Guidelines for Drafting University Statutes

1 July 2001



Queensland Government

Office of the Queensland Parliamentary Counsel

Guidelines issued under Legislative Standards Act 1992

These guidelines are guidelines about the drafting practices to be observed in the drafting of university statutes. They are issued under the *Legislative Standards Act 1992*, section 9, to apply to university statutes made on or after 1 July 2001.

Peter Drew
Parliamentary Counsel
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Office of the Queensland Parliamentary Counsel
111 George Street
Brisbane 4000

Copies of the guidelines are available from http://www.legislation.qld.gov.au/Library or Department of Education, PO Box 33, Brisbane Albert Street QLD 4002.

Correspondence about the guidelines should be addressed to—

The Parliamentary Counsel
Office of the Queensland Parliamentary Counsel
PO Box 185, Brisbane, Albert Street
Queensland 4002 Australia

Guidelines for drafting university statutes

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Chapter 1: Introduction to guidelines

Background information

Under the *Constitution Act 1867*, section 2, Queensland's laws may be made for the peace, welfare and good government of Queensland.[1]

Parliament may make laws by an Act or by authorising the making of subordinate legislation. If an Act provides for the making of subordinate legislation, it must delegate the authority to make the subordinate legislation to a body or person.

Queensland's Parliament has enacted the following Acts (called **"university Acts"**) establishing public universities in Queensland—

- *Central Queensland University Act 1998*
- *Griffith University Act 1998*
- *James Cook University Act 1997*
- *Queensland University of Technology Act 1998*
- *University of Queensland Act 1998*
- *University of Southern Queensland Act 1998*
- *University of the Sunshine Coast Act 1998.*

[1] **2 Legislative Assembly constituted**

Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.

Each of the university Acts expresses the intention of Queensland's Parliament about the way in which the relevant university is to operate. For example, the university Acts set up the governing bodies of the universities and state the governing bodies' functions and powers. Also, each of the university Acts provides for the relevant university's governing body to make university statutes about a stated list of matters and to make university rules under a university statute.

University statutes (called **"statutes"**) are subordinate legislation. University rules are statutory instruments and these guidelines can be applied to the rules. For convenience, a reference in these guidelines to statutes includes a reference to university rules.

In making any form of statutory instrument, the body or person empowered to make the instrument must keep in mind a number of matters. When the governing body of a university makes a statute, it should consider the following—

- has the governing body power to make the statute?
- has the process for making the statute been complied with?
- are there any special rules under the common law that are breached?
- does the statute comply with other relevant legislation, for example, the *Legislative Standards Act 1992*?
- does the statute's form enhance the Queensland statute book, for example, by relying on the *Acts Interpretation Act 1954* rather than repeating existing provisions or defining words that are defined for all legislation?
- does the statute contain any material that may be the subject of adverse comment by the Scrutiny of Legislation Committee and result in a motion to disallow the statute or otherwise bring the statute into question?

Purpose of guidelines

Under the *Legislative Standards Act 1992* , section 7, the functions of the Office of the Queensland Parliamentary Counsel (called **"OQPC"**) include drafting all bills and proposed subordinate legislation (other than exempt subordinate legislation). Accordingly, OQPC has a great deal of experience in drafting subordinate legislation and, when doing so, uses a number of styles, conventions and practices.

University statutes are subordinate legislation and exempt instruments under the *Legislative Standards Act 1992* . The essential significance of university statutes being subordinate legislation and exempt instruments is that they are not drafted by OQPC.

Under the *Legislative Standards Act 1992* , section 9, the Parliamentary Counsel may issue guidelines about drafting practices to be observed in drafting exempt instruments.

The purpose of these guidelines is to help universities draft statutes in a way that is consistent with the objectives of the *Legislative Standards Act 1992* about high quality legislation and with the expectations of the Scrutiny of Legislation Committee (called the **"Scrutiny Committee"**). The guidelines adopt the current legislative drafting practice, used by OQPC for all legislation drafted by it.

It should be noted that pending review of the process for drafting university statutes, the Scrutiny Committee did not pursue many of its specific concerns about university statutes. However, with the completion of the review, it appears the Scrutiny Committee will adopt the same approach for university statutes as it takes for other subordinate legislation. Accordingly, the Scrutiny Committee will examine each statute on a clause by clause basis to check its lawfulness and consistency with fundamental legislative principles and will pursue all concerns by way of correspondence with the Minister. Unresolved concerns may be reported by the Scrutiny Committee to Parliament and may become the subject of a motion to disallow the university statute. Disallowance could create significant practical difficulties for the university concerned.

Other relevant documents

These guidelines refer to, and need to be read in conjunction with, other documents about drafting legislation, particularly the *Acts Interpretation Act 1954, Statutory Instruments Act 1992* and *Legislative Standards Act 1992*.

There are also a number of other Acts that apply to universities and that may need to be considered when drafting statutes, including the following Acts—

- *Anti-Discrimination Act 1991*
- *Criminal Justice Act 1989*
- *Financial Administration and Audit Act 1977*
- *Public Sector Ethics Act 1994*
- *Statutory Bodies Financial Arrangements Act 1982*
- *Whistleblowers Protection Act 1994.*

Also, guidance about the drafting process will be found in *Governing Queensland: The Queensland Legislation Handbook.* The handbook can be found at the website of the Department of Premier and Cabinet. The address is www.premiers.qld.gov.au/governingqld/index.htm.

Up to date copies of all Queensland Acts can be found at OQPC's website. The address is www.legislation.qld.gov.au.

Copies of the handbook and Queensland legislation can be purchased at GoPrint. For purchases, contact—

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Structure of guidelines

These guidelines are divided into chapters, each of which includes a statement about the scope of the chapter.

Chapter 2: Effective communication

Scope

The guidelines in this chapter deal with effective communication.

They encourage the use of structure, content, language and presentation in ways that make statutes more readable and understandable.

Effective communication is also the ideal that underpins many of the other guidelines in this document, particularly the guidelines in chapters 4 to 8 dealing with format and printing style, structure, definitions, disciplinary proceedings and amendment statutes.

Plain English

Plain English is commonly considered to be the best technique of effective communication in legislation. OQPC strives to use Plain English when drafting Queensland legislation.

Plain English involves the deliberate use of simplicity to achieve clear, effective communication.

A statute should be as simple as possible. The ordinary undergraduate student or member of university staff should be regarded as the ultimate user of a statute. A statute that is easy to understand is less likely to result in dispute and also helps those involved in administering it.

The Plain English technique does not involve the simplification of a statute 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.

In drafting a statute, the objective should be to produce a statute that is both—

- easily read and understood; and
- legally effective to achieve the desired policy objectives.

In fact, a statute may involve a balancing of the outcomes of simplicity and legal certainty.

The use of simple language alone may be insufficient to guarantee clear communication. There are many ways a statute can simply, accurately and unambiguously expose its intent—purpose clauses, clauses stating key or basic concepts and definitions, explanatory provisions and examples.

Using these, and many other, simple devices to organise, orient and explain a law can help establish context and relevance and, ultimately, foster an improved understanding of the law.

Suggested texts

Plain English for Lawyers , Richard C Wydick, Carolina Academic Press, 3rd edition, 1994

Plain Language for Lawyers , Michele M Asprey, Federation Press, 2nd edition, 1996

Writing in Plain English , Robert D. Eagleson, Australian Government Publishing Service, 1990.

Readable and understandable statutes

Guideline 1 A statute should be structured, drafted and presented in ways that make the statute easy to read and understand.

Note:

See also chapter 9, guideline 75, which requires that a statute be unambiguous and drafted in a sufficiently clear and precise way. The guideline also provides information about the Scrutiny Committee's expectations.

Structure

Guideline 2 A statute should have a logical and coherent structure.

Notes:

1 The structure of a statute can be tested by asking whether it is easy to find things in the text and move from one thing to another.

2 Achievement of a logical and coherent structure usually requires a specific organisation of ideas before starting to write.

3 Suggested practices—

- put related material together
- put the most important ideas first and the less important ideas, for example, unusual cases and procedural detail, later

- be consistent, and if practicable, arrange ideas for different subject matter in a parallel order
- work out what legislative structure is appropriate for the groups of ideas, for example—
  - chapters, parts and divisions; or
  - parts; or
  - parts and divisions.

Content and language

Guideline 3 In a statute, content and language should be used in ways that promote effective communication.

Notes:

1 Clear, concise text is more easily read and understood.

2 Internal consistency in the use of language is important, in particular, different words and expressions should not be used for the same thing.

3 Ambiguity will cause difficulty for those using the statute.

Suggestions:

1 Break down a complicated message into manageable pieces and communicate them to the reader in an order that makes it easy for the reader to understand them.

Example:

Sometimes, complicated material could be presented as the main idea, a list of conditions, a list of consequences and a description of the steps in the procedure.

2 Use the active voice rather than the passive voice.

Example:

'The registrar must give the student written notice.' rather than 'Written notice must be given to the student.'

3 Use everyday words.

Examples:

1 Use everyday words rather than out-dated words, technical words, legal words, non-English words or jargon. If you must use a technical word, explain it.

For example—

- use 'a building or part of a building' rather than 'a building or part thereof'
- use 'while', 'when' or 'although' rather than 'whilst'
- use 'under' rather than 'pursuant to'

2 Avoid acronyms, unless the acronym is in everyday use. If you use an acronym, define it.

4 Emphasise the positive and avoid the use of double negatives.

Example:

'The disciplinary board may set aside the registrar's decision only if ...' rather than 'The disciplinary board must not set aside the registrar's decision unless ...'.

5 Make it clear whether a matter is mandatory or discretionary by using 'must' and 'may'. See also the *Acts Interpretation Act 1954*, section 32CA.

Note:

'Must' is to be used in preference to 'shall'.

6 Make it clear whether a list of things is to be read in the alternative or cumulatively. Do this by using the disjunctive 'or' or the conjunctive 'and'.

Note:

The disjunctive or conjunctive is repeated between each item in the list.

Example:

(1) This section applies if—

(a) property is held by the university on terms requiring the property to be used for a particular purpose (the **"donor's purpose"**); and

(b) the senate is satisfied—

(i) the donor's purpose—

(A) has been wholly or substantially achieved; or

(B) no longer exists; or

(C) has been adequately provided for in another way; or

(D) is uncertain, cannot be identified, or is insufficiently defined; or

(E) becomes impossible, impractical or inexpedient to carry out; or

(ii) the property is inadequate for the donor's purpose; and

(c) the senate has a written scheme for property.

An exception is where the introductory words to the list make it clear whether the list is to be read in the alternative or cumulatively and include the word 'following'.

Example:

(2) Each of the following purposes is a university purpose—

(a) enabling a student or staff member, or former student or staff member, of the university to undertake study or research at the university or elsewhere;

(b) the advancement of learning generally;

(c) helping a body affiliated or associated with the university.

7 Arrange words with care.

Examples:

1 Avoid wide gaps between the subject, the verb and the object.

2 Use lists.

3 Use variations of sentence structure and terminology only if the variation is justified.

8 Use short sentences.

- As a rule of thumb, a provision continuing for more than 5 lines of unbroken text should be broken up into separate provisions, or, breaks in the text, for example, paragraphs, should be introduced.
- Similarly, if a section containing a number of subsections is noticeably long, it should be broken up into separate sections.

9 A section or subsection should contain only 1 sentence.

10 Omit unnecessary words.

Examples:

1 Use a simple form rather than a compound construction: use 'if' rather than 'in the event that'.

2 Use a specific word rather than a string of synonyms: use 'allow' rather than 'suffer or permit'.

3 Do not overuse nominalisations (verbs made into nouns): use 'act' rather than 'take action'.

11 Use 'if' to introduce a set of facts, conditions or cases. Also use 'if' when it is possible that something will happen, but not certain. If an event is so certain that 'if' is inappropriate, use 'when'.

12 Express a number, year, date, time, amount of money, quantity or measurement of a thing, or other matter or idea in a way that is consistent with current legislative drafting practice, for example, '25' rather than 'twenty-five'.

Examples:

See *Reprints Act 1992*, section 29.

13 Constantly test the provision style and word style of the text. Are the provisions short, easy to read, well-structured and clear? Does each provision deal with only one idea? Are the words used simple, active and specific? Is the range of words used appropriate for the audience?

Presentation

Guideline 4 In a statute, the presentation or layout of the statute should be used to promote effective communication.

Notes:

1 Presentation techniques include the use of headings, tables of provisions, page headers, white space and typefaces that help readability.

2 See chapter 4 for guidelines about format and printing style.

Chapter 3: Guidelines about relationship with Act

Scope

The guidelines in this chapter cover matters arising from the making of a university's statutes under the Act that established the university and the governing body that makes the statutes. In other words, the guidelines cover the relationship with the university Act under which a statute is made.

Consistency with Act

As previously noted, the Queensland Parliament has made the following Acts establishing public universities—

- *Central Queensland University Act 1998*
- *Griffith University Act 1998*
- *James Cook University Act 1997*
- *Queensland University of Technology Act 1998*
- *University of Queensland Act 1998*
- *University of Southern Queensland Act 1998*
- *University of the Sunshine Coast Act 1998.*

Each university Act provides for the university's governing body to make university statutes about a stated list of matters and to make university rules under a university statute. Therefore, universities may make statutes about the listed matters but only to the extent that making the university statute is authorised by Parliament.

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

A simple illustration of a statute that would be *ultra vires* is a statute that allowed a penalty that exceeded the number of penalty units that the governing body is empowered by the university Act to impose. If the university Act stated that a statute may authorise the governing body to impose a penalty of not more than 10 penalty units for a breach of a university statute and the statute allowed the governing body to impose a penalty of 20 penalty units, the imposed penalty would be *ultra vires*. Similarly, if Parliament does not authorise a university to make a statute about a particular matter, a university can not make a statute about the matter.

The specific powers contained in each of the university Acts to make subordinate legislation about particular matters are supported by supplementary powers in the *Statutory Instruments Act 1992*. In particular, sections 23 to 31 of that Act make statements supporting the making of subordinate legislation, for example—

- power enabling subordinate legislation to make provision for a matter by applying, adopting or incorporating (with or without modification) provisions of an Act, subordinate legislation or other law or another document [s 23];

- power enabling subordinate legislation to make provision for a matter by applying generally throughout the State, by being limited in its application to a particular part of the State, by applying generally to persons and matters or by being limited in its application to particular persons or matters or particular classes of persons or matters [s 24];

- power enabling subordinate legislation to provide for the review of, or a right of appeal against, a decision made under the subordinate legislation [s 29];

- power enabling subordinate legislation to require a form prescribed by or under the subordinate legislation, or information or documents (whether or not included in, attached to or given with a form), to be verified by statutory declaration [s 30].

Accordingly, if the relevant university Act authorises a university to make a statute about a matter, a statute may rely on a statement in the *Statutory Instruments Act 1992* to deal with the matter in a particular way.

Consistency is a major factor in ensuring subordinate legislation is within the scope of the Act that empowers the making of the subordinate legislation. Consistency in naming conventions, structure, language and style help ensure subordinate legislation stays within the scope of its empowering Act.

Guideline 5 A statute should be authorised by, and not inconsistent with, the university Act that allows the statute to be made.

Notes:

1 A university may only make university statutes for the matters stated in its university Act or supported under the *Statutory Instruments Act 1992* . See also chapter 9, guideline 87.

2 A university statute should be consistent with the relevant university Act.

3 A university rule may be made about a matter only if the making of the rule is authorised by a university statute and authorising that matter to be dealt with by a university rule is appropriate, particularly considering the *Legislative Standards Act 1992*, section 4(5).

4 The *Acts Interpretation Act 1954* and *Statutory Instruments Act 1992* contain important provisions that may affect the making of statutes.

5 The *Acts Interpretation Act 1954* , part 8 contains provisions aiding the interpretation of laws including statutes. For example, section 36 defines commonly used words and expressions.

6 The *Statutory Instruments Act 1992* , part 4, division 3 contains provisions about the making of subordinate legislation that apply to university statutes. In particular, part 4, division 3, subdivision 2 makes express provision for matters that may be provided for in statutory instruments such as university statutes and university rules.

Guideline 6 The use of words and expressions in a statute should be consistent with their use in the relevant university Act.

For example, if the relevant university Act uses the term 'general staff', it is appropriate to use those words in statutes and not to use a different term, for example, 'non-academic staff'.

Note:

If a word or expression is defined in the relevant university Act, it does not have to be defined in statutes made under the Act because it has the same meaning—see *Statutory Instruments Act 1992*, section 37. However, in a particular case, to prevent a provision being significantly obscure or being misleading, it may be appropriate to insert a signpost provision or footnote advising the reader that a particular word or expression is defined in the Act.

Further, if a word is used in a university Act but not defined, it may be *ultra vires* to define the word in a statute made under the university Act.

Chapter 4: Format and printing style

Scope

This guideline covers the format and printing style of a statute.

Format is about how each particular type of provision or part of a provision is presented on the page, for example, where a heading is located, how a section, subsection, paragraph or subparagraph is set out.

Printing style is about how each character of a provision is printed, for example, the size and style to be used.

Together, format and printing style control how text is presented on a page.

Format and printing style

Guideline 7 The format and printing style of a statute should, as far as practicable, be the same as the format and printing style of Acts of the Queensland Parliament.

Notes:

1 This guideline means that in setting out a statute, recent Acts of the Queensland Parliament should be perused and a sensible and practical effort should be made to follow the same format and printing style.

2 An example of a difference between a statute and an Act that may affect format and style is that a statute might be published in a way that uses the whole of an A4 page. Therefore, a sensible adaptation of the format of an Act is necessary.

Guideline 8 The format and printing style of statutes made by a single university should be the same.

Chapter 5: Structure

Scope

The guidelines in this chapter cover—

- how a statute is divided into provisions; and
- the basic provisions of a statute associated with its structure.

General structure

Guideline 9 The structure of a statute should as far as practicable be the same as an Act of the Queensland Parliament.

Provision units

Guideline 10 At the higher level, provisions may be divided into chapters, parts, divisions and subdivisions.

Note:

Depending on the size and subject matter of a particular statute, it may not be necessary to use all higher level provision units.

Example:

It may be sufficient to divide a statute into parts and divisions, or not to divide a statute into chapters or parts at all.

Guideline 11 At the lower level, the basic provision unit is the section.

Guideline 12 A section may be divided into a number of subsections.

Guideline 13 A section or subsection may contain paragraphs.

Guideline 14 A paragraph may contain subparagraphs.

Guideline 15 A subparagraph may contain, unusually, sub-subparagraphs.

Guideline 16 A schedule at the end of a statute can be a useful device to gather information together.

Example:

A schedule containing a list of things to which the statute applies or a list of fees.

Numbering

Guideline 17 Provisions in a statute should be numbered alphanumerically.

Guideline 18 Figures should be used in the numbering of chapters, parts, divisions, subdivisions, sections and subsections.

Guideline 19 Every sentence in a provision (other than sentences in an example) should be numbered.

Guideline 20 Lower case letters should be used for numbering provisions at paragraph level. Lower case roman numerals should be used for numbering provisions at subparagraph level. Upper case letters should be used for numbering provisions at sub-subparagraph level.

Example:

University of Southern Queensland Act 1998, section 41(1)(b)(i)(A)

Guideline 21 Letters may be added to figures if an amending statute inserts a new provision between existing provisions that use figures.

Notes:

1 If, under an amending statute, a new section or sections are to be inserted before section 19 and for some reason a

section number using 18 is unavailable, the section or sections are inserted as section 19AA, 19AB, 19AC etc.

2 If, under an amending statute, a new section or sections are to be inserted between section 19 and section 20 of a statute, the section or sections are inserted as section 19A, 19B, 19C etc.

3 If, under a subsequent amending statute, a new section or sections are to be inserted between section 19 and section 19A, the section or sections are inserted as section 19AA, 19AB, 19AC etc.

4 If, instead of being inserted between section 19 and section 19A, the new section is to be inserted between section 19A and section 19B, the section or sections are inserted as section 19AA, 19AB, 19AC etc. If the new section is to be inserted between, for example, section 19M and section 19N, the section or sections are inserted as section 19MA, 19MB, 19MC etc.

5 Note that rules 1, 3 and 4 present the same numbering solution for different positions. The problems caused by this are more apparent than real. If new sections are being inserted between provisions that themselves were inserted by amendment, it is often practical to recast or renumber the provisions.

6 Note also that if additional amendments are to be inserted before, for example, an AA number, then AAA is resorted to as a numbering solution. Ordinarily, this level of number complexity should be avoided by recasting or renumbering the provisions.

Preliminary provisions

Guideline 22 A statute should be given a short title.

Note:

See the *Acts Interpretation Act 1954*, sections 14F to 14J, as applied by the *Statutory Instruments Act 1992*, section 14, for important provisions facilitating reference to legislation. These provisions depend on the inclusion of a short title.

Guideline 23 The short title of a statute should reflect its subject matter and state the year of its making.

Examples:

1 A statute dealing with student misconduct and disciplinary proceedings may be titled—

- University of Queensland (Student Discipline and Misconduct) Statute 2001

2 A second statute dealing with student misconduct and disciplinary proceedings made in the same year may be titled—

- University of Queensland (Student Discipline and Misconduct) Statute (No. 2) 2001

Guideline 24 All commencement provisions (provisions providing a point of time when the statute, or any part of the statute, is to take effect) should, to the extent practicable, be gathered together in the preliminary provisions of the statute.

Example:

University of the Sunshine Coast Act 1998, section 2

Notes:

1. If provisions dealing with the commencement of a statute, or part of the statute, are not gathered consistently at the front of the statute, they can easily go unnoticed.

2. However, unless there is a good reason for including a commencement provision in a statute, it is preferable to be silent in the statute about commencement as it then commences under the *Statutory Instruments Act 1992* , section 3, on the day on which it is notified or published. See guideline 71.

3. See also *Statutory Instruments Act 1992* , section 33 which provides for the automatic commencement of citation and commencement provisions.

Guideline 25 If appropriate, the preliminary provisions of a statute should contain a purpose provision.

Examples of when a purpose provision is appropriate:

1. If the statute is a particularly important implementation of university policy.
2. If a purpose provision makes it easier to interpret the statute.

Guideline 26 If a purpose provision for the whole statute is to be inserted, it should always be located in the preliminary provisions of the statute.

Headings

Guideline 27 Every chapter, part, division, subdivision and section of a statute should have a heading.

Guideline 28 Other parts of a statute should not have a heading.

Guideline 29 Headings should reflect their subject matter.

Examples:

1. A part of a statute dealing with administrative matters may be titled '**PART 2—ADMINISTRATION**'.
2. A division of the part in example 1 dealing with the powers of authorised persons may be titled '***Division 2—Powers of authorised persons***'.

Table of contents of statute

Guideline 30 A statute should have a table of contents or provisions similar to the table of provisions in an Act of the Queensland Parliament.

Clearly identifiable definition provisions

Guideline 31 Definitions of something in a statute should be given in a way that allows the definitions to be easily identified.

Guideline 32 The style used to present definitions in an Act of the Queensland Parliament should be used to the extent practicable.

Notes:

1. There are established ways of defining terms so they are easily identified.

2. Definitions can be placed in a number of places in a statute, including, for example—
   - a definition section at the start of the statute with a list of defined words for the statute
   - a section with a list of definitions for part only of the statute, if the part is longer than a single section
   - a subsection at the beginning or end of a section with a list of definitions for the section

- a section that defines something for the statute or part of the statute
- a dictionary schedule.

3 It is not acceptable to define a term in one section of a statute for the purpose of the section and another provision of the statute in the following way—

(5) In this section and section 15—

"registrar" means the chief administrative officer of the university.

4 The guidelines in chapter 6 deal in more detail with definitions.

Other guidelines affecting structure

Effective communication—see chapter 2, guidelines 1 and 2.

Definitions—see chapter 6.

Amendment statutes—see chapter 8.

Chapter 6: Definitions

Scope

This chapter contains guidelines about the types of definitions and the preferred ways of defining terms.

Meaning and use of definitions

Guideline 33 A definition is a provision—

- giving a meaning to a word or expression; or
- limiting or extending the meaning of a word or expression.

Note:

See the *Acts Interpretation Act 1954*, section 36.

Guideline 34 A word or expression may be defined if it is necessary to give certainty to the meaning of the word or expression.

Example:

"assessment", of a student, means work the student is required to complete—

(a) for the fulfilment of educational purposes; or

(b) to provide a basis for a record of achievement or certification of competence; or

(c) to permit grading.

Guideline 35 A word or expression may be defined to limit its ordinary meaning.

Example:

"decision-maker" means an officer or body listed in section 10.

Guideline 36 A word or expression may be defined to extend its ordinary meaning.

Example:

"student" includes a person undertaking a course at the university.

Guideline 37 A word or expression may be defined merely to avoid repetition.

Example:

"designated officer" means any of the following—

(a) the vice-chancellor;

(b) a deputy vice-chancellor;

(c) a security officer.

List of definitions for all of statute

Guideline 38 Definitions for all of a statute may be placed in the last schedule of the statute, called a 'Dictionary', containing an alphabetical list of defined terms.

Example:

SCHEDULE

DICTIONARY

section 4

"allegation notice" means the notice the university gives a student to start misconduct proceedings.

"assessment", of a student, means work the student is required to complete—

(a) for the fulfilment of educational purposes; or

(b) to provide a basis for a record of achievement or certification of competence; or

(c) to permit grading.

Note:

The benefits of using a dictionary include—

- removing bulky material from the preliminary provisions of a statute, allowing the front to be used for important statements or provisions.
- the ability to conveniently contain a great many definitions and signpost definitions that effectively can be an index of important terms.

Guideline 39 If a statute contains a dictionary schedule, the following section should be inserted in the preliminary provisions of the statute—

'4 Definitions

The dictionary in the schedule defines particular words used in this statute.'.

Guideline 40 Definitions for the whole of a statute may also be placed in a section in the preliminary provisions of the statute.

Example:

3 Definitions

In this statute—

"allegation notice" means the notice the university gives a student to start misconduct proceedings.

"assessment", of a student, means work the student is required to complete—

(a) for the fulfilment of educational purposes; or

(b) to provide a basis for a record of achievement or certification of competence; or

(c) to permit grading.

List of definitions for part of a statute, other than a single section

Guideline 41 A list of definitions for all of a chapter, part, division or subdivision may be placed in a section at the start of the chapter, part, division or subdivision.

Example:

26 Definitions for pt 3

In this part—

"allegation notice" means the notice the university gives a student to start misconduct proceedings.

"assessment", of a student, means work the student is required to complete—

(a) for the fulfilment of educational purposes; or

(b) to provide a basis for a record of achievement or certification of competence; or

(c) to permit grading.

List of definitions for a single section

Guideline 42 A list of definitions for a section may be placed in the section, preferably at the end, less so at the start, never in the middle.

Example (subsection (4) is the last subsection):

(4) In this section—

"allegation notice" means the notice the university gives a student to start misconduct proceedings.

"assessment", of a student, means work the student is required to complete—

(a) for the fulfilment of educational purposes; or

(b) to provide a basis for a record of achievement or certification of competence; or

(c) to permit grading.

Note:

Experience suggests it is better to consistently insert the list of definitions for a section at the end of the section, as the last subsection. Otherwise, throughout a statute, lists of definitions for sections can appear haphazardly in various places.

Alphabetical order is used in lists of definitions

Guideline 43 In any list of definitions, all definitions should be ordered as follows—

- First, any definitions starting with a figure are listed, with a lower number taking precedence over a higher number.
- Then, any definitions starting with letters are listed, in alphabetical order decided on a letter-by-letter basis, ignoring spaces, hyphens etc.
- If the definitions include a definition containing a figure anywhere, regard must be had to the figure when ordering the definitions, with a lower number taking precedence over a higher number.

Examples:

"1990 statute" means....

"1994 statute" means....

"breach of a 5 penalty unit provision" means ....

"breach of a 10 penalty unit provision" means .....

Tag definitions

Guideline 44 A word or expression may be defined by including the word or expression, highlighted as a definition and within brackets, in text effectively defining the word or expression.

Examples:

1 To start misconduct proceedings against a student, the university must give the student a notice stating the alleged misconduct (the **"allegation notice"**).

2 The university librarian (the **"librarian"**) or the manager of a branch library (also the **"librarian"**) must report any theft of library books to the registrar.

Verb allocating meaning to definitions

Guideline 45 In definitions, the verbs commonly used to allocate meaning are 'means', 'includes' and 'is'.

Notes:

1 In the common form of definition, in a list of definitions starting with the word to be defined, the verb allocating meaning is 'means' or 'includes'—

- 'means' indicates the definition is exhaustive
- 'includes' indicates the definition is not exhaustive, or is being used to enlarge the ordinary meaning of a word
- the use of both 'means' and 'includes' should be avoided, if possible.

Examples:

1 **"allegation notice"** means the notice the university gives a student to start misconduct proceedings.

2 **"student"** includes a person undertaking a course at the university.

2 If the definition is presented in the form of a separate section, the verb 'is' may be used, or the word being defined may appear anywhere in the text, in the usual highlighted way, with the context indicating the meaning.

Example:

5 Meaning of "assessment"

An **"assessment"**, of a student, is work the student is required to complete—

(a) for the fulfilment of educational purposes; or

(b) to provide a basis for a record of achievement or certification of competence; or

(c) to permit grading.

Use of 'and' and 'or' between paragraphs of a definition

Guideline 46 The following is the practice if a definition contains a series of paragraphs—

(a) use 'or' between each paragraph if the verb used in the definition to allocate meaning is 'means';

(b) use 'and' between each paragraph if the verb used in the definition to allocate meaning is 'includes';

(c) use neither if the general words before the list of paragraphs uses 'following' to introduce the paragraphs.

Examples:

1 **"designated officer"** means—

(a) the vice-chancellor; or

(b) a deputy vice-chancellor; or

(c) a security officer.

2 **"designated officer"** includes—

(a) the vice-chancellor; and

(b) the deputy vice-chancellor.

3 **"designated officer"** means any of the following—

(a) the vice-chancellor;

(b) a deputy vice-chancellor;

(c) a security officer.

Signposting definitions

Guideline 47 Definitions included in the text of a statute other than in a list of definitions in a dictionary, or definition section within the preliminary sections, should be signposted in the dictionary or definition section. This does not apply to a definition for a single section.

Examples:

1 **"notice period"** see section 4.

2 **"student"** see section 5.

Notes:

1 The purpose of this guideline is to ensure the reader can find the definition easily in the text, and also to ensure the reader's attention is drawn to its existence.

2 The Scrutiny Committee is opposed to the use of signpost definitions referring to definitions in other legislation or another document, unless there is a good reason, as the committee considers signposting makes legislation less accessible to the reader.

An example of a good reason would be that the statute in which the signpost definition appears, and a statute in which the signposted definition referred to appears, are part of the same legislative scheme.

An example of insufficient reason would be mere convenience, for example, the signposting of a definition to avoid repetition of text or to avoid making fresh decisions about the content of a definition.

Chapter 7: Disciplinary proceedings

Scope

The guidelines in this chapter cover disciplinary proceedings provided for in statutes. The chapter covers the general power to take disciplinary proceedings and some of the most general principles about how to build provisions intended to be used to deal with disciplinary breaches. It also covers some of the main incidents of how natural justice should be afforded a person alleged to have breached a disciplinary statute.

However, given the flexible nature of the requirement to afford natural justice, details of how processes should provide for natural justice are limited to a few basic matters that have come to the attention of the Scrutiny Committee.

General power

Each of the university Acts provides for statutes to be made for the disciplining of students and other persons undertaking courses at the relevant university (**"disciplinary statutes"**). In each case, the university Act states that without limiting this power, a statute may authorise the university council (for the University of Queensland, its senate) to impose a penalty of not more than 10 penalty units for a breach of a disciplinary statute. Each also provides that statutes may provide for the recovery and enforcement of penalties.

Prescribed breaches should be relevant

Guideline 48 Types of breaches prescribed by a disciplinary statute should be relevant having regard to the objectives sought to be achieved by conferring the power to make disciplinary statutes.

Note:

In considering whether a provision of a university's disciplinary statute is relevant, regard should be had to the statement of functions of the university set out in the relevant university Act.

Example of irrelevant disciplinary provision:

A provision that simply declares 'frightening birds' and 'wearing green hair' to be examples of disorderly conduct is an irrelevant disciplinary provision. The provision needs to include further elements giving a reasonable indication of the link between the conduct and the functions of the university.

Types of breaches should be defined precisely

Guideline 49 A provision of a disciplinary statute that defines a disciplinary breach should state with precision what are the elements that will constitute the breach.

Note:

This is because persons required to comply with a statute are entitled to know with precision what is expected of them.

Types of breaches should be defined precisely in a way that ensures breaches are capable of practical proof

Guideline 50 The facts prescribed to constitute a disciplinary breach should be expressed in a way that allows them to be proved in a practical way.

Note:

This is because persons required to enforce a statute should be able to do so in a practical way.

Examples of imprecise breach for guidelines 49 and 50:

1. A provision that states that 'a student is guilty of misconduct who, without reasonable cause, divulges confidential information relating to any University matter', without further definitions, has a number of problems—
   - what is meant by 'divulge'? Is every disclosure wrong?
   - what is meant by 'confidential information'? What are the criteria?
   - what is a 'university matter'?
2. A provision that states a student is guilty of misconduct who fails to comply with any action taken under a statute, without further definition, is likely to

be too wide. There will be actions under the statute that are immaterial to what is sought to be achieved by disciplining students.

Proportionate penalty

Guideline 51 The maximum penalty prescribed for a disciplinary breach should be proportionate to the offence. Although there is less scope in disciplinary statutes than in other legislation for wide ranging monetary penalties, nevertheless, consideration needs to be given to each particular type of breach to ascertain whether the maximum penalty available under the relevant university Act should be prescribed in the statute for the breach, as opposed to a lower maximum penalty.

Notes:

1. Current Queensland legislative instruments generally do not prescribe general penalties, that is, the same maximum monetary penalty for all breaches. Each offence is separately allocated an appropriate penalty.

2. See also chapter 9, guideline 79.

Punishment must fit the breach

Guideline 52 A statute must provide for a person to be dealt with for a disciplinary breach in a way that is appropriate to the nature of the breach.

Notes:

1 Except for punishment of a generic nature, for example, payment of a fine, if the punishment provided under a statute is for the person committing the disciplinary breach to do an act, then the act required of the person must have a reasonable nexus to the type and severity of the breach.

2 See also chapter 9, guideline 79.

Natural justice

Guideline 53 The enforcement of a disciplinary statute against a person alleged to have breached the statute should be provided for by statute in a way that is consistent with the principles of natural justice. The principles require procedural fairness and an unbiased decision-maker.

Note:

See chapter 9, guideline 66.

Natural justice—who will hear and decide the disciplinary allegation

Guideline 54 A disciplinary statute must make it clear who will constitute the body that will hear and decide disciplinary breaches. The body must not include anyone who would be seen to be biased in relation to the matter.

Natural justice—notice of alleged breach

Guideline 55 A disciplinary statute must provide for a person alleged to have breached a disciplinary statute to be given notice of the alleged breach, setting out particulars of the breach sufficient to inform him or her of the statute alleged to have been breached and the occasion on which it is alleged to have been breached. Information about further particulars, or how to obtain further particulars, should also be provided for to the extent necessary to ensure the person is able to fully assess and respond to the allegations.

Note:

Natural justice requires that a person should not be taken by surprise at a hearing of a disciplinary breach alleged against the person.

Natural justice—how notice is given

Guideline 56 Provisions of a disciplinary statute relating to how a person is given notice of an alleged breach or a hearing of a breach must be sufficient to ensure the person is aware of the allegation or hearing, and, if the person is not aware because of the method of service, sufficient to allow the person to take action to retrieve the situation once the person becomes aware.

Note:

The Scrutiny Committee has expressed concern that merely posting a notice to a person at the person's last known address may be insufficient, particularly if the consequences of not responding to a notice are significant.

Natural justice—notice of hearing

Guideline 57 The procedure stated in a disciplinary statute for the hearing of an allegation of a disciplinary breach should require that the person alleged to have breached the statute be given a notice making it clear the person is required to attend the hearing at a stated time and place if the person wishes to respond to the allegation. The procedure should require notice be given in sufficient time before the hearing to enable the person to fully prepare for the hearing. The procedure should also ensure the person served with the notice is left in no doubt about the consequences of an adverse decision.

Note:

The basic procedure provided for the enforcement of a breach should make it completely clear what are the proceedings at which the alleged breach will be dealt with.

Natural justice—procedure at hearing

Guideline 58 The procedure stated in a disciplinary statute for the hearing of an allegation of a disciplinary breach should be consistent with the principles of natural justice.

Note:

See chapter 9, guideline 66.

Review

Guideline 59 A disciplinary statute should make provision for a review of the actions of a disciplinary body on application by an aggrieved person. The review body must not include anyone who would be biased in relation to the matter.

Chapter 8: Amendment statutes

Scope

The guidelines in this chapter are about the repeal and amendment of a statute.

The object of these guidelines is to ensure the accurate amendment of the text of a statute in a way that allows for the proper consolidation of the statute.

Guidelines generally apply to an amending statute

Guideline 60 These guidelines apply to an amending or repealing statute in the same way as they do to a new statute.

Amending or repealing a statute

Guideline 61 A university must amend or repeal a statute by making another statute that amends the statute to the extent necessary or repeals the statute.

Notes:

1. A university statute should amend or repeal only another university statute.

2. A university rule should amend or repeal only another university rule.

3. A university rule ceases to have effect if the authorising university statute is repealed.

Guideline 62 If a statute replaces another statute, the replacement statute must contain the provision that repeals the existing statute.

Guideline 63 A university should not amend a statute by merely making a statute that overwrites the existing statute, that is, to amend the existing statute, another statute should specifically omit any inconsistent material.

Amendment rules

Guideline 64 A university, in making a statute that amends another statute, should follow the same practice as an Act of the Queensland Parliament.

Notes:

1. Use only 2 types of command—
   - the first type of command (the **"location command"**) identifies the place in the statute

where the amendment is to be made.

- the other type of command (the **"action command"**) is the amendment action to be taken at the identified place.

2 Deal with the location command before the action command, that is, keep the 2 commands separate.

3 Include all the words identifying where the amendment is to be made in the location command and not in the action command.

4 To omit particular words, include in the location command 'from '[*quote first word to be omitted*]' to '[*quote last word to be omitted*]' ', however, if all words in the introduction or end of a provision are to be omitted, it is sufficient to say 'all the words before '[*quote word(s)*]' ' or 'from '[*quote word(s)*]' '.

5 In the location command, use light single quotes around the text that is part of the location.

Examples:

1 **3 Amendment of s 4 (Discipline review panel)**

Section 6, 'vice-chancellor'—

omit.

2 **3 Amendment of s 4 (Discipline review panel)**

Section 6, 'vice-chancellor'—

omit, insert—

'registrar'.

6 Use only the following action commands—

- omit
- insert

- omit, insert
- renumber.

7 Examples 1 and 2 above use the action commands 'omit' and 'omit, insert'.

8 Following are examples of the action commands 'insert' and 'renumber'.

Examples:

1 **5 Amendment of s 7 (Rule-making and notification)**

After section 7(1)—

insert—

'**(1A)** The council may, by resolution, amend or repeal a rule.'.

2 **6 Insertion of new s 20AA (Application of pt 3)**

In part 3, before section 20—

insert—

'**20AA Application of pt 3**

'This part applies to an appeal from a decision of the disciplinary board.'.

3 **7 Amendment of s 7 (Rule-making and notification)**

Section 7(1A) and (2)—

renumber as section 7(2) and (3).

9 When the action commands ' *omit, insert*' are used to replace a whole provision, refer to the replacement of the provision in the section heading for the amending section.

Example:

8 Replacement of s 5 (Roll)

Section 5—

omit, insert—

‘**5 Alumni roll**

The registrar must keep a roll of QUT alumni.’.

Chapter 9: Fundamental legislative principles

Scope

The guidelines in this chapter deal with the application of fundamental legislative principles to statutes.

It is important for university statutes to be consistent with fundamental legislative principles. The Scrutiny of Legislation Committee (the **"Scrutiny Committee"**) examines each university statute to consider its lawfulness and its consistency with fundamental legislative principles. Any concerns will be pursued initially by way of correspondence with the Minister and, if unresolved, may be reported to Parliament and/or result in a motion to disallow all or part of the offending statute. Disallowance could cause significant practical difficulties for the university concerned.

What are fundamental legislative principles

Fundamental legislative principles (**"FLPs"**) are defined in the *Legislative Standards Act 1992* (the **"LSA"**). See attachment 1.

The LSA, section 4(1) contains the basic statement that FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

All other statements about FLPs in section 4 are illustrative of this principle and not a complete list of its application.

The LSA, section 4(2) mentions 2 examples of what must be had sufficient regard to in order to comply with the basic principle—

- the rights and liberties of individuals
- the institution of Parliament.

The LSA, section 4(3), sets out a list of examples of issues that may be involved in considering whether particular legislation has sufficient regard to the rights and liberties of individuals. These examples are dealt with in guidelines 65 to 75.

The LSA, section 4(5) sets out a list of examples of issues that may be involved in considering whether particular subordinate legislation, for example, a university statute, has sufficient regard to the institution of Parliament. These examples are dealt with in guidelines 87 to 91.

All these lists of examples are not exhaustive of the basic principle.

For this reason additional examples of issues that may be involved in considering whether a statute has sufficient regard to FLPs are set out in guidelines 76 to 86. These may involve the following issues, in relation to affecting rights and liberties of individuals—

- reasonableness
- fairness
- traditionally accepted liberties
- treatment of individuals by a law maker in ways that an Act of Parliament requires individuals to treat each other.

Status of FLPs

FLPs are principles to be observed in drafting legislation, they are not rules of law. In having regard to FLPs, the purpose of the LSA to be achieved is that of ensuring Queensland legislation is of the highest standard.

Departures from the principles are sometimes justifiable but must be based on sound reasoning. Before a statute containing a departure from the principle is made, the university concerned should ensure the proposed departure is justifiable and be ready to explain its reasoning.

How to approach FLPs in drafting

FLPs flag crucial matters to be addressed in the drafting process.

In considering whether sufficient regard is had to FLPs, a drafter should consider the following—

- what other values are being furthered?
- can those values be realised in other ways?
- do those values justify departure from the principles?

It is better to identify an issue concerning FLPs, and work it through, than to ignore the issue.

Reliance on a precedent that failed to have sufficient regard to fundamental legislative principles does not justify a subsequent failure to have sufficient regard to the principles.

The Scrutiny Committee is a Standing Committee of the Legislative Assembly with responsibility for monitoring the operation of the LSA, section 4 and the application of FLPs to particular Bills and subordinate legislation. The committee's reports are an excellent reference tool in drafting legislation in a way that has sufficient regard to FLPs.

Attachment 2 contains an extract from the *Parliamentary Committees Act 1995* stating the role of the committee.

The Scrutiny Committee's reports include special reports about particular matters, for example, Scrutiny Committee Report No. 14, *University Statutes*, 9 November 1999, and alert digests dealing with the Bills introduced into the Legislative Assembly.

The Scrutiny Committee's reports are the major source of authority for the practical application of FLPs and are applied on a daily basis in the work of the Office of the Queensland Parliamentary Counsel.

Scrutiny Committee's approach to FLP issues in university statutes and the consequences of departure from FLPs

The Scrutiny Committee has noted that the university statutes, particularly statutes about student discipline, potentially have a significant impact on a large number of people and considers it essential that the statutes have sufficient regard to the rights and liberties of individuals: Scrutiny Committee Report No. 14, *University Statutes*, 9 November 1999, paragraphs 5.14 and 7.1.

Generally, if the Scrutiny Committee has concerns about any matters within its terms of reference in relation to subordinate legislation, the committee corresponds with the relevant Minister. If the matter is not resolved, the committee will consider giving notice of a motion to disallow an item of subordinate legislation or a provision of the subordinate legislation and/or reporting its concerns to Parliament.

It should be noted that pending review of the process for drafting university statutes, the Scrutiny Committee has not pursued many of its specific concerns about university statutes unless it considered the matter so serious that more immediate action was necessary. The Scrutiny Committee has been awaiting the departmental review of the process for drafting university statutes and the establishment of a more effective process to ensure university statutes are drafted in compliance with FLPs. In addition, the committee has requested a substantive review under the new process of all university statutes: Scrutiny Committee Report No. 14, *University Statutes*, 9 November 1999, paragraphs 6.3 to 6.19 and paragraph 7.4.

With the completion of the review of the drafting process, it appears the Scrutiny Committee will adopt the same approach for university statutes as it takes for other subordinate legislation. Accordingly, the Scrutiny Committee will examine each statute on a clause by clause basis to check its lawfulness and consistency with FLPs and will pursue all concerns by way of correspondence with the Minister. Unresolved concerns may be reported by the Scrutiny Committee to Parliament and/or be the subject of a motion to disallow all or part of the university statute. Disallowance could cause significant practical difficulties for the university concerned.

Having sufficient regard to the rights and liberties of individuals—issues listed in Legislative Standards Act 1992

Defining administrative power, reviewing its use

Guideline 65 A statute should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review: *Legislative Standards Act 1992*, section 4(3)(a).

Notes about 'sufficiently defined':

1. 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 university statute without stating criteria for making the decision.

2. The Scrutiny Committee takes issue with provisions that do not stipulate, or that insufficiently stipulate, the matters to which a decision-maker must have regard in exercising a statutory administrative power: Annual Report 1998–1999 paragraph 3.10.

Examples of 'sufficiently defined' provided by the Scrutiny Committee:

1. In commenting on a statute that gave a decision-maker an extremely broad discretion, the committee considered it preferable for the statute to provide

guidelines about, or limitations on, the exercise of the discretion.

2 The committee has also commented that if a statute provides certain consequences for a student the registrar considers is 'not a suitable person to undertake campus service', the statute should contain guidelines about who is not a suitable person.

3 The committee has commented adversely on a provision of a statute that gave a person power to appoint a replacement for a member of a board or panel unable to sit in a particular case without the statute including a requirement that the replacement hold the same qualification as the replaced member (for example, that a student member unable to sit in a particular case would be replaced with another student). The committee was concerned that the provision effectively gave the appointer power to change the constitution of the board or panel.

Notes about 'appropriate review':

1 Again, depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in a university statute without providing for a merits-based review of the decision.

2 If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review. In the context of disciplinary statutes, the Scrutiny Committee has criticised the following reviews as insufficient—

- a review limited to whether the original decision-maker complied with procedural requirements (This would exclude from

appropriate review a decision that is wrong on the facts but for which procedural requirements were satisfied.)

- a review of the record of the original decision that did not require the reviewer to accept further submissions when serious penalties, including expulsion, were imposed.

3 A university statute should ordinarily provide for review of a decision having substantial consequences by an independent body as there may otherwise be a perception that the decision-maker lacks impartiality: Scrutiny Committee Report No. 14, *University Statutes*, 9 November 1999, paragraphs 3.7 and 3.8.

Occasionally, for other legislation, the Scrutiny Committee has considered appropriate a 2-tiered system with an internal review of the original decision-maker's decision and a subsequent right of appeal to a court or tribunal. See, for example, the *Transport Planning and Coordination Act 1994*, part 5 (Review of and appeals against decisions).

4 The Scrutiny Committee has commented that a statute should provide an avenue of appeal against the following decisions because the decisions could have very serious implications—

- a registrar's decision not to exercise a discretion provided under a statute to release results for a student, despite unpaid fines, on the grounds of hardship
- an interim suspension of a student charged with misconduct until the student's case is decided—the committee noting the suspension period could be 6 weeks.

Note also that the committee has commented in relation to other legislation that the lack of opportunity to make representations before an immediate suspension is made arguably denies the suspended person natural justice: Alert Digest 2000/06.03 *Food Production (Safety) Bill 2000*, paragraphs 20–28.

5 Ideally, review provisions should provide—

- the period within which a person may apply for review
- the way application is made
- whether the reviewer may consider new material or hear the matter afresh
- that the principles of natural justice apply and specify some of the contentious points that often arise in questions of procedural fairness, for example, whether persons seeking review may be legally represented
- whether the reviewer may—
  - confirm the decision being reviewed
  - set aside the decision being reviewed and substitute another decision
  - set aside the decision being reviewed and refer the matter back to the original decision-maker with appropriate directions
- entitlement to written reasons of the reviewer:

Alert Digest 1996/01 page 12.

Notes about related issues:

Reasons for decision and information on review/appeal rights

1 Related to this FLP, and consistent with having sufficient regard to the rights and liberties of individuals, is a requirement that the decision-maker provide reasons for the decision, together with information on review/appeal rights: Annual Report 1996–1997 paragraph 3.3, page 11. See also *Acts Interpretation Act 1954*, s 27B (Content of statement of reasons for decision).

Non-exclusion of judicial review

2 Another related issue is the non-exclusion of judicial review, about which the Scrutiny Committee made the following comments in relation to the *Local Government Amendment Bill 1996*—

> Whenever ordinary rights of review are removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the committee takes particular care in assessing whether sufficient regard has been had to individual rights…Such a removal of rights may be justified by the overriding significance of the objectives of the legislation.
>
> The purpose of judicial review is to deal with those actions of public officials who act beyond the powers that are intended for them. It acts to protect the legislative intention approved by Parliament and proposed by the Executive. As such, ouster clauses should rarely be contemplated and even more rarely implemented: Alert Digest 1996/02 paragraphs 6.20–6.23.

There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Consistency with natural justice principles

Guideline 66 A statute should be consistent with the principles of natural justice: *Legislative Standards Act 1992*, section 4(3)(b).

General notes:

1 The principles of natural justice are principles developed by the common law. The principles require procedural fairness and an unbiased decision-maker.

2 This guideline recognises the indefinite number of ways in which natural justice may be afforded. However, it is likely that the Scrutiny Committee would have concerns about any process purporting to afford natural justice that is not transparent. This means that the process should be reliable because it is made clear to all concerned precisely how natural justice will be afforded and that breaches of natural justice will be avoided and not concealed.

Notes on disciplinary statutes:

3 The issue of consistency with the principles of natural justice clearly arises in the context of disciplinary statutes. The university Acts do not limit enforcement to enforcement by courts, for example, under the *Justices Act 1886*. Each university has established procedures local to it for enforcing its disciplinary statutes, as opposed to enforcement before a court. Care therefore needs to be taken that the basic requirements of natural justice are met in dealing with disciplinary breaches. See chapter 7, guidelines 53 to 59.

4 For a full discussion of the requirements of natural justice for dealing with disciplinary breaches outside the court system, see—

- *Disciplinary Tribunals*, JRS Forbes, The Law Book Company Limited, 1990
- *The Laws of Australia, 2 Administrative Law, 2.5 Judicial Review of Administrative Action: Procedural Fairness*, The Law Book Company Limited.

Notes on natural justice requirements generally:

Procedural fairness

5 The principles require procedural fairness. This involves a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case. The usual requirements of natural justice may be reduced by circumstances of urgency.

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

Aspects of procedural fairness include:

- **adequate notice of particular hearings, for example, a disciplinary hearing**

  Persons who are entitled to be heard are entitled to prior notice. The notice should give the recipient sufficient time and information to prepare and present the person's case and to arrange to attend the hearing or make written submissions. The person should also be put on notice of the possible consequences of an adverse decision: *The Laws of Australia,* The Law Book Company Limited, Volume 2.5, paragraph [23].

  The Scrutiny Committee has made the following comments about adequate notice of a disciplinary hearing—

  - It is insufficient to merely post notice of a hearing to a student as the mail might not be received. (Perhaps

registered post would be an acceptable minimum procedure.)

- Natural justice includes a student's right to know the elements and particulars of the alleged breach or misconduct. Natural justice includes the right of a person to be made aware of evidence adverse to the person and to make submissions in relation to it: Alert Digest 2000/09.01, *Children Services Tribunal Bill 2000*, paragraph 34.

- **observance of natural justice in the conduct of a hearing**

  Natural justice includes a person's right to answer allegations made against the person.

  Persons who are entitled to be heard must be given a reasonable opportunity to present their case and to respond to any adverse material of which the decision-maker has informed itself: *The Laws of Australia* , The Law Book Company Limited, Volume 2.5, paragraph [41].

  What is appropriate depends on the circumstances. In a disciplinary proceeding, any of the following matters may be important in ensuring consistency with natural justice—

  - information made available to a disciplinary body adverse to the person must be disclosed to the person
  - the person must always be permitted to put his or her case
  - the person may be entitled, having regard to all the circumstances, to put the case orally
  - the person may be entitled, having regard to all the circumstances, to be represented, even legally represented
  - the person may be entitled to a hearing on the issue of punishment that is separate to the hearing on the question of guilt of a breach.

  It would be useful for a statute to address the contentious points that often arise concerning these matters.

- **legal representation**

  It is the Scrutiny Committee's view that, as a general rule, representation by a lawyer enhances a person's right to natural justice because it gives the person the means to most efficiently present the person's case. The committee

considers this principle is most applicable in proceedings where there is a binding outcome imposed by a third party umpire. This happens, for example, in court proceedings or arbitration but not in mediation (an informal dispute resolution process where the outcome, if any, is agreed to by the parties themselves). For mediation, the committee examines whether the representation allowable provides for *equality* of representation: Alert Digest 2000/05.08, *Queensland Competition Authority Amendment Bill 2000*, paragraphs 27–32.

However, even where the principle is most applicable, the committee has acknowledged that the following factors may support arguments that the exclusion of lawyers promotes the effective and even-handed operation of the decision-maker—

- the cost of legal representation and the ability of all parties to afford it
- the possible lengthening of proceedings
- the nature of the subject matter being practical rather than technical: Alert Digest 2000/09.01, *Children Services Tribunal Bill 2000*, paragraph 30.

Unbiased decision-maker

6 The principles of natural justice also require that the decision-maker must be unbiased.

Appropriateness of delegation of administrative power

Guideline 67 A statute should allow the delegation of administrative power only in appropriate cases and to appropriate persons: *Legislative Standards Act 1992*, section 4(3)(c).

Notes:

1. The Scrutiny Committee has a policy on delegation of powers—if a power being delegated is significant, the category of delegate should be limited and the qualifications or office specified. Alert Digest 1996/04, paragraph 1.17.

2. If significant powers are delegated to a broad category of people, the statute should require the delegate to be 'appropriately qualified'.

3. The Scrutiny Committee has explained that a power being delegated is significant if the power is extensive, may affect the rights or legitimate expectations of others, or appears to require particular expertise or experience.

Example of a 'significant power':

Power to grant, suspend or cancel registration.

Reversal of onus of proof in disciplinary proceedings

Guideline 68 A statute should not reverse the onus of proof in disciplinary proceedings without adequate justification: *Legislative Standards Act 1992*, section 4(3)(d).

Notes:

1. A statute should not provide that in disciplinary proceedings it is the responsibility of a person alleged to have breached a statute to prove innocence, for example,

by disproving a fact the university would otherwise be obliged to prove, unless there is adequate justification.

2 A statute merely requiring a person to prove something peculiarly within the person's knowledge that is inherently impracticable to establish by any alternative evidentiary means may not breach this fundamental legislative principle.

Examples:

1 If a statute prohibits a person from doing something 'without reasonable excuse', it is generally appropriate for a person to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the university's case.

2 A further example of 'adequate justification' may be circumstances indicating that the provision cannot be practically administered otherwise, for instance, disciplinary breaches concerning the late return or non-return of library books. This type of justification is used in relation to traffic offences in Queensland's traffic legislation.

3 A statute should not provide that something is conclusive evidence of a fact, without adequate justification.

Generally, a statute may provide that a certificate or something else is evidence of a fact. However, a person subject to university proceedings should always be given the opportunity to disprove the fact.

Example:

Legislation frequently provides that a certificate signed by a person administering a law is evidence of a fact so that a range of basic matters relating to records kept by

an administering authority, and to its activities, may be put in evidence before a court through the certificate, rather than be put in evidence through the calling of witnesses. The Scrutiny Committee considers such provisions are acceptable provided that they relate to matters that are essentially non-controversial. However, the committee has expressed concern about a provision that might be interpreted as making a complaint that started a proceeding evidence of the respondent's guilt of the offence alleged in it. Alert Digest 2000/05 *First Home Owner Grant Bill 2000*, paragraphs 18–22.

Judicial warrant required for entry, search and seizure

Guideline 69 A statute should 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: *Legislative Standards Act 1992*, section 4(3)(e).

Note:

There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Protection against forced self incrimination

Guideline 70 A statute should provide appropriate protection against self-incrimination: *Legislative Standards Act 1992*, section 4(3)(f).

Notes:

1. It is a long established and strong principle of common law that an individual should not be forced to incriminate himself or herself.

2. There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Retrospectivity

Guideline 71 A statute should not adversely affect rights and liberties, or impose obligations, retrospectively: *Legislative Standards Act 1992*, section 4(3)(g).

Notes:

1. Unless there is a good reason for including a commencement provision in a university statute, it is preferable to be silent in the statute about commencement as it then commences under the *Statutory Instruments Act 1992*, section 32 on the day on which it is notified or published. Inclusion of a commencement provision in a university statute may inadvertently result in a purported retrospective commencement of questionable validity if, for example, there are procedural delays after the statute is made.

2. See *Statutory Instruments Act 1992*, section 34 (Beneficial retrospective commencement).

Example:

A statute can not be made and its operation backdated to cover circumstances that arose before it was made if the retrospectivity decreases a person's rights or imposes liability on a person.

Immunity from proceeding or prosecution

Guideline 72 A statute should not confer immunity from proceeding or prosecution without adequate justification: *Legislative Standards Act 1992*, section 4(3)(h).

Note:

There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Compulsory acquisition of property

Guideline 73 A statute should provide for the compulsory acquisition of property only with fair compensation: *Legislative Standards Act 1992*, section 4(3)(i).

Note:

There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Aboriginal tradition and Island custom

Guideline 74 A statute should have sufficient regard to Aboriginal tradition and Island custom: *Legislative Standards Act 1992*, section 4(3)(j).

Clarity, precision and no ambiguity

Guideline 75 A statute should be unambiguous and drafted in a sufficiently clear and precise way: *Legislative Standards Act 1992*, section 4(3)(k).

Notes:

1. For additional material, see also chapter 2 (Effective communication).

2. The Scrutiny 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: Scrutiny Committee Annual Report 1998–1999, paragraph 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: Scrutiny Committee Annual Report 1999–2000, paragraph 2.14.

Examples:

1 Terms should be sufficiently defined, particularly when they may have substantial consequences. This principle is particularly important if a sanction applies: Alert Digest 1999/02.01 *School Uniform Bill 1999* , paragraphs 1.9–1.14. The committee has applauded the fact that a bill, in contrast to the Act it replaced, included a definition of a pivotal term: Alert Digest 2000/04.01, *Mental Health Bill 2000*, paragraphs 41–47.

2 The committee has expressed concern that if a statute provides that whenever a discipline review panel convenes to hear a matter the registrar will appoint a secretary to the panel, the statute should be clear about whether the secretary is a voting member of the panel.

3 If a provision of a statute is expressed to operate in particular circumstances that depend on an official's opinion, it may be necessary to state the matters to which the official should have regard in reaching the opinion: see guideline 65.

4 A statute should, wherever possible, not use the expression 'such other information as the university may require' but should specify the information required. If a general expression is necessary, it should at least limit the information that may be required to information relevant to the issue concerned, for example, the admission and enrolment of a student.

5 Tautology should be avoided: Alert Digest 1996/04, paragraph 6.12.

Having sufficient regard to the rights and liberties of individuals—other examples

Justification required to abrogate common law and similar rights

Guideline 76 A statute should not abrogate common law or similar rights without sufficient justification.

Notes:

1 *Rights associated with elections* —Voting rights are examined by the Scrutiny Committee. The committee has expressed concern about provisions in a statute that meant that technically an election could be held on the same day as the ballots were sent. The committee has also expressed concern about a provision in a statute providing that an election was not invalidated by reason of certain things. This removed safeguards designed to ensure the proper conduct of elections, and the protection of the rights of candidates and people eligible to vote.

In the context of a statute giving a chancellor power to enquire into complaints about election processes and to confirm or annul an election, the committee expressed concern about a provision in the statute purporting to make the chancellor's decision 'final and conclusive' and about the absence of guidelines for the chancellor.

2 *Common law rights to freedom of movement and association*—Ordinarily, a statute should not exclude a person from a public place. Excluding a person from a public place may sometimes be justified on the basis that the restriction protects the rights of the majority of users by ensuring they are free to use the place without fear of assault or intimidation. This particular type of exclusion power arguably promotes the common law rights of the majority.

There appears to be little or no scope for a statute to breach common law rights to freedom of movement and association.

Inappropriate imposition of responsibility

Guideline 77 A statute should not ordinarily make a person responsible for actions or omissions over which the person may have no control.

Note:

There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Undue restriction of ordinary activities

Guideline 78 A statute should not, without sufficient justification, unduly restrict ordinary activities.

Note:

There appears to be little or no scope for a statute to breach this fundamental legislative principle.

Proportionality and relevancy

Guideline 79 Consequences provided by a statute should be proportionate and relevant to the actions resulting in the consequences.

Notes:

1. A penalty should be proportionate to the misconduct. A statute should provide a higher penalty for misconduct of greater seriousness than for misconduct of lesser seriousness.

2. General penalty provisions should be avoided—see chapter 7, guideline 51.

Examples:

1. The Scrutiny Committee has expressed concern about a statute effectively allowing the imposition of a higher penalty if a student admits misconduct than if the student does not admit it.

2. The Scrutiny Committee has also expressed concern about a statute enabling a disciplinary board to impose penalties that require the person breaching the statute to do something, other than pay a fine, that is not necessarily related to the misconduct—see chapter 7, guideline 52.

Appropriate standard of proof

Guideline 80 Any change from the common law standard of proof should be justified.

Example:

The Scrutiny Committee has expressed concern about a statute prescribing the balance of probabilities as the standard of proof to be used by a disciplinary review panel when considering student disciplinary matters. The committee noted that in the absence of any express provisions, the common law would imply a sliding scale between 'on the balance of probabilities' and 'beyond reasonable doubt', depending on the seriousness of the consequences of an adverse finding.

Appropriate defences

Guideline 81 A statute should provide appropriate defences to disciplinary breaches.

Note:

The words 'without reasonable excuse' are often used in provisions creating offences in Acts of the Queensland Parliament to provide appropriate defences.

Continuous penalties

Guideline 82 A statute should not provide for a continuing penalty for a disciplinary breach for a period before the person has been dealt with by the relevant body.

Notes:

1 Continuous penalties accumulating before a person is dealt with can artificially inflate the penalty to which the person is liable at a time before the relevant body has considered the lawfulness of the person's behaviour.

2 This guideline does not prevent a low penalty being set as a daily penalty up to a reasonable maximum not in excess of the maximum penalty for a single breach.

Discrimination prohibited

Guideline 83 A statute should not be discriminatory, without adequate justification.

Extraordinary power only in urgent circumstances

Guideline 84 A statute should provide for the exercise of extraordinary powers only in urgent situations.

Example:

If a statute provides that an appeal suspends the implementation of a disciplinary decision but gives power to direct that the decision is to be implemented despite the appeal, the power should be limited to urgent circumstances.

Privacy issues and confidentiality issues

Guideline 85 In resolving privacy issues and confidentiality issues, sufficient regard should be had to the rights and liberties of individuals.

Unintended adverse impact

Guideline 86 A statute should not have an unintended adverse impact on individuals.

Example:

A statute should be checked to ensure that there are no gaps that adversely affect individuals. For example, if a statute changes the way a university deals with something, there should be sufficient transitional clauses to protect individuals who are affected by the transition from the existing statute to the statute as changed.

Having sufficient regard to the institution of Parliament—issues listed in Legislative Standards Act 1992

Authorisation of statute

Guideline 87 A statute should be within the power that, under an Act (the **"university Act"**), allows the statute to be made: *Legislative Standards Act 1992*, section 4(5)(a).

Notes:

See also chapter 3, guideline 5.

Examples:

1 The committee has raised concerns that the university Acts do not authorise a statute to—

- provide a student disciplinary penalty of more than 10 penalty units or
- deal with persons who have ceased to be students or
- provide any of the following sanctions for nonpayment of student fees—
  - withholding of results, an academic transcript or award certificate
  - loss of the right to re-enrol

- loss of access to computing services, libraries and other facilities or
- impose penalties that restrict the use of motor vehicles.

2 The committee also has concerns about whether the university Acts authorise a statute about student discipline to require a student to pay restitution of an amount that is not limited in the statute.

Consistency with objectives of authorisation

Guideline 88 A statute should be consistent with the policy objectives of the Act, allowing the statute to be made: *Legislative Standards Act 1992*, section 4(5)(b).

Appropriateness of matter to level of legislation

Guideline 89 A statute should contain only matter appropriate to that level of legislation: *Legislative Standards Act 1992*, section 4(5)(c).

Notes:

1 The Scrutiny Committee has a policy on the delegation of legislative power to prescribe penalties: Alert Digest 1996/04, paragraph 1.31.

2 The committee has noted that the matters listed as being suitable for statutes no longer include the conduct of persons on university land and control of traffic and that these topics have been relocated to the university Acts. The committee considers this relocation appropriate because of their potential to affect individual rights and liberties: Alert Digest 1997/11, paragraph 1.16. Because traffic control has been relocated, the committee has questioned whether penalties restricting the use of motor vehicles are appropriate for statute.

Statute should only amend a statute

Guideline 90 A university statute should amend only a university statute and a university rule should only amend a university rule: *Legislative Standards Act 1992*, section 4(5)(d).

Subdelegation

Guideline 91 A statute should allow the subdelegation of a power delegated by an Act only—

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

(b) if authorised by an Act: *Legislative Standards Act 1992*, section 4(5)(e).

Notes:

1 The Scrutiny Committee has a policy on delegation of powers. See the notes to guideline 67.

2 Part of the rationale for this guideline is to ensure sufficient parliamentary scrutiny of a delegated legislative power: *Legislative Standards Act 1992*, section 4(4)(b). For this reason, it seems inappropriate to delegate matters of significance to university rules. While university statutes are subject to the tabling and disallowance provisions of the *Statutory Instruments Act 1992*, part 6, university rules are not.

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, in the context of non-university legislation, took into account the importance of the subject dealt with and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation. Alert Digest 1999/04.01 *Coal Mining Safety and Health Bill 1999*, paragraphs 1.65 to 1.67

Examples:

1 If a university Act authorises a statute to make provisions about a particular matter and also authorises the university council to make university rules under the statute, the statute should not sub-delegate the entire power to the rules. The Scrutiny Committee has commented that the university statute should at least contain guidelines and limitations on the rules that may be made.

2 If a statute authorises a university rule to fix criteria for a particular matter, it would be an invalid delegation for a university rule to purport to authorise an authorised person to decide some or all of the criteria. For example, the Scrutiny Committee has commented adversely on a university statute that sub-delegated to the registrar authority to give notice of rules in a way the registrar considers appropriate. The committee considered it would be more appropriate for the notification of rules to contain more specific requirements.

Chapter 10: Gender neutral language

Gender neutral language

Guideline 92 Statutes should be drafted in gender neutral language.

Notes:

1 The *Reprints Act 1992*, section 24, has examples of how to avoid the gender specific terms 'he', 'him', 'his' and 'her'.

2 Suggestions are—

- 'chairperson' rather than 'chairman'
- 'police officer' rather than 'policeman'.

Guideline 93 Words that are, or could be taken to be, gender specific should not be used unless the statute is intended only to refer to a specific gender.

Attachment 1

Legislative Standards Act 1992, section 4

4 Meaning of "fundamental legislative principles"

(1) For the purposes of this Act, **"fundamental legislative principles"** are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.

(2) The principles include requiring that legislation has sufficient regard to—

(a) rights and liberties of individuals; and

(b) the institution of Parliament.

(3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—

(a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and

(b) is consistent with principles of natural justice; and

(c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and

(d) does not reverse the onus of proof in criminal proceedings without adequate justification; and

(e) confers 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; and

(f) provides appropriate protection against self-incrimination; and

(g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

(h) does not confer immunity from proceeding or prosecution without adequate justification; and

(i) provides for the compulsory acquisition of property only with fair compensation; and

(j) has sufficient regard to Aboriginal tradition and Island custom; and

(k) is unambiguous and drafted in a sufficiently clear and precise way.

(4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—

(a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and

(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and

(c) authorises the amendment of an Act only by another Act.

(5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—

(a) is within the power that, under an Act or subordinate legislation (the **"authorising law"**), allows the subordinate legislation to be made; and

(b) is consistent with the policy objectives of the authorising law; and

(c) contains only matter appropriate to subordinate legislation; and

(d) amends statutory instruments only; and

Attachment 1 (continued)

(e) allows the subdelegation of a power delegated by an Act only—

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

(ii) if authorised by an Act.

Attachment 2

Parliamentary Committees Act 1995, section 22

22 Area of responsibility of Scrutiny of Legislation Committee

(1) The Scrutiny of Legislation Committee's area of responsibility is to consider—

(a) the application of fundamental legislative principles to particular Bills and particular subordinate legislation; and

(b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation.[4]

(2) The committee's area of responsibility includes monitoring generally the operation of—

(a) the following provisions of the *Legislative Standards Act 1992*—

- section 4 (Meaning of "fundamental legislative principles")
- part 4 (Explanatory notes); and

(b) the following provisions of the Statutory Instruments Act 1992—

- section 9 (Meaning of "subordinate legislation")
- part 5 (Guidelines for regulatory impact statements)
- part 6 (Procedures after making of subordinate legislation)

[4] A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, section 50.

Attachment 2 (continued)

- part 7 (Staged automatic expiry of subordinate legislation)
- part 8 (Forms)
- part 10 (Transitional).