutory body and a conflict of interest arises between the two offices, it may be necessary to expressly authorise such an appointment and provide for ways to avoid the conflict. (See The Australian Law Journal, Volume 51, page 317.)

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

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

2.12.11 Time

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

For example, if a provision deals with a set of circumstances, some of which could happen before the provision commences and some after, 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. Existing processes that need to be examined with care when legislative change happens include any litigation, enforcement, appeal, review or administrative application processes. See also Chapter 2.12.12.

Also, if the Bill requires a person to do something, when the thing is to be done needs to be stated. If no express statement is made, reasonability is implied. (See the *Acts Interpretation Act 1954*, s. 38(4).) But this can sometimes be an impractical concept to administer.

2.12.12 Transitional and savings provisions

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

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

Some occasions when express transitional or savings provisions may be required have been mentioned in relation to provisions taking account of the time factor (see Chapter 2.12.11). Transitional provisions are also often required when amending or replacing schemes for the grant of any form of property, right, privilege, authority or licence, and in order to continue decisions, appointments or appeals or the right to decide, appoint or appeal.

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

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

2.12.13 Delegations

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

2.12.14 Inconsistency with *Corporations Act 2001* (Cwlth)

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

3 The drafting process

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

OQPC may be involved in the drafting process before approval of an Authority to Prepare a Bill submission is obtained from Cabinet, or other appropriate authority is obtained. However, formally the drafting process starts when there is Cabinet Authority to Prepare a Bill approval, 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 time frame. After the drafting is completed, an Authority to Introduce a Bill submission should be lodged.

This chapter considers the drafting process at the following stages:

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

In carrying out its statutory role, OQPC's duty in relation to government legislation is to the government as a whole and not simply to individual Ministers, departments or members. (See The Queensland Cabinet Handbook.) Further, because OQPC is attached to the Department of the Premier and Cabinet, OQPC reports to the Premier.

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

The following are some of the circumstances in which OQPC is involved in the preparation of legislation before an Authority to Prepare a Bill approval 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 a Cabinet Authority to Prepare a Bill submission is circulated, OQPC may provide a briefing note to the Policy Division of the Department of the Premier and Cabinet as part of the department's processes to brief the Premier on Cabinet submissions.

- There may be a special arrangement for OQPC to start drafting before Cabinet Authority to Prepare a Bill approval has been obtained.

3.1.1 Sponsoring department discussions with OQPC before finalising submission

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

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

3.1.2 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 longstanding 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 Division of the Department of the Premier and Cabinet. Also, a copy of the note is sent to the instructing officer.

3.1.3 Drafting before an Authority to Prepare a Bill approval has been obtained from Cabinet

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

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.

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

the Premier and Cabinet may provide written authorisation. The parliamentary counsel may also arrange for an earlier start.

3.2 Authority to Prepare a Bill approval

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

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

3.3 Drafting process

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

3.3.1 The drafting process is creative

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

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

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

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

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

- read the draft carefully to make sure he or she understands it
- test the draft against scenarios to make sure it gives effect to policy and does not have any unintended consequences
- check the draft for consistency to make sure it is internally consistent and, if appropriate, consistent with related legislation
- check the authority to draft the legislation, usually a Cabinet Authority to Prepare a Bill approval, 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 without explanation, is far less useful to the drafter than a clear outline of the problem, presented in a way that is easy to understand.

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

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

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

Once the drafter and instructing officer agree the Bill is settled and ready for the department to submit to Cabinet by way of an

Authority to Introduce a Bill submission, the instructing officer will prepare other necessary Cabinet documents, for example, the proposed explanatory notes.

3.4 Role of instructing officer in providing effective drafting instructions

The instructing officer is a key player in the drafting process 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.

3.4.1 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 Cabinet legislation and liaison officer (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.

For the purposes of the process of instructing, an instructing officer needs to be familiar with:

- The Queensland Cabinet Handbook
- The Queensland Executive Council Handbook
- the *Acts Interpretation Act 1954*
- the *Legislative Standards Act 1992*
- the *Reprints Act 1992*
- the *Statutory Instruments Act 1992*
- current legislative regimes within their department
- similar regimes administered by other departments and in other jurisdictions
- recent drafting trends in Queensland.

3.4.2 Effective drafting instructions return direct benefits

Drafting instructions often form the initial and most important contact with OQPC. Investment of time and effort in preparing quality drafting instructions yields 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 instructing officer 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 include:

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

3.4.3 Drafting instructions—general requirements

Written drafting instructions should state:

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

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

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

This will prevent a situation in which the drafter has to make something up to fill a gap.

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

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

3.4.4 Drafting instructions—specific requirements

Drafting instructions in writing

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

Proposals fully developed

For instructions to provide optimum support for 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.

Clarity and consistency

Drafting instructions written in plain English and in narrative form enable the instructing officer'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.

Appropriate format

There is no set format for drafting instructions. However, to make it easier to refer to particular provisions in the instructions when issues are being discussed, the drafting instructions should:

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

Other material to be included

Include the instructing officer's name, address, telephone number, fax number and email 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 on the cover page. Contact information is easiest to find if it is stated clearly at the start or end of instructions. 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.

Authority and priority

State the authority to draft the Bill, usually an Authority to Prepare a Bill approval.

Indicate the priority that has been given to the legislation and, in particular, when the legislation is required. The Queensland Cabinet Handbook deals with the government's legislative program. Matters covered include the formulation of the program, guidelines for programming proposed Bills, controlling the volume of legislation and monitoring the program.

Principal objectives

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

Legislative environment

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

If proposed legislation affects legislation of other departments, include in the drafting instructions:

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

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

Mention any aspect of the legislation that is politically sensitive.

Attach copies of relevant legal opinions. These could include opinions from the Solicitor-General, Crown Solicitor or, if native title is an issue, Native Title and Indigenous Land Services within the Department of Natural Resources, Mines and Energy. Relevant court decisions also should be mentioned.

Other matters that should be considered when drafting instructions are given are set out in Chapter 2.12 and Chapter 7.

Departmental drafts

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

Departmental drafts can 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.

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

3.5 Role of drafter

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

3.5.1 Plain English

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

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

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

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 expression 'statutory instrument' is defined in detail in the *Statutory Instruments Act 1992*, section 7. Statutory instruments include subordinate legislation.)

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

3.5.3 Examination for compliance with fundamental legislative principles

Under the *Legislative Standards Act 1992*, section 7(g)(ii) and (h)(ii), OQPC's functions include advising on the application of fundamental legislative principles. Chapter 7 of this handbook deals with fundamental legislative principles.

OQPC is an internal control mechanism for fundamental legislative principles. The Scrutiny of Legislation Committee is an external control mechanism for them. The Scrutiny 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 Scrutiny Committee's conclusions. Advice provided by OQPC during the drafting process about the application of fundamental legislative principles

is commonly based on earlier comments by the Scrutiny Committee in its Alert Digests.

3.5.4 Quality assurance checks—the final process

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

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

An appropriate quality assurance check by OQPC at the end of the drafting process can involve a variety of considerations. For example, it may involve considering:

- whether the rules of law in the draft are effective and sufficient
- the inherent quality of the policy from a legal professional viewpoint
- whole-of-government perspectives
- the draft's consistency with the Cabinet decision approving the preparation of the Bill
- the draft's consistency with longstanding Queensland Government policy
- the draft's consistency with fundamental legislative principles
- the quality of the draft as an instrument of policy implementation.

Also, at an editorial and publishing level it may involve considering:

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

Many of these matters can only be fully considered after what is effectively the final draft of the Bill has been settled between drafter and instructing officer in terms of the Bill's content. Therefore, time is needed after the final draft 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 Authority to Introduce a Bill approval

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

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

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

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

3.7 Other relevant matters

3.7.1 Consultation—draft stage

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

Relevant government departments should be consulted about draft legislation if:

- the legislation makes consequential amendments to the other department's legislation
- the Authority to Prepare a Bill approval expressly requires the consultation

  or
- consultation is necessary to comply with the consultation requirements outlined in The Queensland Cabinet Handbook.

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

3.7.2 Explanatory notes

The department (usually the instructing officer) is responsible for preparing accompanying documents required for the introduction of a Bill, such as the explanatory notes and the Minister's parliamentary 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 explanatory notes to accompany the Authority to Introduce a Bill submission.

The instructing officer should start preparing the explanatory notes in sufficient time to ensure the notes are ready in final form when required. Explanatory notes are designed to explain the legislation and not merely to 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 (*Acts Interpretation Act 1954*, s. 14B). More immediately, well-reasoned and comprehensive explanatory notes can help the Scrutiny of Legislation Committee to reach a better-informed judgment about fundamental legislative principles issues.

3.7.3 Time requirements

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

3.7.4 Drafting private members' Bills

Under the *Legislative Standards Act 1992*, section 10, opposition or independent members can ask OQPC to prepare Bills or amendments. Their communications with OQPC are subject to legal professional privilege. (See the *Legislative Standards Act 1992*, s. 9A.)

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

4 The parliamentary process

This chapter examines the processes of the Legislative Assembly relating to the passage of a Bill and government processes as they apply in the context of the Legislative Assembly processes.

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 of Queensland is the State's paramount law-making body. It consists of the Queen and the Legislative Assembly. In Queensland, there is no second legislative chamber (or upper House). The Queen's role in the Parliament of Queensland is carried out by her representative in Queensland, the Governor, 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 the *Constitution of Queensland 2001*, Chapter 2, Part 1 and the *Constitution Act 1867*, sections 1 and 2. It operates in accordance with the standing rules and orders authorised by the *Parliament of Queensland Act 2001*, section 11.

4.2 Timing of the introduction of a Bill

There is an administrative process associated with the introduction of a government Bill into the Legislative Assembly. Cabinet authorises the introduction of the Bill after considering an Authority to Introduce a Bill 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, after consultation with the relevant Minister, authorises supply of the Bill, and indicates when the Bill is to be introduced into the Legislative Assembly. The relevant government department also advises OQPC that the Bill may be printed and copies supplied to the staff of the Table Office of Parliament House in readiness for introduction. It is this combination of administrative processes that authorises the supply of the Bill to the House.

OQPC is the agency that arranges for 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 to meet the demand. When the Bill is printed, Goprint delivers copies of the Bill to the departmental instructing officer in accordance with details supplied by OQPC.

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

4.3 Explanatory notes

At about the same time as OQPC forwards the Bill to 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.

4.4 Messages from the Governor

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

> ***68 Governor's recommendation required for appropriation***
>
> *(1) The Legislative Assembly must not originate or pass a vote, resolution or Bill for the appropriation of—*
>
> *(a) an amount from the consolidated fund; or*
>
> *(b) an amount required to be paid to the consolidated fund;*
>
> *that has not first been recommended by a message of the Governor.*
>
> *(2) The message must be given to the Legislative Assembly during the session in which the vote, resolution or Bill is intended to be passed.*

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

At the request of OQPC, State Affairs within 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 Parliament.

4.5 Presentation and first reading

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

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 Parliament 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 and accompanying explanatory notes 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. Unless the Legislative Assembly suspends standing and sessional orders, it will not deal with the Bill until after thirteen whole calendar days have elapsed. The thirteen calendar days is a minimum time only, and in some cases it can be several months before debate on the Bill is scheduled.

It is sometimes necessary for the Minister to table an erratum to the explanatory notes presented with a Bill to correct an error or other inaccuracy. For this purpose, the Table Office of Parliament House is supplied with the copies of the erratum document in accordance with its requirements. After the document is tabled, either the Table Office or Goprint supplies OQPC with an electronic version for publication on its website. The supply of supplementary explanatory notes to accompany amendments in committee is separately considered in Chapter 4.8.

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 the 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 Scrutiny

Committee is set up under the *Parliament of Queensland Act 2001*, section 80. See also section 103 of that Act for more detail about the Scrutiny Committee's area of responsibility.

The Scrutiny Committee also examines the explanatory notes accompanying a Bill, both to help in its examination of the Bill and 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 Scrutiny Committee on the Monday of a week in which the Assembly is sitting, and tabled in the House the following day.

If the Scrutiny Committee reports on a Bill, generally its report on that Bill will appear in the Alert Digest of the next sitting week after the sitting week in which the Bill is introduced into the Assembly.

A subsequent Alert Digest will contain the Scrutiny 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 Scrutiny 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:

- the Minister to respond to the committee's report
- the committee to respond to the Minister's letter
- both responses to be included in the subsequent Alert Digest.

Whether the Minister should consult with OQPC before responding to the Scrutiny Committee's comments depends on the circumstances. However, particular circumstances where consultation is highly desirable are:

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

The Scrutiny 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 Committee are usually the subject of discussion between the sponsoring Minister and the officers of the sponsoring department.

The Scrutiny of Legislation Committee also has a role in relation to amendments to Bills, known as amendments in committee. On 13 May 2004, the Legislative Assembly conferred upon the Scrutiny of Legislation Committee the function and discretion to examine and report on the application of the fundamental legislative principles to amendments, whether or not the Bill to which the amendments relate has received royal assent.

4.8 Amendments in committee

Note: From 31 August 2004, the 'Committee of the Whole' stage for the passage of a Bill becomes the 'consideration in detail' stage. See the Standing Rules and Orders of the Queensland Legislative Assembly as at that date.

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

The Legislative Assembly deals with amendments to the Bill—amendments in committee—at the committee stage when it forms itself into the Committee of the Whole House. This committee is also known as the Committee of the Whole. 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 Parliament House by OQPC. This happens whether the amendments are being proposed by the sponsoring Minister or any other member. This is because the amendments may later need to be incorporated by OQPC into the Bill that is passed by the Legislative 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.

Within government, 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 Cabinet's approval for its introduction, that is, it may require further approvals. It should also be noted that all departments are now required to prepare supplementary explanatory notes for amendments to a Bill intended to be moved at the committee stage by the sponsoring Minister, if it is practicable to do so.

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

When OQPC is authorised to supply an amendment in committee, OQPC sends it to the Table Office in electronic form for printing and distribution to members. Either the Table Office or Goprint supplies OQPC with an electronic version of any accompanying supplementary explanatory notes for publication on OQPC's

website and, ultimately, in the yearly bound volume of explanatory notes accompanying the bound volumes of Acts as passed.

4.9 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 about the Bill's policy 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 agreed to, the second reading takes place, with the Clerk of the Parliament again reading the Bill's short title.

The Queensland Parliamentary Procedures Handbook gives more detail about this stage of the Bill's passage through the Legislative Assembly.

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 that are moved by a member of the committee in the form of an amendment in committee and agreed to by the committee.

If the Bill has a preamble, the preamble is considered after the passing of the clauses and any schedules. The chair of the committee then reports to the Speaker of the Assembly as to how the committee dealt with the Bill.

4.11 Third reading and long title

When the Bill has been reported to the Legislative 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 of the Parliament reading aloud its short title.

After the third reading, the Bill's long title is then agreed to, and the Bill is then said to have been passed by the Legislative Assembly, even though it does not become a law of Queensland

until it receives assent from the Governor. After a Bill's third reading, no further questions can be put.

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 two related Bills, the Assembly might authorise:

- the one question being put in regard to the second readings
- the consideration of the Bills together at the committee stage
- 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, includes a summary of the progress of any Bill before the Legislative Assembly on that day, including the votes on any matter relating to the Bill. The 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 website of Parliament House. The Votes and Proceedings are used by the Clerk of the Parliament and OQPC to prepare copies of the Bill as passed by the Legislative Assembly.

4.14 Attendance by departmental 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 departmental officers outside the bar of the House and advising the Minister as the debate proceeds. A policy or instructing officer may also be required to brief members of the Legislative Assembly or interest groups when the Bill is introduced or is about to be, or is being, debated.

The OQPC drafter 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. Private members do not have a statutory obligation to provide explanatory notes for private members' Bills, but ordinarily do so. In relation to amendments in committee, the Legislative Assembly agreed to the following motion on 7 November 2001:

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

There are special issues that arise if a non-government member asks OQPC to prepare amendments 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 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 three forms: 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 the Bill is to be presented to the Governor for assent. The letter advises that it is in order for the Attorney-General to sign an attached certificate.

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

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

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

Once the Bill has received assent and has become an Act, the Clerk of the Parliament advises OQPC of details of the assent, including the Act's number, and requests that OQPC prepare a copy of the Act. The Act will include the Act's number and its date of assent. The Act commences to operate as a new law on the date of assent, subject to any commencement provision included in the Act. (Chapter 2.12.2 gives more detail about Act commencement.)

The Queensland Parliamentary Procedures Handbook notes that the process of having a Bill assented to can take up to two weeks. Urgent assent can be obtained in some circumstances. If it is

necessary for a Bill to be assented to urgently, the chief executive of the sponsoring department must give the Clerk of the Parliament the earliest possible written notification and the reasons that urgent assent is required.

6 Subordinate legislation

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

6.1 What is subordinate legislation?

This chapter (and this handbook generally) considers subordinate legislation within the framework established by the *Statutory Instruments Act 1992*, rather than from the point of view of the wider meaning the expression 'subordinate legislation' is sometimes given under the general law. Under the *Statutory Instruments Act 1992* framework, all items of subordinate legislation are statutory instruments, but not all statutory instruments are subordinate legislation.

A statutory instrument is made by an entity other than the Parliament, usually under power delegated by the Parliament to the entity by a provision in an empowering Act.

Power is commonly delegated:

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

For Queensland legislative (and administrative) purposes, a statutory instrument is subordinate legislation if the *Statutory Instruments Act 1992* causes it to be subordinate legislation, although sometimes another Act or some other instrument must be read in conjunction with the *Statutory Instruments Act 1992* to establish its status as subordinate legislation.

Chapter 1.5.2 notes that the most familiar example of subordinate legislation is a regulation made by the Governor in Council, but there are many other types.

For example, an empowering Act sometimes provides for a statutory instrument to be made by an entity (for example, a board), but then requires the instrument to be approved by the Governor in Council. Under the *Statutory Instruments Act 1992*, the instrument is subordinate legislation. Rules and by-laws are sometimes instruments of this nature.

On the other hand, an empowering Act sometimes provides for a statutory instrument to be made by an entity (for example the Minister or the chief executive) without any subsequent Governor in Council involvement being required, but declares the instrument to be subordinate legislation. This instrument is also subordinate legislation under the *Statutory Instruments Act 1992*. Standards and notices are sometimes instruments of this nature.

Under the *Statutory Instruments Act 1992*, a proclamation of the Governor fixing the commencement day for an Act would always be subordinate legislation.

For a fuller understanding of what instruments are subordinate legislation, see the *Statutory Instruments Act 1992*, sections 6 to 9, and the Statutory Instruments Regulation 2002. Also, see the glossary for the meaning of 'significant subordinate legislation', both at law under the *Legislative Standards Act 1992*, and administratively under The Queensland Cabinet Handbook.

6.2 Drafting subordinate legislation

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

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

The authority to draft subordinate legislation ordinarily comes from a decision of Cabinet, or the relevant Minister or chief executive.

The principles for drafting a Bill outlined in Chapter 3 also apply generally to the drafting of subordinate legislation. However, there are other fundamentals that must be taken into account when drafting legally effective subordinate legislation.

6.3 Subordinate legislation must be within power

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

6.4 Unauthorised subdelegation

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

allow a chief executive to deal substantively with the issue under a public notice.

6.5 General presumption that legislation will be prospective

Subordinate legislation generally commences on notification 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. The one exception is where the subordinate legislation expressly provides for the retrospective operation of a beneficial provision.

6.6 Retrospective operation of a beneficial provision

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

6.7 Power to make instruments

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

- Section 22 enables subordinate legislation to be made with respect to any matter that is required or permitted to be prescribed by the authorising law or other law or is necessary or convenient to be prescribed for carrying out or giving effect to the authorising law.
- Section 23 enables subordinate legislation to make provision for a matter by applying, adopting or incorporating (with or without modification) the provisions of an Act, statutory instrument or other law, or another document.
- Section 24 enables subordinate legislation to make provision for a matter by applying generally throughout the State or being limited in its application to a particular part of the State. Section 24 also enables subordinate legislation to make provision for a matter by applying generally to all persons and matters or being limited in its application to particular persons or matters or particular classes of persons or matters.

- Section 29 enables subordinate legislation to provide for the review of, or a right of appeal against, a decision made under the subordinate legislation.
- Section 30 enables subordinate legislation to require a form prescribed by or under the subordinate legislation, or information or documents (whether or not included in, attached to or given with a form), to be verified by statutory declaration.

An Act and the subordinate legislation under it should be a single set of rules. Generally, there should be no duplication in subordinate legislation of rules that are already stated in the Act and there should be no significant change in concepts or language.

6.8 Certification

Ordinarily, OQPC certifies subordinate legislation drafted by it, and supplies the subordinate legislation to the relevant department.

If the subordinate legislation is to be made by the Governor or Governor in Council, OQPC supplies one blue copy and one white copy, both certified.

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

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

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

All copies are supplied on archival paper. The Executive Council Secretariat retains white certified copies it receives from a department. Blue certified copies eventually form part of the administering department's records.

OQPC will certify subordinate legislation only if it is satisfied that the proposed subordinate legislation:

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

Under The Queensland Cabinet Handbook, proposed subordinate legislation that has not been certified by OQPC must be submitted to Cabinet.

6.9 Penalties

A penalty can not be imposed for a contravention of subordinate legislation unless the empowering Act authorises the subordinate legislation to impose the penalty.

Penalties for a breach of subordinate legislation should generally be limited to not more than 20 penalty units. (See the Scrutiny of Legislation Committee's Policy No. 2 of 1996 on the delegation of legislative power to create offences and prescribe penalties, in Alert Digest No. 4 of 1996 at pages 7–8.)

6.10 Infringement notice offences

If a department is proposing an amendment of the State Penalties Enforcement Regulation 2000 in order to prescribe an offence under legislation the department administers as an infringement notice offence under the *State Penalties Enforcement Act 1999*, and to prescribe an infringement notice fine for the offence, the department should liaise with the Department of Justice and Attorney-General.

As a general guide, infringement notice fines prescribed in the State Penalties Enforcement Regulation 2000 for an infringement notice given under the *State Penalties Enforcement Act 1999* should not be more than one-tenth of the penalty prescribed in the Act or the subordinate legislation to which the infringement notice fine relates. For example, if a provision of a regulation attracts a maximum penalty of 20 penalty units, the penalty under an infringement notice would ordinarily be prescribed at not more than 2 penalty units.

6.11 Regulatory impact statements and explanatory notes

The *Statutory Instruments Act 1992*, section 43 requires that 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'.

The Business Regulation Reform Unit of the Department of State Development and Innovation has a focus on regulatory activities generally and, in particular, provides advice, assistance and training on the RIS process, including advice as to whether a RIS is required in particular cases.

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. Section 44(g) of the Act requires the RIS to state all benefits and costs either quantitatively or

qualitatively. If benefits and costs can not 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. '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.

The *Statutory Instruments Act 1992*, section 45 requires that a notice about the proposed subordinate legislation 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, section 45(2) requires the notice be published in a way likely to ensure members of the group understand the purpose and content of the notice. The notice must allow at least twenty-eight days for public comment on the proposed subordinate legislation.

Under the *Legislative Standards Act 1992*, section 22, an explanatory note prepared by the administering department must accompany all subordinate legislation for which a RIS is required. Section 24 of that Act 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 RIS or explanatory note. However, OQPC does this only if the RIS or explanatory note has been formatted by OQPC and bears an OQPC stamp evidencing the formatting. Accordingly, an electronic copy of any RIS or explanatory note must be given to OQPC for formatting as early as practicable in the drafting process. By arrangement with the Executive Council Secretariat, OQPC makes a notation on all subordinate legislation when it is certified and supplied by OQPC to indicate whether or not there is any RIS or explanatory note formatted by OQPC accompanying the subordinate legislation.

A week before each Executive Council meeting, the Executive Council Secretariat advises OQPC which subordinate legislation drafted by OQPC is to be considered at the meeting and confirms with OQPC which subordinate legislation is accompanied by a RIS or explanatory note.

6.11.1 Uniform legislation

Under section 46(1)(g) of the *Statutory Instruments Act 1992*, a RIS need not be prepared for proposed subordinate legislation if the subordinate legislation only provides for, or to the extent it only provides for, a matter arising under legislation that is substantially uniform or complementary with legislation of the Commonwealth or another State. However, under administrative arrangements the sponsoring Minister is required to table in the Legislative Assembly any RIS prepared for the legislation for national scheme purposes in the other jurisdiction (national scheme RIS). Accordingly, the sponsoring department supplies an

electronic copy of the national scheme RIS and any accompanying explanatory notes to OQPC for formatting (and for stamping to evidence the formatting), in the same way as for other RISs and explanatory notes accompanying subordinate legislation.

6.12 Notification

Under the *Statutory Instruments Act 1992*, section 47, subordinate legislation must be notified by:

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

  or

- publication in the gazette of the subordinate legislation.

See Chapter 6.17 for information on the notification process.

6.13 Tabling and disallowance

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

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

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

See Chapter 6.17 for information on the tabling process.

6.14 Parliamentary scrutiny

Under the *Parliament of Queensland Act 2001*, section 103(1), the Scrutiny of Legislation Committee has responsibility to consider for subordinate legislation:

- the application of fundamental legislative principles to the subordinate legislation
- the lawfulness of the subordinate legislation.

The Scrutiny Committee approaches its responsibilities to subordinate legislation in much the same way as it does with Bills, with one notable exception: the Scrutiny Committee can directly oppose an objectionable provision in subordinate legislation by asking the Legislative Assembly to support a motion to disallow the provision (*Statutory Instruments Act 1992*, s. 50).

If subordinate legislation is the subject of a motion of disallowance moved by any member, the subordinate legislation can be expected to be the subject of a separate report by the Scrutiny Committee. However, ordinarily the Scrutiny Committee reports to the Legislative Assembly only on subordinate legislation with which it has concerns, and its reporting consists of:

- a listing of the subordinate legislation in the Alert Digest as subordinate legislation with which the Scrutiny Committee has concerns
- on the completion of the Scrutiny Committee's inquiries, an incorporation in the Alert Digest of correspondence recording the Scrutiny Committee's exploration of those concerns with the relevant Minister.

6.15 Interpretation

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

6.16 Expiry of subordinate legislation

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

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

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

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

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

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

6.17 Printing, notification and tabling processes

OQPC is responsible for managing and coordinating the notification of subordinate legislation (except exempt subordinate legislation) for the government as a whole. 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, the Executive Council, Goprint, the Table Office of Parliament House and OQPC.

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

1. The administering department notifies the Executive Council Secretariat that subordinate legislation is to be signed by the Governor at the Executive Council meeting on Thursday.
2. The Executive Council Secretariat advises OQPC.
3. OQPC prepares the subordinate legislation for printing in the subordinate legislation series and also prepares the notification table for publication in the gazette on Friday.
4. Goprint prints the subordinate legislation on Friday.
5. Goprint sends copies of the subordinate legislation to relevant administering departments and to the Table Office.
6. The Table Office automatically tables the subordinate legislation in the Legislative Assembly. Subordinate legislation is tabled within fourteen sitting days of notification in the gazette.

For subordinate legislation made by an entity other than the Governor or Governor in Council, for example, by a Minister or board, and where there is no subsequent Governor or Governor in Council involvement, the administering department must liaise directly with OQPC to arrange notification. OQPC requires advice about the date the subordinate legislation was made and the date it is to be notified. The subordinate legislation is then printed, notified and tabled according to the procedures outlined in items 3 to 6 above.

7 Fundamental legislative principles

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

7.1 Considering fundamental legislative principles

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

OQPC has a statutory responsibility to advise in relation to the application of fundamental legislative principles in drafting legislation (*Legislative Standards Act 1992*, s. 7). 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 (*Parliament of Queensland Act 2001*, s. 103(1)).

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

This chapter provides some practical guidance on the application of the fundamental legislative principles. For more information on the application of fundamental legislative principles in the drafting of legislation, contact OQPC or consult the Alert Digests of the Scrutiny of Legislation Committee (see http://www.parliament.qld.gov.au/ committees/scrutiny.htm).

The *Legislative Standards Act 1992*, section 4(3) specifies some of the matters that should be considered in deciding whether legislation has sufficient regard to the rights and liberties of individuals. These are considered below in Chapters 7.2.1–7.2.11. Chapter 7.2.12 considers some other matters that are relevant to the rights and liberties of individuals.

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

considers some other matters that are relevant to the institution of Parliament.

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

7.2 The rights and liberties of individuals

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

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

In relation to defining administrative power, other matters that the Scrutiny of Legislation Committee has monitored have included:

- the imposition of conditions on a licence or other statutory authority
- the imposition of suitability, eligibility and similar criteria for granting an appointment, place, position or other status
- the appropriate nature of a power to administratively grant an appointment, place, position or other status
- the appropriate nature of a power to give administrative directions generally or in unusual circumstances, for example, to persons and bodies ordinarily regarded as independent or to affect an established trust
- the limitation of the period within which prosecutions may be started for breaches of statutory duty.

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

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

7.2.2 Is the legislation consistent with principles of natural justice?

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

Right to be heard

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

Matters that the Scrutiny Committee has monitored have included:

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

Absence of bias

The decision-maker must be unbiased.

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

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

Procedural fairness

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

The Scrutiny of Legislation Committee would be likely to have concerns about any process purporting to afford natural justice that is not transparent.

In relation to procedural fairness, other matters that the Scrutiny Committee has monitored have included whether a person who is the subject of the decision will be provided with:

- adequate notice of when any hearing will take place
- adequate notice of any allegation being considered
- adequate notice of any particular requirements of the decision-maker

- a reasonable opportunity to present the person's case and to respond to any adverse material of which the decision-maker has informed itself.

Whether the Scrutiny Committee considers that legal representation is required at any hearing depends on all the circumstances (Alert Digests 2002/1, pp. 21–22; 2001/8, pp. 18–20; and 2000/9, p. 6, para. 30).

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

Generally, powers should be delegated only to appropriately qualified officers or employees of the administering department. This approach reflects the policy of the Scrutiny of Legislation Committee (see Policy No. 1 of 1996 in Alert Digest 1996/4, p. 5). The *Acts Interpretation Act 1954*, section 27A contains extensive provisions dealing with delegations.

Delegation to a person or body outside government is uncommon because, as noted by the Scrutiny of Legislation Committee, it 'potentially circumvents the traditional means of accountability usually applicable to the public sector' (Alert Digest 1997/9, p. 9). As also noted by the Scrutiny Committee, 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 *Crime and Misconduct Act 2001* and the *Ombudsman Act 2001*.

The appropriateness of placing limitations on a delegation of a power depends on all the circumstances, including the extent of the power, how use of the power may affect the rights or legitimate expectations of others, and whether particular expertise or experience is needed to exercise the power properly.

A power of subdelegation requires careful consideration and may be inappropriate on some occasions (see Alert Digest 2002/6, p. 45, paras 6–7).

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

Generally, reversal of the onus of proof in criminal proceedings is opposed. However, justification for the reversal is sometimes found in situations where the matter that is the subject of proof by the defendant is peculiarly within the defendant's knowledge and would be extremely difficult, or very expensive, for the State to prove (Alert Digest 1997/2, p. 11).

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

A provision making a person guilty of an offence committed by someone else with whom the person is linked, and providing defences allowing the person to disprove connection with the offence, is an apparent reversal of onus of proof and must be justified. Common situations where these concerns 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.

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

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

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

The Scrutiny of Legislation Committee examines powers of entry and can be expected to comment adversely if appropriate safeguards are not provided (see, for example, Alert Digest 1997/13, p. 19).

7.2.6 Does the legislation provide appropriate protection against selfincrimination?

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, Gibbs CJ said:

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

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

> *The committee's general view is that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if:*
>
> - *the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed, and would be difficult or impossible to establish by any alternative evidentiary means; and*
> - *the Bill prohibits use of the information obtained in prosecutions against the person; and*
> - *in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming the right).*

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

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

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

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

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

For subordinate legislation, the *Statutory Instruments Act 1992*, section 32 provides for the commencement of a statutory instrument prospectively. Only section 34 provides otherwise. Section 34 allows a statutory instrument to expressly provide for beneficial retrospectivity, that is, retrospectivity that does not decrease a person's rights or impose liabilities on a person other than the State, a State authority or a local government. Subordinate legislation that purports to have an adverse affect can not be made without the authority of an Act.

The Scrutiny of Legislation Committee brings to the attention of Parliament all provisions in Bills that have effect retrospectively (see the Scrutiny Committee Annual Report 1997–1998, p. 7, para. 2.14).

The Scrutiny Committee generally opposes retrospective legislation but concedes that on occasions retrospective legislation that is curative and validating may be justified (see Alert Digest 1999/3, p. 25, paras 4.17–4.18).

7.2.8 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 everyone is equal before the law and should therefore be fully liable for one's acts or omissions (Alert Digest 1998/1, p. 5). However, it does recognise that the conferral of immunity is appropriate in certain situations.

The Scrutiny of Legislation Committee has not objected to immunity being conferred on the following:

- public servants implementing announced policy (Alert Digest 2001/4, p. 7, para. 16)
- persons acting judicially or in roles similar to or associated with judicial process (Alert Digests 2003/1, p. 3, paras 21–23; 2002/6, pp. 31–32, paras 35–44; 2002/6, p. 48, para. 28; 2002/3, p. 16, paras 15–18; and 1999/11, p. 11, paras 4.20–4.21)
- persons carrying out statutory functions (Alert Digest 1999/4, p. 16, paras 2.8–2.14)
- whistleblowers or persons making disclosures similar to whistleblowing (Alert Digests 2003/06, pp. 27–8, paras 34–41; and 2000/1, p. 5, paras 37–42)
- persons making disclosures to entities carrying out statutory functions (Alert Digest 2002/3, p. 4, paras 24–25).

The granting of immunity is most justifiable when there is a significant public interest in doing so. For example, the Scrutiny Committee has considered that diverting particular offenders from court proceedings for drug offences to processes that provided alternative ways of deterring the offending behaviour had sufficient regard to both the individual and the public interest (Alert Digest 2002/9, p. 1, para. 6).

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

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

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

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 (*Acts Interpretation Act 1954*, s. 13A).

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

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

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

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

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

- be user friendly and accessible so ordinary Queenslanders can gain an understanding of the laws relating to a particular matter without having to refer to multiple Acts of Parliament
- contain coherent provisions, addressing foreseeable matters (See the Scrutiny Committee Annual Report 1998–1999, para. 2.14.)
- be drafted in a style that is as simple as possible, consistent with the nature of the subject matter
- be structured in a logical, user-friendly and accessible way

- contain provisions that are precisely drafted. (See the Scrutiny Committee Annual Report 1999–2000, para. 2.14.)

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

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

The Scrutiny Committee takes an expansive approach in identifying rights and liberties. These include traditional common law rights, for example, the right of a landowner to the use and enjoyment of his or her land. They can also encompass, for example, rights that are only incompletely recognised at common law (for example, the right to privacy) and rights (especially human rights) that arise out of Australia's international treaty obligations. (See the Scrutiny Committee Annual Report 1998–1999, p. 6, para. 2.13).

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

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

7.3 The institution of Parliament

The definition of fundamental legislative principles found in the *Legislative Standards Act 1992* is derived from an understanding of our parliamentary system.

> *(T)he very concept of representative government and representative democracy signifies government by the people through their representatives (Sir Anthony Mason, then Chief Justice of the High Court, in Australian Capital Television Pty Ltd v Commonwealth (No. 2) (1992) 177 CLR 106 at p. 1387).*

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

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

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

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

- power to affect the operation of an Act, as decided by Parliament, by subordinate legislation made by someone else (see the material on Henry VIII clauses in Chapters 7.3.3 and 7.3.7)
- unduly wide power to fill in legislative gaps by subordinate legislation (see the Scrutiny Committee Annual Report 1995–1996, pp. 15–17, paras 2.25–2.35)
- vague or overgeneralised powers to make subordinate legislation (see Alert Digest 2001/7, p. 16, paras 11–14)
- creation of offences and imposition of penalties, other than minor offences or penalties, by subordinate legislation (see Policy No. 2 of 1996 in Alert Digest 1996/4, pp. 7–8)
- definition of rights of review or appeal by subordinate legislation (see Alert Digest 2002/1, pp. 12–13, paras 11–12).

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

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

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

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

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

The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary scrutiny (Alert Digest 1996/3, p. 5).

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

- the importance of the subject dealt with
- the practicality or otherwise of including those matters entirely in subordinate legislation
- the commercial or technical nature of the subject matter
- whether the provisions were mandatory rules or merely to be had regard to (see Alert Digests 2002/1, p. 2, para. 10; 2001/8, p. 15, para. 6; 2000/9, p. 24, para. 48; and 1999/4, p. 10, paras 1.65–1.67).

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

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

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

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

A new Bill sometimes provides for a power to make transitional regulations for matters for which the Bill either does not make provision or does not make sufficient provision. Such a power is intended to provide a mechanism for dealing with unforeseen difficulties that may arise in the transition from the previous legal framework to the new framework to be established under the new Bill. The Scrutiny of Legislation Committee often reviews transitional regulation-making powers against the background of its opposition to Henry VIII clauses. However, the Scrutiny Committee has indicated in Alert Digest No. 10 of 1996 at page 14 that, in the context of urgent Bills, a transitional regulation-making power may have sufficient regard to the institution of Parliament if it is subject to:

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

The Scrutiny Committee has also expressed the view that the subjects about which transitional regulations may be made should be stated in the relevant Bill (Alert Digests 1997/7, pp. 13–14; 1997/5, pp. 10–11; 1996/10, pp. 13–14; 1996/3, p. 17; and 1996/2, p. 19–20).

The Scrutiny 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 the Parliament.

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

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

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

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

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

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

The *Acts Interpretation Act 1954*, Part 8 contains provisions that aid in the interpretation of legislation, including, for example, the definitions of commonly used words and expressions in section 36 that apply to subordinate legislation.

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

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

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

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

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

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

Also, for example, an empowering Act may have been enacted at a much earlier time under different circumstances to the circumstances applying when the subordinate legislation is made.

See Chapter 7.3.1 for some specific occasions when the use of delegated legislation has been considered dubious.

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

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

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

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

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

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

The report notes that an Act is not one of the types contained in the list in section 7(3), and further notes that the *Acts Interpretation Act (Qld) 1954* provides that in an Act 'amend' includes, for an Act or a provision of an Act, amend by implication. (See p. 4, paras 5.6 and 5.9–5.11 of the report.)

The Scrutiny Committee has consistently expressed the view that a subordinate instrument that amends an Act, whether it be the body of the Act or a schedule to the Act, is inconsistent with the fundamental legislative principle requiring that subordinate legislation has sufficient regard to the institution of Parliament (see the Scrutiny Committee Annual Report 1997–1998, para. 3.8 and the Scrutiny Committee Annual Report 1996–1997, p. 11).

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

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

7.3.8 For subordinate legislation, does the legislation subdelegate a power delegated by an Act only:

(a) in appropriate cases and to appropriate persons; and

(b) if authorised by an Act?

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

When considering whether it was appropriate for matters to be dealt with by an instrument that was not subordinate legislation, and therefore not subject to parliamentary scrutiny, the Scrutiny Committee has taken into account the importance of the subject dealt with and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation (Alert Digest 1999/4, p. 10, paras 1.65–1.67).

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

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

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

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

- whether legislation providing for direct democracy processes such as citizens-initiated referendums erodes parliamentary democracy (Alert Digests 1999/3, p. 5, para. 1.41; and 1998/7, pp. 11–19)
- whether a power to delegate to the executive a power to confer office and other rewards on members of Parliament erodes the Parliament's ability to control its own affairs (Alert Digests 1999/4, para. 8.6–8.13; and 1996/2, p. 4)
- whether restrictions on candidature in elections undermine the institution of Parliament (Alert Digests 2002/3, pp. 9–10; and 2002/1, pp. 18–19, paras 3–14)
- whether national scheme legislation erodes Parliament's sovereign power because it is required of Parliament in compliance with executive agreements made between governments without the agreement of Parliament (see *Scrutiny of National Schemes of Legislation*, a Position Paper of Representatives of Legislation Committees throughout Australia, October 1996).

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

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

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

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

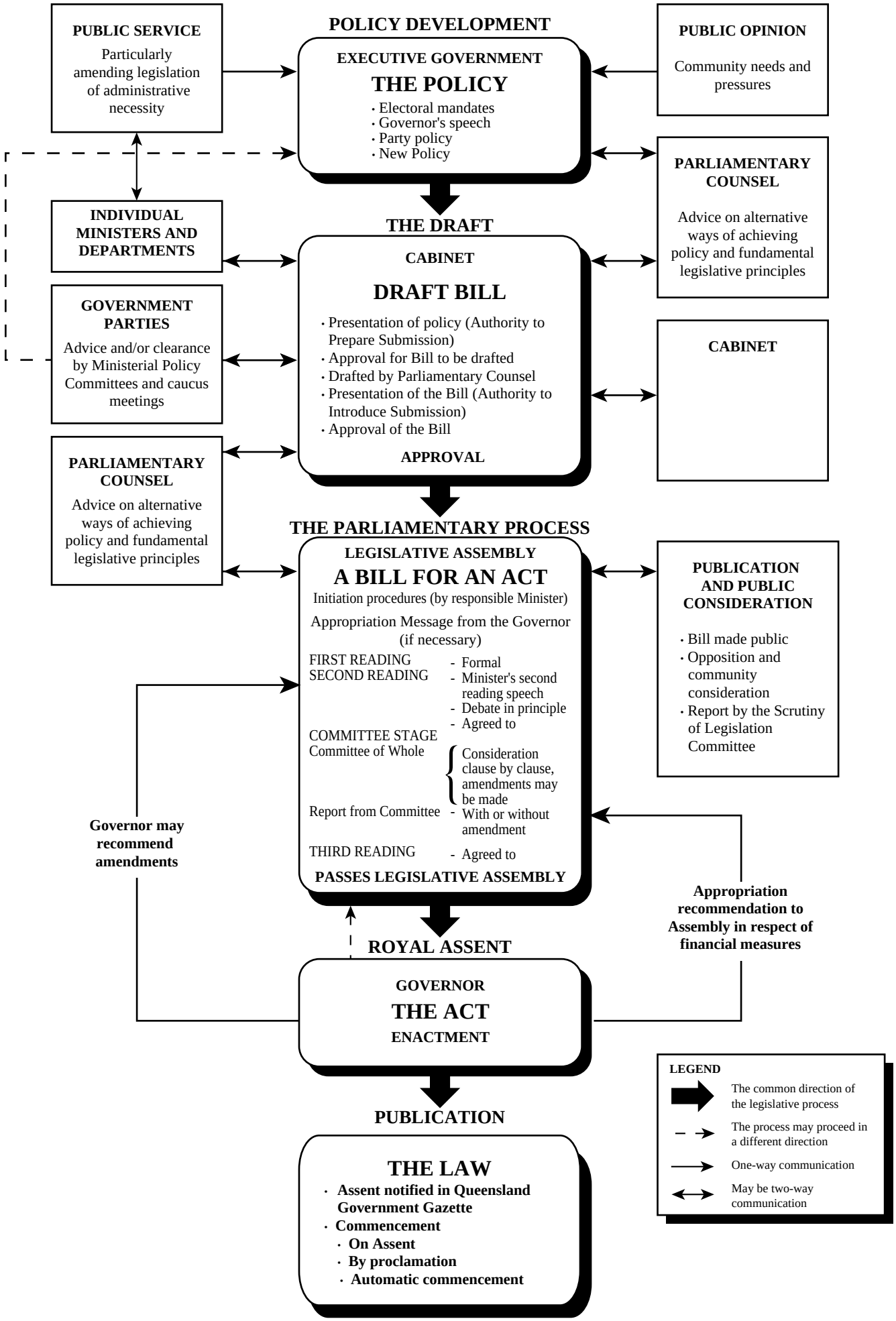
- If a person loses the privilege against selfincrimination under a provision, the person must be legally protected from the use against the person in criminal proceedings of evidence derived directly or indirectly from the loss of the privilege. The use of the evidence in other proceedings should also be prohibited unless there is a justification that is demonstrably proportionate to the impact of the loss of the privilege.

Appendix

THE MAKING OF AN ACT OF PARLIAMENT

THE LEGISLATIVE PROCESS

(For ordinary non-urgent Government Bills having passage in a "normal" way)



Glossary

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

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

amending legislation. Legislation amending other legislation.

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

assent. *See* royal assent.

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

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

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

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

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

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

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

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

CLLO. *See* Cabinet legislation and liaison officer.

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

committee stage. The stage in the passage of a Bill through the Legislative Assembly, between the Bill's second and third reading, when the Assembly sits as a committee constituted by the whole of the Assembly (the Committee of the Whole House) to consider the Bill in detail, that is, clause by clause and schedule by schedule. (See The Queensland Parliamentary Procedures Handbook for more detail.)

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

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

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

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

exempt subordinate legislation. Subordinate legislation not required to be drafted by OQPC. See the *Legislative Standards Act 1992*, section 2, definition ***exempt subordinate legislation*** and section 7(e) for more detail.

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

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

first reading. When the Clerk of the Parliament formally reads aloud the short title of a Bill introduced into the Legislative Assembly immediately after the Bill's sponsoring Minister has moved that the Bill be read a first time. (For more detail about the first reading, and the stages of the passage of a Bill generally, see The Queensland Parliamentary Procedures Handbook.)

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

government. A reference to the government is a reference:

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

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

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

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

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

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

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

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

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

long title. *See* title.

member. An elected member of the Legislative Assembly.

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

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

OQPC. *See* Office of the Queensland Parliamentary Counsel.

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

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

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

portfolio. The administrative and legislative responsibilities assigned to a Minister under the *Constitution of Queensland 2001* and the *Public Service Act 1996*.

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

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

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

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

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

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

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

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

RIS. *See* regulatory impact statement.

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

Scrutiny of Legislation Committee. One of the statutory committees established under the *Parliament of Queensland Act 2001*, section 80. Under section 103(1) of that Act, the committee's area of responsibility is to examine all Bills and subordinate legislation to consider the application of fundamental legislative principles to particular Bills and particular subordinate legislation, and to consider the lawfulness of particular subordinate legislation.

second reading. When the Clerk of the Parliament formally reads aloud the short title of a Bill introduced into the Legislative Assembly if, at the conclusion of the second reading debate, the Assembly agrees to the motion that the Bill be read a second time. (For more detail about the second reading, and the stages of the passage of a Bill generally, see The Queensland Parliamentary Procedures Handbook.)

second reading speech. The speech made by the member sponsoring a Bill (the relevant Minister in the case of a government Bill) in moving a motion that the Bill be read a second time.

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

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

SLMP Bill. *See* Statute Law (Miscellaneous Provisions) Bill.

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

State. *See* Queensland.

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

Statute Law (Miscellaneous Provisions) Bill (SLMP Bill). A Bill used for minor amendments of a housekeeping nature across a number of Acts.

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

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

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

third reading. When the Clerk of the Parliament formally reads aloud the short title of a Bill introduced into the Legislative Assembly if, after the Bill is reported to the Assembly at the end of the committee stage of the Bill, the Assembly agrees to the motion that the Bill be read a third time. (For more detail about the third reading, and the stages of the passage of a Bill generally, see The Queensland Parliamentary Procedures Handbook.)

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

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

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