QUEENSLAND GOVERNMENT

Office of the Queensland Parliamentary Counsel

Working with OQPC on Queensland legislation



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1. Welcome

Welcome to our guide to working with OQPC on Queensland legislation. The preparation of legislation is a team effort, and here at OQPC we acknowledge the critical role that instructors play in ensuring its quality and timeliness.

This document is intended to give a brief overview of our respective roles and how you can best provide effective drafting instructions and work with us during the drafting process. Although dealing primarily with the development of Queensland legislation by departments, the matters raised are also relevant for private members working with OQPC on private member's Bills or an amendment of a Bill (see 11. Private members).

We hope you find this information helpful, and look forward to working with you on your next legislative project.

2. Is legislation necessary?

An important first step before embarking on a legislative project is to consider whether legislation is necessary.

Controlling the volume of legislation

The general policy is to limit the making of legislation to cases where it is necessary. The Cabinet handbook requires that a submission for Cabinet authority to prepare legislation (ATP) include justification for legislation as the most appropriate way of proceeding.

In general, legislation should be used only:

- to redefine rights or obligations
- to circumscribe or extend powers
- if there is a constitutional requirement
- to raise revenue
- if it is justified for important policy reasons.

See generally, the Cabinet handbook, chapter 7.1.3.

Administrative matters

Each provision of proposed legislation needs to be considered to see that it has some legal consequence. Typically, this will be an offence or adverse consequence for those who do not comply. For this reason and because departments are subject to machinery of government changes at any time, purely administrative matters (e.g. requirements for a particular named department to notify particular named departments) are not generally appropriate for legislation. Typically, they are best dealt with by inter- and intra- departmental arrangements.

Aspirational statements

It is generally inappropriate to include aspirational statements in legislation unless the making of the statement has some legal consequence. An example of an aspirational statement with a consequence is a purpose provision that then governs the ambit of regulation-making and other powers under the legislation.

3. Drafting is a team project

Drafting is a team project that involves OQPC officers, the instructor and sometimes other officers from the instructing department.

The OQPC team consists of:

- a drafter who has primary responsibility for drafting the legislation (commonly called the 'D1')
- another drafter who performs a back-up and quality assurance role (commonly called the 'D2')
- a legislation services officer who performs an editorial and publishing role
- in varying degrees, the relevant deputy parliamentary counsel, first assistant parliamentary counsel and sometimes the parliamentary counsel (the parliamentary counsel always needs to 'sign off' on Bills before supply).

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

- whether the rules of law in the draft are effective and sufficient
- the inherent quality of the policy from a legal viewpoint and whole-of-government perspective
- the draft's consistency with the ATP or other authority
- the draft's consistency with Queensland Government policy
- the draft's consistency with Fundamental Legislative Principles (FLPs)
- the quality of the draft as an instrument of policy implementation.

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

- consistency of language both within the legislation and with other Queensland legislation
- consistent use of formats, styles and expressions
- sense and flow of words and sentences, including the flow of subsections into paragraphs and subparagraphs
- correct numbering of provisions, including inserted provisions
- correct cross-references within the legislation
- correct references to other legislation
- textual accuracy of amendments of other legislation to ensure that, when the directions for amendment take effect, the legislation being amended will read sensibly
- appropriate pagination.

Many of these matters can only be fully considered after what is effectively the final draft of the Bill has been settled between the drafter and instructing officer in terms of the Bill's content. Therefore, time is needed after the final draft is approved for quality assurance checking. The overall quality of legislation can be seriously undermined if the time for carrying out these tasks is truncated.

4. Drafter's role

Ensuring legislation achieves policy in a legally effective way

The drafter translates the policy in the drafting instructions into a legislative form. However, the drafter is not a mere scribe. The drafting process requires the drafter to understand the drafting instructions and to:

- consider the legislative framework in which the legislation will operate
- provide advice about alternative ways of achieving policy objectives and the application of FLPs
- draft the legislation in accordance with current legislative drafting practice
- discuss revisions with the instructor
- make changes and finalise the legislation
- provide advice about matters raised by the portfolio committees under the *Parliament of Queensland Act 2001*, chapter 5, part 3, after introduction (see the Cabinet handbook, chapter 8.2.1).

The primary responsibilities of the drafter are to ensure:

- the proposed legislation achieves the policy in a legally effective way
- the statute book is of the highest standard (including, for example, by drafting in plain English).

5. Instructor's role

Main aspects of role

From the perspective of a drafter, the main aspects of the instructor's role in the drafting process are:

- developing comprehensive policy
- preparing comprehensive drafting instructions
- explaining the drafting instructions and background to the drafter
- carefully examining drafts of legislation

- providing constructive comments on drafts of legislation
- consulting on draft legislation
- preparing explanatory notes for legislation
- signing off on completed legislation.

Understanding of particular Acts of general application

An effective instructor does not need to be a lawyer but needs to have some understanding of the *Acts Interpretation Act 1954* (AIA), the *Statutory Instruments Act 1992* (SIA), the *Legislative Standards Act 1992* (LSA) and the *Reprints Act 1992* (Reprints Act) because:

- the AIA contains provisions that apply generally to all legislation as aids in the interpretation of legislation resulting in clearer and shorter drafting, including, for example, definitions of commonly used expressions
- the SIA brings together and clarifies the law about statutory instruments, particularly in relation to the power to make statutory instruments
- the LSA establishes OQPC, states its functions and provides for the FLPs
- the Reprints Act affects how legislation is consolidated and published after it is amended.

Understanding of OQPC's reliance on AIA, SIA and Reprints Act

OQPC practice is to ensure the AIA is relied on and not repeated or overridden. It can save time during the drafting process if the instructor has a broad knowledge of common AIA provisions and does not need to have them explained. Also, an experienced instructor is able to speed up the drafting process by acting as a filter for comments and queries by other departmental offices about routine matters covered by the AIA, SIA and the Reprints Act.

Examples of things an experienced instructor will know are:

- the use of the singular includes the plural and vice versa (AIA, s 32C)

- the use of 'person' to cover corporations (AIA, s 32D)
- the power to make an instrument or decision includes the power to amend or repeal it (AIA, s 24AA)
- the standard rules about delegation of powers in the AIA, s 27A that do not need to be repeated in delegation provisions
- a statutory instrument can provide for something by applying another document (e.g. an Australian Standard) and that if it does so it picks up that document as amended from time to time (SIA, s 23)
- the Reprints Act, section 5 requires all necessary consequential punctuation and other amendments if a provision is amended (e.g. if a subsection is added to an existing section without subsections or if a paragraph is added).

Familiarity with Governing Queensland package

Every instructor should be familiar with:

- the Queensland Legislation Handbook (the 'legislation handbook')
- the Queensland Cabinet Handbook (the 'Cabinet handbook')
- the Queensland Executive Council Handbook.

These documents are available at ‹www.premiers.qld.gov.au›.

Understanding of the role of portfolio committees

An instructor should be familiar with the role of the portfolio committees of the Legislative Assembly under the *Parliament of Queensland Act 2001*, chapter 5, part 3. One of the roles of a portfolio committee is to examine legislation in its portfolio area to consider the application of FLPs to the legislation. An understanding of this role can be gained by reading:

- the legislation handbook, chapter 7
- the FLP notebook prepared by OQPC and available at ‹www.legislation.qld.gov.au›
- reports of the portfolio committees published on the Parliament's website

- Legislation Alerts (previously Alert Digests) of the former Scrutiny of Legislation Committee published on the Parliament's website.

Familiarity with other matters

An instructor should be familiar with:

- current legislative regimes within their department
- similar regimes administered by other departments and in other jurisdictions
- recent drafting trends in Queensland
- parliamentary procedures in relation to Bills.

What the instructor should be able to do

An effective instructor does not just act as a 'post box' between other officers and the drafter.

Valuable time and drafting resources may be wasted because an instructor does not have sufficient understanding, seniority or full authority to give instructions.

The instructor needs to be able to:

- explain the aims of a legislative proposal to the drafter
- tell the drafter all he or she needs to know to be able to draft legally effective legislation that implements the policy
- make decisions on issues arising during drafting.

If an instructor does not understand the instructions, it is unlikely the drafter will understand them. If an instructor is asked to include things in the instructions that he or she does not understand, the instructor should do whatever is necessary to obtain a proper understanding of the instructions before sending them to OQPC.

Although there may be a number of policy officers involved in draft legislation, for practical reasons there must be only 1 instructor responsible for coordinating instructions.

6. Developing policy and the timetable

Instructor translates policy

An instructor translates political and administrative policy into legislative policy, expressed as drafting instructions. The development of comprehensive legislative policy is necessary to achieve workable legislation.

Considerations for instructor

An instructor should be familiar with:

- political and administrative considerations
- the legislative context
- the things that may or should be dealt with in an Act or subordinate legislation
- the things that may or should be left to administration.

The legislation handbook, chapter 2 discusses these things in more detail.

Establishing a practical timetable

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

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

- initial development of policy
- consideration of regulatory best practice principles including, as required, conducting a regulatory assessment
- consultation, both within and outside government, as required (in particular as required by the Cabinet handbook) and as otherwise considered appropriate

- development, and departmental and Ministerial approval, of the ATP submission, including preparation of the drafting instructions for the Bill
- Cabinet approval of the ATP submission
- drafting
- final consultation
- final drafting and preparation of the Bill for introduction, including preparation of the explanatory notes for the Bill and OQPC checking processes (see 3. Drafting is a team project)
- development, and departmental and Ministerial approval, of the Authority to Introduce (the 'ATI') submission
- Cabinet approval of the ATI submission
- passage through the Parliament, including consideration by a portfolio committee under the *Parliament of Queensland Act 2001*, chapter 5, part 3
- subsequent commencement and implementation.

Provision of appropriate periods of time for all of these steps is essential for the effective and efficient progressing of the legislative scheme. In developing a timetable for a legislative project, instructors are encouraged to consult with their departmental Cabinet Legislation and Liaison Officer (CLLO) who will in turn consult with the Parliamentary Liaison Officer.

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

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

- for a small Bill (20 pages or less)—3 months
- for a medium Bill (21-90 pages)—6 months
- for a large Bill (over 90 pages)—12 months.

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

It is important to plan as far ahead as possible. Maximum use should be made of Parliamentary sitting times.

Some departments, for example, have a legislative schedule worked out annually, which sets out the relative priorities of Bills and subordinate legislation. Minor amendments are 'stockpiled' for available Bills.

Although OQPC can not start drafting a Bill without an ATP or authorisation from the Premier, it encourages general discussion about pending Bills for FLP and other issues.

7. The benefits of preparing effective drafting instructions

Whole-of-government benefit

Effective drafting instructions allow drafting resources to be used more efficiently in meeting the Government's overall legislative program. As demand for legislation increases, effective drafting instructions become more critical.

Benefits for the instructing department

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

- a complete first draft is prepared more quickly
- the number of revising drafts is minimised
- fewer issues arise in the drafting process needing resolution
- further instructions are likely to be more timely and focus is maintained

- legislation of a high standard is completed in the shortest possible timeframe
- for a Bill, the ATP will be more comprehensive and result in fewer changes at the ATI stage.

8. Content of drafting instructions

Format

The instructing department must give initial drafting instructions in writing. OQPC will accept oral instructions only in exceptional circumstances. OQPC's preference is for instructions to be sent electronically to ‹parliamentarycounsel@oqpc.qld.gov.au›.

Otherwise, there is no set format for drafting instructions. However, to make it easier to refer to particular provisions or issues in the instructions, the drafting instructions should:

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

Authority to draft

For a Bill, the authority is an ATP or written authorisation from the Premier. The authority to draft a Bill should be stated in the drafting instructions. For subordinate legislation, the authority is ordinarily a decision of Cabinet or the written authorisation of the relevant Minister or chief executive.

Legislative priority

Drafting instructions should indicate the priority for the legislation and, in particular, when the legislation is required and anything affecting that timing including, for example, any requirements for consultation drafts.

Information about instructor

Drafting instructions should include the instructor's name, address, telephone number, fax number and email address. The instructor's details are often not included in instructions accompanying Cabinet submissions. However, the details are required for, and will appear on, the cover page of drafts of the Bill. Goprint will deliver the department's copies of the Bill to the address shown on the cover page.

Contact information is easiest to find if it is stated clearly at the start or end of instructions.

In addition, drafters can prioritise their workloads more effectively if they know in advance of times the instructor plans to be absent. If the instructor works part-time, it is highly desirable to nominate an additional instructor and give OQPC his or her contact details.

Complete, accurate and comprehensive instructions

An effective instructor prepares instructions consisting of:

- the overall purpose, objective or philosophy behind the legislative proposal
- main or basic concepts (who and what are we talking about)
- principal rules or objectives (what is the main or basic thing we are trying to do)
- the other rules or objectives (what other things do we need to do to make the main or basic thing work)
- the way the rules or objectives work together (are the things that we are doing consistent and compatible with each other)
- the relationship between the legislative proposal and existing legislative provisions or other law.

Effective drafting instructions are complete, accurate and comprehensive. It is important they state:

- what has to be done
- why it has to be done
- when it has to be done by

- the persons or things to whom the legislation is to apply and cover
- all aspects of the scheme from the big picture to matters of relatively minor detail.

The drafter should not have to make something up to fill a policy gap.

In addition, effective drafting instructions for a Bill would identify whether any of the rules or objectives should be implemented in subordinate legislation.

Instructions should represent settled policy

Drafting should not be used as the basis for policy development. Policy stated in drafting instructions should represent the department's settled policy. All internal consulting and consultation with other departments should be done first.

The reasons for this are:

- settling policy by draft legislation wastes the resources of the department and of OQPC
- timeframes are expanded
- there are more efficient mechanisms to facilitate policy discussion (e.g. discussion papers and stakeholder forums).

In some cases, time constraints may mean drafting will have to start while some aspects are still being worked out. If this happens, effective instructions would clearly identify matters still undergoing consideration or subject to change.

Principal objectives

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

Clarity and consistency

Effective drafting instructions are written in plain language and in narrative form (i.e. the instructions tell the story about the matters under the heading 'Complete, accurate and comprehensive instructions' above).

They need to avoid specialised or technical jargon, unless it is necessary. If it is necessary, jargon needs to be explained. Also, words need to be used consistently throughout the instructions and variation for the sake of elegance is to be avoided. If the legislation is subordinate legislation or it forms part of a related scheme, the existing terms in the authorising Act or scheme need to be used.

Legislative environment

Effective drafting instructions indicate the provisions of the legislation to be amended and of other legislation that need to be understood and the relationship between the proposed legislation and the specific provisions of the existing legislation.

Related matters

If there are any other legislative proposals that relate to the legislation, these should be mentioned whether or not they are already before the Parliament.

If there are known equivalent legislative schemes in other Australian jurisdictions or elsewhere, these should also be mentioned.

Binding on the State

For new Acts, effective drafting instructions state whether the Act is to bind the State.

The AIA, section 13 provides that an Act does not bind the State unless express words are included for that purpose. However, clarity

is required in legislation and case law suggests that the issue should be dealt with expressly or by necessary implication in each Act.

The Cabinet handbook requires legislation that has the potential to bind the State to expressly declare whether or not it binds the State, and also requires that this matter be specifically addressed in the ATP submission.

Consideration of FLPs

Effective drafting instructions should address whether the proposed legislation is consistent with FLPs. For a good general discussion of FLPs, see the legislation handbook, chapter 7. The FLP notebook produced by OQPC has a more detailed discussion of FLPs and is available at ‹www.legislation.qld.gov.au›.

If the legislation involves any decision of an administrative character, an FLP issue often overlooked is the question whether the decision is to be reviewable, and if so, by whom. This should be addressed in the drafting instructions.

Political sensitivity

Effective drafting instructions will mention any aspect of the legislation that is politically sensitive.

Legal opinions and case law

Copies of relevant legal opinions and case law should be attached to the drafting instructions, including opinions from the solicitor-general, Crown solicitor, Crown Law and private lawyers. The instructions should also refer to any known relevant court decisions. The instructor should be aware that all confidential communications between the instructor and OQPC are subject to legal professional privilege and may not be disclosed by OQPC without the client's consent (see the LSA, s 9A).

Commencement and expiry

Effective drafting instructions state when the legislation is to commence and any time at which it is to expire. For Acts, see the AIA, part 5. For subordinate legislation, see the SIA, part 4, section 14 and division 3, subdivision 3.

The main options for commencement dates for Bills are:

- on royal assent (by the Governor)
- on a stated day
- on a day to be fixed by proclamation
- on the commencement of another Act.

An Act commences on the date of assent unless it expressly provides otherwise (AIA, s 15A). If possible, the timetable for commencement should be stated in the Bill instead of being left to proclamation. Overlapping, complex, delayed and excessively separated commencement of provisions can make it difficult to understand what the applicable law is at a particular time.

The main options for commencement dates for subordinate legislation are:

- on notification in the Queensland Government Gazette
- on a stated day
- on the commencement of the authorising Act or other legislation.

Commencement on a past day raises the FLP issue of retrospectivity which will need to be addressed, and subordinate legislation may commence on a past day if its only effect is beneficial.

Regulation-making powers

Drafting instructions for a Bill should address the extent of intended regulations so that sufficient regulation-making power is included in the Bill. Generally, matters of detail, or minor matters likely to be changed frequently, are dealt with by regulation (e.g. fees).

Penalties for offences

Penalties need to be stated

If the legislation is to create offences, the penalties for the offences need to be included in the instructions. The penalties must be internally consistent and consistent with government policy and other legislation. It should be remembered that it may not be necessary to create an offence if other legislation already covers the intended offence. In particular, the offences in the Criminal Code should not be replicated.

Consultation with the Department of Justice and Attorney-General

The Cabinet handbook requires that the Department of Justice and Attorney-General (D-JAG) be consulted about legislative proposals involving the creation of new offences or the giving of increased powers to police (see the legislation handbook, chapter 2.12.7) or other State officials, and proposals affecting court or tribunal processes or resources.

There is also a protocol requiring that D-JAG be consulted if there is a proposal for a penalty infringement notice under the *State Penalties Enforcement Act 1999* for a particular offence.

Penalties and children

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

Savings and transitional provisions

An instructor should consider all transitional and savings issues resulting from a change in the law. For example, the following need to be included in the instructions:

- the application of the new legislation to things done etc. before the change
- the requirement for a transitional period during which the effect of the new legislation needs to be modified, or special provisions are required
- the extent to which anything done under the old legislation may have effect under the new legislation.

Consequential amendments

The impact of the legislation on existing legislation and other laws should be included in the instructions. The instructions should identify all provisions across the Queensland Statute Book that need to be amended as a consequence of the proposed legislation. Searches of electronic current reprints on OQPC's website may help.

Consequential amendments of particular significance need to be explained in detail. Routine ones (e.g. updating changed names or titles) could be mentioned by just grouping the Acts and the provisions.

Consultation

If the legislation affects other departments or their legislation, the instructions should include:

- a list of the departments
- an indication of the extent to which they have been consulted
- an indication of any proposed future consultations.

If the legislation affects other stakeholder groups who have or will be consulted, it would be helpful for the instructions to include equivalent details for them.

Other matters discussed in legislation handbook

The following other matters discussed in detail in the legislation handbook, chapter 2.12 need to be addressed if they are relevant:

- any extraterritorial application
- the use of administratively approved forms, rather than prescribing forms in legislation (see AIA, s 49 and SIA, s 58)
- National Competition Policy
- consolidation of police powers in the *Police Powers and Responsibilities Act 2000*
- provisions about statutory bodies and statutory office holders
- delegations
- consistency with the Corporations Act.

Amendments of Bills after introduction

It may be necessary to amend a Bill after it is introduced into Parliament because, for example, it is necessary to add new provisions or make other changes in response to matters raised by a portfolio committee.

Ideally, instructions for these amendments should be comprehensive and given to OQPC well before the debate for the second reading stage of the Bill starts. The instructions should also include details of the approval to draft the amendments. Depending on their nature and scope, approval to draft the amendments is required from Cabinet or the Premier (see the Cabinet handbook, chapter 7.3.8 and the legislation handbook, chapter 4.7).

9. Examination of and comments on draft legislation

Considering each draft

It is essential for an instructor to read and check each draft of legislation to ensure it gives effect to drafting instructions and to point out any problems.

Steps in considering draft

On receiving a draft, an effective instructor:

- **reads the draft carefully** to make sure he or she understands it and, if the instructor does not understand it or is unsure about an aspect, he or she asks the drafter about it
- **test runs the draft against scenarios** to make sure it gives effect to policy and does not have any unintended consequences
- **checks the draft for consistency** to make sure it is internally consistent and, if appropriate, consistent with related legislation
- **checks the authority to draft the legislation** to ensure **all matters** included in the draft are covered by the authority and all matters required by the authority are included.

Problems with authority to draft

If the current authority to draft does not cover all matters in the proposed legislation, further authority needs to be obtained. For example, further authority will be needed if a draft takes a different turn from that originally envisaged in the drafting instructions because a problem is encountered with the original concept or an additional issue needs to be dealt with. Depending on scope and urgency, further authority may be obtained by the ATI. If an instructor is in doubt about whether the authority to draft covers the proposed legislation, the instructor should seek advice from his or her departmental CLLO and discuss this advice with the drafter.

Constructive comments

An instructor's role includes giving constructive comments on each draft.

Comments can be given at a meeting or by email or phone. However, comments about significant issues need to be confirmed in writing.

An effective instructor provides comments on all matters the instructor wants the drafter to consider. Comments should clearly relate to particular provisions. The drafter will assume the instructor

is satisfied with the parts of the draft on which the instructor does not comment.

An effective instructor makes the comments easy to follow and understand.

Explanation of problems

If an instructor thinks a particular provision does not work or does not give effect to the policy, the instructor should identify the problem. It is extremely important to fully explain the problem, including by giving an example demonstrating the problem. It is inappropriate to attempt to redraft the provision or return the draft showing suggested changes without the explanation.

Need to focus on policy

An instructor's role includes checking drafts, but an instructor is not a mere proof reader. After draft legislation is 'signed off' by the department, OQPC's separate checking processes (see 3. Drafting is a team project) come into play. During the early stages of drafting the draft may be in a continual state of change. A focus on minor matters during the early stages may be at the expense of the core function of checking whether the legislation achieves the policy intent. As the drafting is near to completion, attention to minor matters becomes more appropriate.

For Bills, there is typically a period of about 3 weeks after first lodgement of the ATI submission before introduction of the Bill into Parliament. During that period, the Bill should be closely examined for corrections of a minor nature with no policy implications.

10. Departmental drafts not encouraged

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

Problems caused by departmental drafts

(a) Policy not effectively communicated

A departmental draft by itself is a poor means of communicating proposed policy. The drafter may interpret particular words used in a departmental draft in a way different from that intended but not communicated. Without clear explanation, the drafter may not fully appreciate the precise nature and extent of the legislative proposal.

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

The drafter reading a departmental draft is forced to work backwards to attempt to deduce the policy or to ask the department what it is. For example, a draft that makes particular conduct an offence does not by itself necessarily communicate what the ultimate problem is. The prohibited conduct may only be a small part or the end result of the problem. The drafter needs to know what the problem is so that all legislative options to address the issue can be considered and the best option can be selected.

(b) Potential for delay

Departmental drafts can lead to potential delays. The department and the instructor are distracted from the core function of formulating policy. Drafting is a time-consuming process. The time taken to prepare a departmental draft is drafting time lost to OQPC.

(c) Potential for distraction

If a departmental draft is provided, the immediate focus is on the drafting rather than the policy and considering options to achieve it. The department can become wedded to a particular form of words or a particular drafting option. If the departmental draft has been given to stakeholders, the department may have to explain each change from the departmental draft.

(d) FLP issues not properly considered

FLP issues are often overlooked, particularly if the departmental draft is prepared by an external body that does not usually need to consider them.

(e) Plain English and current drafting practice not used

Departmental drafts are often prepared without regard to plain English and current drafting practice.

Limited circumstances in which a draft can be helpful

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

11. Private members

Drafting for private members

The LSA, section 10, provides that any member of Parliament may request that OQPC draft a private member's Bill or an amendment of a Bill. OQPC must comply with the request unless the Parliamentary Counsel considers it would not be possible to comply with the request without significantly and adversely affecting the Government's legislative program.

Confidentiality

All confidential communications between a private member and OQPC are subject to legal professional privilege and may not be disclosed by OQPC without the member's consent (see the LSA, s 9A).

Consultation drafts

If a private member wishes to publish or circulate a draft version of his or her legislation before it is introduced into Parliament, the member should ask the drafter for a consultation version. This version will be given an appropriate quality assurance check by OQPC and will not contain the confidential internal OQPC information ordinarily stated on the cover page.

Explanatory notes

A private member should table and circulate an explanatory note (EN) when introducing a Bill. The member is responsible for preparing and supplying the EN for the Bill. OQPC does not draft or review the EN's contents. Similarly, if a member is proposing an amendment to a Bill, the member is encouraged to circulate an EN with the amendment (see the legislation handbook, chapter 4.14).

When preparing ENs, members should consider the LSA, section 23, which sets out what should be included in an EN. Also, the Cabinet handbook includes detailed guidelines and a template for the preparation of ENs (see the Cabinet handbook, chapter 7.3.2).

Attachment Checklist for effective drafting instructions

Are the instructions—

- written and dated
- complete, accurate and comprehensive
- in plain language (technical words and jargon should be avoided if possible)
- in the narrative form (departmental drafts generally not appropriate)
- in an effective format
- understood by the instructing officer?

Do the instructions contain details of—

- the authority to draft
- the legislative priority
- the instructing officer
- the principal and ancillary objectives
- the legislative environment
- whether the legislation is to bind the State
- consideration of fundamental legislative principles
- administrative or judicial review
- political sensitivity
- legal opinions and known relevant court decisions
- commencement and expiry
- retrospectivity
- regulation-making powers under an Act
- penalties for offences
- savings and transitional provisions
- consequential amendments
- consultations
- consultation draft requirements?

Glossary

Act A law made by Parliament.

AIA The *Acts Interpretation Act 1954*.

ATI Cabinet authority to introduce legislation into Parliament.

ATP Cabinet authority to prepare legislation.

Bill An Act in draft form that needs to be passed by the Parliament and receive Royal Assent before becoming law.

Cabinet A group of senior members of the governing party known as Ministers, who collectively are responsible for policy development and implementation.

Cabinet handbook The Queensland Cabinet Handbook of the Governing Queensland suite of handbooks being the handbook that outlines the procedures and conventions for operation of the Cabinet.

Cabinet Legislation and Liaison Officer The officer in a department responsible for the flow of all matters from the department to the Executive Council Secretariat and the Cabinet Secretariat.

Fundamental legislative principles (FLPs) The principles relating to legislation that underlie a parliamentary democracy based on the rule of law, including protecting the institution of Parliament and the rights and liberties of individuals.

Governor The Queen's representative in Queensland.

Legislation handbook The Queensland Legislation Handbook of the Governing Queensland suite of handbooks being the handbook that outlines what is needed in drafting instructions for Acts and subordinate legislation.

Legislation Written law made by Parliament, or by a delegate of the Parliament such as the Governor in Council.

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

LSA The *Legislative Standards Act 1992*.

Minister A Member of Parliament who is a member of the executive government and is responsible for a government department. Ministers are also Executive Councillors.

OQPC The Office of the Queensland Parliamentary Counsel.

Private member's Bill A Bill introduced by any member of Parliament as an individual.

Reprints Act The *Reprints Act 1992*.

Royal Assent The final stage by which a Bill becomes an Act when the Governor, as the Queen's representative, accords it formal approval.

SIA The *Statutory Instruments Act 1992*.

Notes

