

TASMANIA

OFFICE OF PARLIAMENTARY COUNSEL

GUIDELINES FOR THE PREPARATION OF STATUTORY RULES

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GUIDELINES FOR THE PREPARATION OF STATUTORY RULES

1. INTRODUCTION

1.1 Aim of guidelines

The aim of these guidelines is to help government departments and agencies with the statutory rule-making process by –

- explaining what they need to do to have a statutory rule drafted
- giving them some appreciation of what the drafting of a statutory rule involves and practical pointers on how they can facilitate that task
- giving them some useful information about statutory rules and their promulgation
- explaining the role of the Office of Parliamentary Counsel.

1.2 Interpretation of guidelines

The guidelines have 8 chapters and 5 schedules.

A reference in the guidelines to a chapter or schedule by number is a reference to the chapter or schedule bearing that number.

In Schedule 1 there is a dictionary of some of the key terms used in the guidelines. When a term defined in the dictionary is introduced into the text it appears in **bold letters**.

For convenience, the guidelines make some use of abbreviations and technical terms. When an abbreviation or technical term is introduced into the text for any expression it appears between square brackets straight after that expression.

All legislative references in the guidelines are to Tasmanian statutes.

1.3 Scope of guidelines

Given their aim, the guidelines look at the statutory rule-making process mainly from a legislative drafting perspective and focuses on the role of the Office of Parliamentary Counsel [**OPC**]. Other parts of the process are dealt with only briefly or indirectly.

More complete information about other parts of the process is available elsewhere. For instance –

- an explanation of regulatory review requirements can be obtained from the Economic Reform Unit [ERU] of the Department of Treasury and Finance
- an explanation of relevant Executive Council procedures can be obtained from its Secretariat
- guidance on tabling a statutory rule in a House of Parliament can be obtained from its Clerk.

Further sources of useful information are given in chapter 8.4.

Except in so far as they are relevant to OPC, the guidelines are not concerned with the internal procedures that government departments and other agencies follow when making statutory rules; most major government departments and agencies have some kind of handbook for that.

The guidelines do not purport to be a comprehensive technical guide to statutory rules or the law relating to their promulgation though some information of that kind is necessarily included.

The guidelines aim to give advice that is practical and realistic. Accordingly, it is based on OPC's actual experience of the statutory rule-making process, not on some ideal but artificial view of it.

It is hoped that the guidelines will be of particular value to persons who may be instructing OPC for the first time and persons who may instruct OPC only on an occasional basis.

1.4 What are statutory rules?

1.4.1 General description and purpose

Broadly speaking, statutory rules are legislative instruments made under the authority of Acts to activate, expand on, support or give more detailed effect to their provisions.

Statutory rules can play a useful part in a legislative scheme by –

- prescribing detail that would clutter the primary legislation
- giving the scheme a measure of flexibility and responsiveness (particularly for matters such as fees, forms and minor administrative procedures)

- allowing the legislature to concentrate on the essential elements of the scheme (thereby saving valuable Parliamentary time)
- relieving the legislature of the need to be directly involved with each and every minor adjustment of the scheme.

The essential feature of statutory rules is that nearly all of them are made under, and derive their entire authority from, delegated Parliamentary power. That is why statutory rules are often generally referred to as delegated or subordinate legislation.

However, some care should be taken with those terms because not every item of delegated or subordinate legislation is a statutory rule and, in some contexts, the terms have a very precise technical meaning [see, for example, chapter 4.4].

The validity of any statutory rule made under delegated authority – and nearly all of them are – can be challenged in court on the grounds that it is not sanctioned by – is *ultra vires* – the power under which it is made.

Even so, statutory rules do not have limited force or effect. Contravening a by-law, for example, can have consequences that are every bit as serious for the individual as those that might flow from a breach of the Act under which the by-law is made.

There are various kinds of statutory rule, each serving a different purpose. Regulations, rules, proclamations and orders are commonplace, by-laws and notices less so.

1.4.2 Meaning of "statutory rule" for guidelines

For the specific purposes of the guidelines, a statutory rule is a legislative instrument that fits the definition of "statutory rule" in the *Rules Publication Act 1953* [RPA] and is not exempt from that Act's operation.

The RPA definition of "statutory rule" is reproduced in Schedule 2.

Section 4 of the RPA specifies which legislative instruments are exempt from that Act's operation.

Note, however, that the guidelines do not deal with instruments of a legislative character made in the exercise of the prerogative rights of the Crown. Such instruments do fit the RPA definition of "statutory rule" but they are uncommon and they need to be made in a particular way.

Note also that an Act may specifically declare that a legislative instrument made under it is not to be regarded as a statutory rule within the meaning of the RPA even though, technically, the legislative instrument fits the RPA definition. The guidelines are not concerned with such legislative instruments.

1.5 Who drafts statutory rules?

A statutory rule does not have to be drafted by any particular person but it cannot be made unless –

- a draft of it has been sent to the Chief Parliamentary Counsel [CPC]
- the CPC has examined the draft
- such revisions as the CPC considers necessary or desirable have been made to the draft
- the statutory rule conforms to the draft as so examined and revised.

This is a requirement of the *Rules Publication Regulations 2008* [RPR], r.4.

The practical import of this requirement, and of certain other requirements involving the CPC and the State's statute book, legislative database and legislative style, is that statutory rules have to be drafted by OPC.

The only exceptions are rules of court and certain other legislative instruments made or approved by judges: RPR, r.5. Consistent with English constitutional tradition, the Tasmanian judiciary has an independent rule-making power [see, for example, *Supreme Court Civil Procedure Act 1932*, s.197 and *Criminal Code Act 1924*, s.12].

Even so, OPC often gives professional advice and assistance to the State's judges in drafting rules of court and, moreover, looks after the formatting and processing of such rules.

1.6 Drafting of other subordinate legislation

Except in special circumstances that are immaterial for the purposes of the guidelines, OPC is not required to advise on, carry out or assist in the drafting of any piece of proposed subordinate legislation that is not a statutory rule.

So, for instance, OPC does not draft –

- municipal by-laws
- instruments that Parliament has declared not to be statutory rules even though, technically, they fit the RPA definition of "statutory rule" [see chapter 1.4.2 and Schedule 2].

2. INSTRUCTIONS

2.1 Statutory rules are drafted only on instructions

A government department or other agency [**Agency**] wanting to have a statutory rule made should give OPC instructions to that effect [**instructions**].

This can be done by –

- the head of the Agency
- the head of one of its Divisions or other major work units
- an officer, such as a legislation manager or project manager, with relevant special authority.

OPC will ordinarily assume that –

- a person purporting to give it instructions on an Agency's behalf has authority to do so
- instructions signed by someone on a senior officer's behalf have that senior officer's approval
- a proposal for a new statutory rule enjoys Ministerial backing.

Accordingly, it is only on rare occasions that OPC will seek to confirm the legitimacy of its instructions.

OPC sometimes finds it necessary to initiate the drafting of a statutory rule and in such a case it will alert the responsible Agency.

2.2 What form should instructions take?

The instructions for a proposed statutory rule should be in writing.

OPC will not act on oral instructions unless there is a serious emergency and the matter has been cleared with the CPC.

The instructions should consist of –

- a covering memorandum
- a draft of the statutory rule
- any necessary supporting information.

The covering memorandum should –

- say what needs to be done and why it needs to be done
- alert OPC to any critical factors such as deadlines or political undertakings
- identify the legislative authority for the proposed statutory rule
- give the instructing officer's name and contact details
- give the instructing Agency's file reference.

The draft of the proposed statutory rule should –

- be set out in one clean document prepared expressly for the purpose
- be written in a clear fair-sized font (not less than 12 pt)
- conform, as far as possible, to the format of comparable statutory rules recently posted on the **Tasmanian Legislation Website**
- be in plain English
- use terminology that is consistent with that of the Act under which the statutory rule is to be made [the **enabling Act**]
- be consistent with the policy and machinery of the enabling Act.

The supporting information, if any, might be –

- a code, guideline or standard
- a technical specification
- a plan or diagram
- a legal opinion or policy document.

2.3 How to prepare effective instructions

An instructing Agency can facilitate the drafting of a statutory rule by giving OPC effective instructions. In Part 1 of Schedule 4 there is a list of some of the things that make for effective instructions.

By way of contrast, in Part 2 of Schedule 4 there is a list of some of the things that make for ineffective instructions. Needless to say, ineffective instructions will hinder the drafting of a statutory rule.

If there is one thing that instructions need to do above all else, they must explain why a fresh statutory rule is needed. For instance –

- for a completely new statutory rule – what policy outcome is contemplated?
- for an amending statutory rule – what needs fixing?

2.4 Who should instructions be given to?

The instructions for a statutory rule should be addressed to the CPC.

They may, however, be marked for the attention of a particular legislative drafter [**drafter**] if –

- they have already been discussed with that drafter and the drafter has indicated that they may be so marked
- the instructing Agency has other reasonable grounds for supposing that that drafter is likely to be dealing with the matter.

Even so, an Agency should not take it for granted that the instructions for a statutory rule will be assigned to any particular drafter; responsibility for managing the State's drafting resources rests with the CPC.

2.5 How should instructions be delivered?

The instructions to OPC for a statutory rule may be –

- emailed to: legislation@dpac.tas.gov.au
- faxed to: (03) 6233 3335
- posted to: GPO Box 1409, Hobart, 7001
- sent through the internal (State Service Courier) mail service
- dropped off by hand at: 11th Floor, AMP Building, 86 Collins Street, Hobart.

Further correspondence in the matter may be delivered the same way.

2.6 Advance warning of instructions not required

OPC does not need or, indeed, particularly welcome advance warning of instructions for a statutory rule.

Such warnings are disruptive and serve no worthwhile purpose. OPC cannot act until it has the instructions anyway and the warning will not, of itself, change OPC's legislative drafting priorities.

OPC prefers to set or reassess its legislative drafting priorities as and when instructions are received and it does not regard an advance telephone call, email or fax as necessarily entitling an Agency to go to the front of the queue.

2.7 Instructions need to be given in good time

An Agency wanting to have a statutory rule made must allow time for it to be drafted.

Unfortunately OPC is seldom able to say precisely how long this will take; each job is different and the drafting process is subject to many influences.

There are, however, a few guidelines that may be of use –

- for a small straightforward job, an Agency should aim to instruct OPC at least 25 clear working days – 5 working weeks – before the intended day of gazettal [see chapter 6.2]

typically, this might be a set of regulations with fewer than 10 provisions, a simple proclamation or a routine declaratory order

- for a slightly longer or more involved job, an Agency should aim to instruct OPC at least 35 clear working days – 7 working weeks – before the intended day of gazettal

typically, this might be a set of regulations comprising 20 or so provisions, a set of by-laws requiring some detailed technical schedules or a proclamation requiring multiple plans

- for a moderately long and involved job, an Agency should aim to instruct OPC at least 50 clear working days – 10 working weeks – before the intended day of gazettal

typically, this might be a set of rules or regulations likely to comprise 45 or so provisions; it would be unusual for an order, notice or proclamation to fall into this category

- for a longer or more involved job, even more time should be allowed: perhaps, as a rule of thumb, a base drafting time of 25 clear working days – 5 working weeks – together with a further 10 clear working days – 2 working weeks – for every 10 provisions.

Even with adequate notice, the drafting process can be affected by many factors, some of which are quite volatile or beyond OPC's control. For instance –

- OPC may not be able to act on the instructions straight away because it has other work of equal or higher priority on hand
- the instructions may require clarification
- the drafting may turn out to be harder than expected
- the instructions may throw up difficult formatting challenges
- the drafting may force a shift in policy
- expert legal or technical advice may be needed
- the Minister may direct that certain consultations take place
- key personnel may have to take leave of absence unexpectedly.

So an Agency should not issue instructions for a set of, say, 70+ new regulations and then expect them to be available in under a month. Regulations of that size might, if they deal with complex matters, take upwards of 6 months to draft. Similarly, a set of regulations likely to comprise, say, 150+ provisions might take upwards of 12 months to draft.

OPC sometimes finds that an Agency that has taken many months to work up a policy expects that a statutory rule to implement it can be prepared in just a few weeks and that, in reliance on that expectation, the government has made a public commitment to an early implementation date. OPC then has to work with urgency to ensure that the government's commitment is honoured even though the Agency itself, relatively free of pressure, has used up nearly all of the available lead time.

It is up to Agencies to make sufficient allowance in their timetables for the legislative drafting process.

OPC is usually able to give Agencies a rough indication of the time that a particular drafting task is likely to take.

2.8 Why is it important to give instructions in good time?

Depending on the circumstances, not allowing adequate time for the drafting of a statutory rule can cause –

- embarrassment for the government (if, say, a publicly announced policy implementation date has to be deferred)
- a legislative hiatus (if an activity that the government means to regulate remains unregulated or is, for a time, inadequately regulated)
- revenue shortfalls (if, say, budgeted fee increases are held up)
- expense and inconvenience for the public, industry or government (in that a statutory rule prepared in haste may have flaws that cause uncertainty or lead to litigation)
- administrative disruption (if, say, the matter needs to be coordinated with other jurisdictions, other Agencies are involved or the instructing Agency has to recalibrate implementation software)
- more administrative work and expense (if, say, there is a need for a remedial statutory rule or special **Gazette**)
- extra work and pressure for other participants in the statutory rule-making process (like the Executive Council Secretariat, Ministerial officers, the ERU and the Government Printer)
- flaws in the statute book (in that a statutory rule prepared in haste and under unreasonable pressure is unlikely to be as sound as one prepared on adequate notice)
- inconvenience for other Agencies (if, say, OPC is forced to suspend work on the drafting of other legislation)
- embarrassment for the instructing Agency (on account of any or any combination of the above)
- embarrassment for OPC (in that it may be unfairly blamed for delays, or for drafting errors that might have been avoided had it had more time).

2.9 Claiming priority

An instructing Agency is quite entitled to request OPC to give priority to the drafting of a statutory rule; each Agency has its own agenda to pursue.

OPC does its best to accommodate such requests but –

- it has limited resources and, invariably, a lot of work on hand
- it has to provide a legislative drafting service for the whole of government and other Agencies may be claiming equal or higher priority for other jobs
- its resources are stretched during peak workload periods such as during and in the lead-up to the last Parliamentary session of the year (usually September through to November)
- it does not always have much room to manoeuvre because –
 - the government will sometimes direct the CPC to give priority to particular drafting tasks
 - the government is usually more focused on the drafting of Bills for its legislative program than on statutory rules
 - critical Parliamentary sessional work, such as the preparation of amendments and the checking of vellums of Acts can *never* be put off
 - sometimes individual drafters must drop everything to attend to tasks of pressing importance.

OPC has to reassess drafting priorities frequently, sometimes even on a daily or half-daily basis. It follows that requests for drafting priority can help OPC to manage its workload, but only if the requests are *genuine*. Made routinely or without justification they are counterproductive; if everything is urgent then no advantage is gained by anyone.

An Agency that has claimed and been given drafting priority for a statutory rule is duty bound to follow through on that claim by ensuring that –

- its instructions are ready
- it gives OPC quick feedback on drafts
- key Agency personnel are made available
- the statutory rule is processed and made with dispatch.

2.10 Appointment of instructing officer

An Agency wanting to have a statutory rule made must appoint someone to instruct OPC [an **instructing officer**].

This will usually be an officer of the Agency but it could sometimes be an outside expert contracted for the purpose.

The instructing officer should be –

- a capable communicator
- conversant with the relevant policy
- conversant with the enabling Act and other relevant legislation
- invested with enough authority to give OPC quick and reasonably definitive responses on policy and drafting issues
- on duty, and prepared and permitted to devote adequate time to the matter commensurate with its priority.

Desirably, the instructing officer should also have –

- some experience in instructing OPC
- some awareness of what legislative drafting involves
- some familiarity with the administrative procedure that needs to be followed to make the statutory rule.

People with some legal or accounting background usually make good instructing officers.

Ideally, there should be only one instructing officer although OPC recognises that on occasion it may need to be instructed by a team. Small instructing teams can work well but OPC has generally found that taking instructions from large teams – drafting by committee – is inefficient.

Similarly, instructions that require direct input from more than one Agency can sometimes be problematic. In such cases it is best if the Agency that administers the enabling Act takes charge of the matter and then consults and clears things with the other Agencies as required.

It is not part of OPC's role to act as an inter-Agency mediator or go-between.

2.11 What does OPC do on receiving instructions?

When OPC receives the instructions for a statutory rule –

- they will be entered in OPC's records
- a new file will be raised for the matter and it will be given a provisional name [see chapter 3.2.2]
- a workflow will be set up for the matter on the Tasmanian Legislative Drafting and Automatic Consolidation System [**EnAct**] [see chapter 3.1.3]
- the CPC, having regard to individual workloads, drafting priorities and other factors, will assign the matter to a drafter [the **assigned drafter**]
- the CPC will decide whether the file should be costed [see chapter 3.4.5].

3. DRAFTING

3.1 Drafting: Preparing and settling drafts

3.1.1. Preliminary

On receiving the file for a statutory rule the assigned drafter should (on the same day) –

- read the instructions
- check that the instructions disclose a need for a statutory rule
- note any critical factors like deadlines or political undertakings
- note and confirm the file's costing status [see chapter 3.4.5].

Then, assuming that things are in order and that the matter is in fact authorised by the enabling Act, the assigned drafter's task is to draft the statutory rule in collaboration with the instructing officer.

As previously indicated [in chapters 2.1 and 2.2] this does not involve drafting the statutory rule from scratch. Strictly speaking, it only involves the examination and revision of the draft that the instructing Agency has forwarded in the instructions. However, for convenience, the term "drafting" is used to describe this part of the statutory rule-making process.

There is no set protocol for drafting statutory rules because they are so variable and different drafters and instructing officers work in different ways. Accordingly, much will depend on what the particular file demands and how those responsible for it approach the task. Drafters are accorded a considerable degree of professional freedom in this respect.

Despite the lack of a set protocol it is possible to make some general observations about the drafting process –

- if the instructions are adequate and the assigned drafter thinks it will be possible to work up a draft within a reasonable time, he or she may simply start working on the file and send the draft to the instructing officer for consideration; this will nearly always be under a covering memorandum that will alert the instructing officer to any regulatory review requirements and say whether the matter is being costed
- if the matter is not especially urgent and the assigned drafter is unable to start working on the file within a reasonable time, he or she should inform the instructing officer of that and indicate when work may be able to get under way
- if there is likely to be a long delay, the assigned drafter should inform the instructing officer of that as soon as practicable
- if the assigned drafter needs more information or clarification before drafting gets under way, he or she will contact the instructing officer for that purpose.

3.1.2 What does drafting involve?

Timing issues aside, the key feature of the drafting part of the statutory rule-making process is that the assigned drafter will prepare one or more drafts of the statutory rule and then revise these in consultation with the instructing officer until –

- they are satisfied that they have settled on a draft that will give legislative effect to the required policy
- the assigned drafter is satisfied that the draft so settled is in accordance with the law and Tasmania's legislative drafting style.

Both of those requirements must be met before the matter can advance.

Converting a policy into law, which is essentially what legislative drafting involves, is a dynamic yet frequently painstaking and time-consuming process.

OPC sometimes encounters instructing officers who believe that OPC is obliged to be a mere cipher as regards proposed policy and that legislative drafting is just an editing and formatting exercise. But that is not so!

To discharge its duty effectively, OPC must not only read and understand its instructions but also analyse them critically, even sometimes "testing them to destruction".

This in turn may mean that it has to question policy energetically and make policy recommendations, especially if it suspects that the legislative approach suggested by the instructing Agency is not the best way forward. Drafting tends to disclose any flaws a policy may have and, more often than not, will force some modification of it. It can even result in a policy being abandoned.

This is not to say, though, that the drafting process should be seen as an opportunity to cobble a policy together or to perfect a policy that has not been fully or sensibly developed in the first place.

The essential thing is that, in practice, OPC is not obliged to sign off on a proposed statutory rule for a policy that is incomplete, confused or otherwise defective. Nor is OPC obliged to uncritically implement any policy that uses excessive or fanciful jargon. If a policy can't be explained in straightforward language then, most probably, there is something wrong with it.

Just as the preparation of statutory rules obliges OPC to weigh into policy issues, instructing Agencies need to be active participants in the drafting process. Legislative drafting can only be carried out well if instructing Agencies vet drafts carefully and provide OPC with constructive feedback.

No draft of a statutory rule from OPC should ever be accepted uncritically and an instructing Agency that does not believe that a particular draft will give proper legislative effect to a proposed policy should unhesitatingly say so.

As suggested, the drafting process may sometimes require the assigned drafter to work closely with the instructing officer, particularly where technical matters are concerned. In such cases, the instructing officer may even need to take an active hand, through regular attendance at OPC, in working up a draft. In other cases, it may be possible for the assigned drafter and instructing officer to settle a draft without face-to-face contact.

Depending on the circumstances it is sometimes possible to settle a draft of a statutory rule after just one or two attempts and most routine proclamations, orders and notices should fall into this category. At other times, particularly for large or complex matters, upwards of 20 drafts may be needed. For small to medium jobs, fewer than 6 drafts is the norm.

The better the instructions, the faster the process will be.

3.1.3 The mechanics of drafting [EnAct]

Nowadays Tasmania uses a computerised legislative drafting system: EnAct.

With this system, proposed legislation is drafted directly on screen and put into Standard Generalized Markup Language [**SGML**]. This is an international formatting language that confers a formal structure on the draft and establishes the relationship between its various components.

This means that the drafter must assign a discrete electronic/legislative tag to each major component of the draft – the headings, clauses and schedules – and to many of the subsidiary components – like dates, definitions, penalties and cross-references – so that, once made, the legislation –

- can be posted onto the Tasmanian legislative database [see chapter 6.5] and accessed through the Tasmanian Legislation Website
- will support the automatic consolidation, historical tracking, point-in-time searching and other features of that website
- is captured in a format that is not dependent on the future availability of any specific technology.

EnAct yields dividends at the end of the legislative drafting process but imposes a cost at its beginning. This is because drafters must attend to the system's formatting requirements as they go.

This is a meticulous and exacting task that takes time. To capture a single external legislative cross-reference, so as to ensure that it will be hyperlinked for the Tasmanian Legislation Website, the drafter must take more than 10 discrete keying actions.

Consequently, in some respects, the initial phase of the legislative drafting process is now slower than in the days of pen and ink.

A further challenge with EnAct is that it will not allow a drafter to finalise a draft of proposed legislation until it has been saved in its entirety as an SGML document. If, in attempting that, the system has difficulty processing a particular electronic command it will generate what is known as an SGML error. Correctly identifying and fixing such errors can be a *very* time-consuming and painstaking task indeed.

Of course, once a draft of entirely new legislation has been captured on EnAct it will usually be relatively easy to produce further versions of it because, in the absence of major changes, the drafter can build on or rework the "electronic platform" so captured.

For amending legislation, the great advantage of EnAct is that the required changes can be marked up straight onto an electronic copy of the principal legislation and, if that is done properly, a draft of the amending legislation can be automatically generated within seconds. The system itself checks that the amendments can be correctly incorporated.

Moreover, OPC and the instructing Agency can see from the mark-up what the amendments will look like *in situ* – eg text being omitted will be struck through, text being added will be underlined.

Sometimes, however, automatically generated amending legislation contains odd expressions and formatting – ie expressions and formatting that one would not expect to find if the same amendments were drafted by hand.

Given the State's large investment in EnAct, however, OPC's default policy is to accept EnAct-generated drafts regardless of their idiosyncrasies. As long as proposed amendments are properly entered by the drafter, the system will process them correctly even though its printed "legislative commands" may appear a little odd, at times even vague, to the eye.

Automatically generated drafts can be overridden manually but this takes time and sustained effort. Moreover, it is a technical task of some delicacy that often needs expert input from OPC's legislation systems officers.

OPC has also found that overriding EnAct's automatically generated wording or formatting poses a risk to the integrity of the drafting process.

Accordingly, OPC will only interfere with EnAct-generated drafts in exceptional circumstances.

3.1.4 Formatting options for drafts

Working in EnAct [see chapter 3.1.3] enables a drafter to format a draft statutory rule in one of two ways.

One of these, the *camera-ready format*, produces a clean unannotated document that is useful for briefings and consultations. It is called the camera-ready format because once the draft has been settled it can be transmitted to the Government Printer electronically, and printed, without further intervention.

The other format is called the *draft format*. This produces a document that is useful for day-to-day working purposes because it will have a version number – which is helpful in tracking the various iterations of the draft – and it can also contain working notes. These working notes can be –

- client notes for the instructing Agency's attention
- private notes for use by the drafter and other OPC staff.

Client notes are particularly useful because they relieve OPC of the need to write interrogatory or explanatory covering letters for the draft; questions and comments can be inserted directly "alongside" the legislative text.

The drafter has the option of including or omitting working notes, or working notes of either category, at any stage of the drafting process.

A draft statutory rule that has been settled and is ready to be made will always be sent to the instructing Agency in the clean camera-ready format.

3.1.5 Quality of working drafts

Because EnAct requires drafters to key in their own work [see chapter 3.1.3] working drafts of statutory rules may contain minor typographical or formatting errors.

Such errors can be eliminated, but only if the drafts are run out and proofread and the affected provisions are correctly re-entered.

However, trying to perfect each and every working draft of a statutory rule would –

- take a lot of time
- yield, in terms of the effort expended, a meagre dividend
- greatly reduce OPC's output.

In the discharge of its drafting responsibilities OPC tries to ensure that government legislation is prepared and settled as speedily as possible. Accordingly, it is prepared to tolerate minor blemishes in EnAct-generated working drafts on the understanding that those blemishes will be detected and fixed later on in the process [see chapters 4.1 and 4.2].

Accordingly, there is no need for an instructing Agency to point out minor typographical or formatting errors in a working draft of a statutory rule unless, say, it wants a perfected, proofread, version for public consultation purposes [see chapter 3.4.4].

3.1.6 How can instructing Agency facilitate drafting process?

In addition to the matters mentioned in Schedule 4 with regard to instructions, an instructing Agency can do a number of things to facilitate the drafting of a statutory rule. Some of these are listed in Part 1 of Schedule 5.

By way of contrast, some of the things that commonly hinder the drafting process are listed in Part 2 of Schedule 5. It helps OPC if an instructing Agency can avoid doing too many of the things mentioned in that list.

3.1.7 Duration of drafting process [Overview]

By way of drawing together some of the previous advice, the duration of the drafting process for a statutory rule will depend on such factors as –

- the quality of the instructions (including the Agency's own draft)
- the size and complexity of the job (legally and technically)
- OPC's overall workload and drafting priorities (which may change frequently)
- the assigned drafter's own workload and drafting priorities (which may also change frequently)
- whether there are any critical factors like deadlines or political undertakings
- whether any changes are made to the policy
- the extent of the instructing officer's authority
- the time it takes the instructing Agency to turn drafts around.

3.2 Drafting: Some drafting and legal considerations

3.2.1 Structure of statutory rules, &c.

For the purposes of preparing instructions and settling drafts, instructing Agencies should note that statutory rules are subdivided as follows:

- *Regulations:*
 - 1. regulation
 - (1) subregulation
 - (a) paragraph
 - (i) subparagraph
- *Rules:*
 - 1. rule
 - (1) subrule
 - (a) paragraph
 - (i) subparagraph
- *By-laws, Orders and Notices:*
 - 1. clause
 - (1) subclause
 - (a) paragraph
 - (i) subparagraph

Proclamations, by their nature, rarely contain subcomponents other than paragraphs and subparagraphs.

OPC does not favour the division of subparagraphs unless it is absolutely unavoidable. On the rare occasions when such division is required, the resulting components are called sub-subparagraphs and they are "numbered" (A), (B), (C) and so on. Any further division should be avoided.

The headings to the substantive individual provisions of a statutory rule are not part of the law: *Acts Interpretation Act 1931* [AIA], s.6(4).

In most statutory rules, provisions of a like kind can, as in an Act, be grouped into Parts, Divisions and Subdivisions as appropriate. The headings to these groupings are part of the law: AIA, s.6(2).

In a statutory rule, a provision with an Arabic number should be self-contained and comprise a single grammatical sentence.

A statutory rule may contain one or more schedules. If so, they should be numbered sequentially. A schedule may be subdivided into clauses, subclauses, paragraphs and subparagraphs, or, where appropriate, it may contain one or more items which may, in turn, employ paragraphs. Schedules and their headings are part of the law: AIA, s.6(3).

If a statutory rule is to contain forms, they will almost invariably be set out in a schedule and the forms themselves will be numbered sequentially: Form 1, Form 2, Form 3 and so on.

If it has them at all –

- the "legislative machinery" provisions of a statutory rule – short title, commencement, interpretation, application – will be placed at the very front of the statutory rule
- the schedules to a statutory rule will be placed at the end of the statutory rule.

Note that Tasmania generally uses forward (major to minor) referencing when citing legislative provisions – eg section 6(1), subsection (3)(a). It does not, as in some other jurisdictions, use reverse referencing – eg subsection 6(1), paragraph 3(a). If reference needs to be made specifically to a minor component it must be set out in full – eg paragraph (a) of section 9.

A bare reference in a statutory rule to a Part, Division, schedule, form or other provision is, in the absence of a contrary indication, a reference to a provision within the statutory rule itself: AIA, s.7A(1). The same rule applies to the internal references of any provision or schedule: AIA, s.7A(2) & (3).

3.2.2 Naming of statutory rules

For citation purposes, statutory rules other than proclamations are given a short title.

A statutory rule may be cited in various ways [see RPA, s.6] but the short title is the most common.

Certain drafting conventions govern the naming of statutory rules.

A statutory rule's short title is essentially determined by the year in which it is made and the title of the enabling Act. Thus regulations made under a new *Boating Act 2007*, if made in 2008, would most likely be named the *Boating Regulations 2008*.

However, a statutory rule that deals exclusively or predominantly with a particular matter might be given a distinctive short title to indicate that it has specialised application – eg *Boating (Fees) Regulations 2008*, *Boating (Infringement Notice) Regulations 2008*.

It might then be appropriate to name the main regulations as the *Boating (General) Regulations 2008*.

A statutory rule that deals with an assortment of matters might be given a short title to indicate its scope – eg *Boating (Miscellaneous) Regulations 2008*.

If a statutory rule is an *amending* statutory rule, its status will almost invariably be signified in its short title – eg *Boating Amendment Regulations 2009*.

If several *amending* statutory rules are made under the same Act in the same year, they can be differentiated numerically – eg *Boating Amendment Regulations (No.2) 2009*, *Boating Amendment Regulations (No. 3) 2009* – or they can be differentiated according to their main subject matter – eg *Boating Amendment (Fees) Regulations 2009*, *Boating Amendment (Safety Equipment) Regulations 2009*.

Because of the drafting conventions and the CPC's overall responsibilities for the statute book, the naming of new statutory rules is a matter for OPC. However, instructing Agencies are free to make recommendations.

Instructing Agencies should note, however, that OPC takes a conservative and neutral approach to the naming of statutory rules. So, while a statutory rule can be given a distinctive short title to distinguish it from other statutory rules, short titles are not used as a vehicle for sloganeering – eg *Boating (Making our Waterways Safer for Children to Enjoy) Regulations 2008*.

3.2.3 Commencement of statutory rules

General rule

A statutory rule takes effect on the day it specifies as its commencement day and from the very beginning of that day: AIA, s.9(5).

If a commencement day is not specified, a statutory rule takes effect on the day on which notification of its making is given in the *Gazette*: AIA, ss.38A(2) & 47(3). There are some limited exceptions to this: eg *Subordinate Legislation Act 1992* [SLA], s.12.

Note that OPC's default drafting policy is that a statutory rule that proposes to set or increase a fee [see chapter 3.2.8] will be drafted to take effect *at least* 7 days after gazettal. This ensures that the public will have some notice of the fee or fee increase.

Anticipatory operation

A statutory rule can be anticipatory in character: AIA, s11(1).

In other words, a statutory rule may be made under an uncommenced provision of an Act if it is necessary or expedient to do so to enable the Act or any of its provisions to operate effectively when or after the Act, or those provisions, commence.

However –

- there must be power to make the statutory rule anyway
- there must not be anything in the Act that negatives the operation of the AIA, s.11
- the anticipatory statutory rule cannot take effect until the provision under which it is made commences, or later.

Similar principles apply to the making of statutory rules under Acts being amended by other (uncommenced) Acts: AIA, s11(2).

In broad terms, this means that if a new Act doesn't commence on Royal Assent –

- if required, a statutory rule can be made to trigger that commencement
- other statutory rules can be put in place in readiness for that commencement.

Retrospective operation

There is a general presumption that legislation cannot have retrospective operation. To displace that presumption, particularly for a statutory rule, very clear evidence of Parliamentary intention is needed.

However, by implication, section 47 of the AIA allows a regulation, rule or by-law to have retrospective effect if –

- it would not thereby prejudice a right or privilege that a person (other than the Crown in right of the State or one of its Agencies) has at the date of gazettal
- it would not thereby impose a liability or obligation on a person (other than the Crown in right of the State or any of its Agencies) in respect of something done or not done on or before the date of gazettal.

With some exceptions, section 38A of that Act allows a proclamation, order-in-council or other instrument of a legislative character to have retrospective effect on the same basis. The exceptions are those proclamations and instruments that fix the commencement day for Acts or provisions of Acts.

In other words, a statutory rule may be able to have retrospective operation if it thereby confers a benefit on, or doesn't disadvantage, someone other than the government.

3.2.4 Application of statutory rules

As a matter of public policy, OPC's starting point in drafting a statutory rule is that the instructing Agency would expect it to have general and uniform effect: that it is meant to apply to all parts of the State and to all Tasmanians uniformly.

However, strictly, there is nothing to prevent a statutory rule from having differential or limited application.

In other words, a statutory rule can –

- have general application (set one rule for the whole of Tasmania, for all Tasmanians, for all circumstances)
- have differential application (set different rules for different groups of Tasmanians or for different circumstances, whether as to time, place or otherwise)
- have limited application (set special rules for, say, a limited group of Tasmanians or limited circumstances).

So, for instance, the prescribed penalty for a statutory offence committed in one place may be higher than if the same offence is committed elsewhere.

As a precaution, OPC will generally try to draft primary legislation in a way that clearly allows for the possibility that a statutory rule made under it may need to have differential or limited application.

3.2.5 Interpretation of statutory rules

An expression that is defined in an Act for the purposes of the Act has the same meaning in any statutory rules made under that Act. As a general rule, the definition cannot be modified, qualified, negated or replicated by those statutory rules.

This does not prevent other expressions being defined in a statutory rule for the purposes of the statutory rule provided the definition is not repugnant to the language of the Act.

Although the definitions in a statutory rule are certainly part of the law, they are essentially ancillary in nature and should not really be regarded as an operative component of the statutory rule. In other words, an instructing Agency should not try to regulate anything by means of a definition.

A statutory rule should contain as few definitions as possible.

It is a safe rule when drafting a statutory rule to consider and insert definitions last, according to strict need, rather than first, according to expectation.

Note that the provisions of the AIA have exactly the same application to regulations, rules and by-laws as they have to Acts. In this connection, the attention of instructing Agencies is drawn to sections 24 to 31 of that Act and to sections 41 to 46 of that Act.

3.2.6 Discretions

OPC's drafting policy is that a statutory rule should not authorise a person to exercise discretions on anything other than very minor administrative matters unless there is clear power for that in the enabling Act. This avoids any argument as to whether the exercise of the "delegated discretions" is valid or invalid.

3.2.7 Exemptions

A statutory rule cannot be used as a means of exempting a person or circumstance from a provision of an Act unless that Act, or some other Act, expressly authorises the statutory rule to do so.

3.2.8 Fees and the GST

A statutory fee is essentially an impost to cover the government's costs of discharging an administrative function for a person in relation to some statutory obligation or privilege as in, say, processing a licence application, issuing a permit, carrying out an inspection or furnishing documentation.

A statutory rule can prescribe a fee if the enabling Act or another Act expressly or impliedly authorises it to do so. However, the fee cannot be more than is reasonably necessary to cover costs unless the Act expressly says so. Otherwise the fee could be challenged and overturned as an unlawful tax.

As previously indicated [in chapter 3.2.3] OPC's default drafting policy is to give the public notice of a new fee or fee increase.

A statutory rule that will be setting or adjusting a fee must express the fee in fee units so that it can be indexed: *Fee Units Act 1997* [FUA], s.4. The only exception to this is if the fee is exempt from that Act: FUA, s.9.

The instructions for a new fee should say whether or not it is required to have the Goods and Services Tax [GST] applied to it. In other words, will the fee be subject to the Commonwealth GST legislation or will it be GST exempt?

The GST does apply to the supply of most government goods and services but the Commonwealth Treasurer may issue a determination exempting certain government fees from the GST. Such fees have generally been so exempted if they serve a predominantly regulatory purpose – eg vehicle registration charges, driving and fishing licence fees.

It is not up to OPC to ascertain or confirm the GST status of a proposed fee. In the absence of instructions OPC will assume that the fee will be subject to the GST and, consistently with ACCC guidelines, will express the fee as being GST inclusive.

Note that the FUA definition of "fee" encapsulates "charge". So care should be taken when prescribing a charge (like a deposit, bond or guarantee) that does not have the legal character of a fee. If the charge is meant to be fixed, rather than indexed, and that intention is not manifest from the enabling Act, then, to avoid any argument or confusion, the instructing Agency should seek to have the charge exempted from the application of the FUA.

Advice on government fees and the GST can be obtained from the Department of Treasury and Finance.

To avoid confusion or disputes over indexation, a statutory rule that is to provide for a government subsidy or other payment to any person should not characterise that subsidy or payment as a fee.

Despite their indexation, statutory fees should be kept under review and it does not always follow that when a statutory rule is remade the fees it prescribes should be increased. Sometimes, technological advances reduce government costs in real terms and enable fees to be reduced.

Note that statutory fees should not be confused with fees for services. The Tasmanian government, and any of its Agencies having a discrete legal identity, can contract to provide services and in so doing are not restricted as to what is charged.

3.2.9 Offences and penalties

A statutory rule can create an offence but, broadly speaking, only if it is a regulation, rule or by-law.

It would be most unusual for a notice, order or proclamation to create an offence because such instruments are usually of a purely declaratory nature. An offence of that kind would need to be clearly sanctioned by the enabling Act and, moreover, critical supporting mechanisms like section 37 of the AIA would need to be expressly adopted.

In the case of regulations, rules and by-laws there is, in addition to what the enabling Act may provide, a standing general power that enables them to prescribe offences: AIA, s.47(1). Even so, that is not an open-ended power; a regulation creating an offence would still have to be authorised by – *intra vires* – the enabling Act in its own right.

Monetary penalties for statutory offences are almost invariably expressed in penalty units: *Penalty Units and Other Penalties Act 1997*. The value of a penalty unit was originally fixed at \$100 but on 24 October 2007 this was increased to \$120 and provision was made for the amount to be indexed for financial years following 2007/8.

The penalty for an offence in a statutory rule can *never* exceed the limit set by the enabling Act. If no limit is set, the maximum penalty that can be prescribed for the offence is 20 penalty units (and a daily penalty of 5 penalty units if it is on-going): AIA, s.47(1)(e).

There are many issues to consider in drafting a statutory offence. These include the nature of the wrongful act or omission, the identity of the offender, the requisite mental element, potential third-party liabilities, the nature, scale and proportionality of the penalties, jurisdictional issues, the onus of proof and possible defences, the time for instituting proceedings and possible alternative sanctions. These issues will be carefully considered in the course of the drafting process.

There should be no doubt about whether the breach of a statutory obligation constitutes an offence. Accordingly, statutory offences are drafted strictly on a case-by-case basis and they are clearly identified. To avoid ambiguity, omnibus offences and penalties are no longer used in Tasmanian legislation.

In instructing OPC on more serious offences, Agencies need to be generally aware of the jurisdictional thresholds in the AIA, s.38. Specifically, is the offence to be created as a summary offence or an indictable offence?

3.2.10 Explanatory notes

At the end of every statutory rule there has to be a short explanatory note.

The note is not part of the law but it serves the *Gazette* notification requirements of the RPA and its regulations. Essentially, a notice of the making of a statutory rule must contain a statement indicating its general purport or effect: RPR, r.7(1)

Explanatory notes are drafted by OPC but instructing Agencies should always check their accuracy.

Explanatory notes are of some consequence because –

- they are usually the first public indication of what particular statutory rules are about
- for statutory rules made by the Executive Council, the wording of the Executive Council minutes must mirror that of the notes.

It follows that explanatory notes must be clear, candid and informative. They must, of course, be succinct but they should not take the form of a synopsis.

To see the explanatory note for any statutory rule on the Tasmanian Legislation Website, it is necessary to go to the *sessional* version of the statutory rule. That version can be accessed through the website's advanced search facility.

3.3 Drafting: Some technical considerations

3.3.1 Provision of images for plans, forms, &c.

If a statutory rule will need to contain a plan, form, diagram or other image, the instructing Agency must provide OPC with a copy of that image.

This can be a hard copy (for scanning), an electronic copy, or both.

Note, however, that providing OPC with an image for a form does not mean that the form will necessarily appear that way in the statutory rule as finally settled. A form may require just as much editing as legislative text [see chapter 3.3.3].

A copy of a plan or form set out in a statutory rule does not have to be the same size as the original; it can be reduced in size as long as the image remains clear.

3.3.2 Plans must be registered in Central Plan Register

Except in very special circumstances, OPC will *not* include a plan in a statutory rule unless the plan has been registered in the Central Plan Register.

This policy, which was put in place some years ago on the advice of the Solicitor-General, ensures that members of the public who may be affected by or interested in the statutory rule can readily check the plan. This is doubly important if the plan is linked to an offence.

The Central Plan Register is established and maintained under the *Survey Co-ordination Act 1944*.

3.3.3 Prescribed forms

OPC's drafting policy is, as far as possible, to avoid prescribing forms in delegated legislation.

This is because –

- government forms usually need to be updated frequently
- it is undesirable to leave obsolete forms on the Tasmanian Legislation Website
- forms are one of the hardest things to format on EnAct (usually requiring a high degree of manual intervention).

Not only do prescribed forms hinder administrative flexibility, but keeping them current also involves time, trouble and expense.

So if there is no legal necessity to provide for prescribed forms (as there may be in, say, the case of a search warrant or breathalyser procedure) OPC will generally try to draft primary legislation in a way that allows for a degree of administrative discretion and flexibility with regard to forms.

3.3.4 Spelling

OPC's policy is to follow the spelling recommendations of the Macquarie Dictionary and to follow the first such recommendation if there is a choice. There may, however, be odd occasions when a different spelling may need to be used.

For instance –

- when an external agreement, code or guideline is being put into a Schedule
- when reference is being made to an organisation (like the World Trade Organization) whose name has the different spelling.

3.4 Drafting: Some procedural considerations

3.4.1 Instructing Agency to deal only with assigned drafter

Once an Agency knows that its instructions for a statutory rule have been assigned to a particular drafter, it should, as regards that matter, deal only with that drafter.

The instructing Agency should *not* directly approach other drafters about the matter and under no circumstances should it try to issue directions to, make demands of or seek legislative drafting or other legal advice from OPC's administrative staff.

That would be unsafe and improper because –

- given the way EnAct works, experience indicates that the approach could result in a serious error or misunderstanding
- OPC's administrative staff are not expected or, indeed, legally permitted to provide legal advice or exercise legislative drafting responsibilities
- drafters exercise a high degree of individual control over their own files so, if asked to advise on the files of others, there is generally some professional uneasiness.

If the assigned drafter is for any reason unavailable when the instructing Agency needs some advice or assistance on the file, it should contact the CPC. If the need is genuine and urgent it may be possible to arrange for another legislative drafter to help the instructing Agency.

3.4.2 Communicating with assigned drafter, &c.

While a statutory rule is being drafted, the instructing officer and assigned drafter will generally communicate by such methods as they from time to time agree on or as circumstances require [see chapter 2.5].

However, all written correspondence to the assigned drafter should be directed through OPC so that it can be seen by the CPC, recorded and properly actioned. It is especially important that emails to the assigned drafter are directed through OPC's central address: Legislation@dpac.tas.gov.au

This will ensure that the correspondence does not have to be double-handled, with a corresponding loss of time and efficiency, and that critical correspondence is not overlooked if the assigned drafter is not on duty.

Nowadays OPC often sends out draft legislation and related correspondence by email, with hard copy only being provided on request. However, there is no rule on this; different drafters work in different ways; some still prefer to make frequent or occasional use of hard copy.

3.4.3 Formatting restriction for emailed drafts

Instructing Agencies should note that OPC does not release electronic drafts of statutory rules except in pdf format.

This policy has been put in place to guard the integrity of the legislative drafting process, the aim being to stop modified and unauthorised draft statutory rules being put into government circulation or, worse, released into the public arena.

Drafters who wish to send out a draft statutory rule electronically in rtf or any other format must, *on each and every occasion*, obtain the express permission of the CPC to do so.

Such permission is rarely given.

3.4.4 Confidentiality

OPC treats all draft legislation as prima facie privileged and confidential to the Crown. Accordingly, it will not directly release a draft statutory rule to anyone but the instructing Agency unless, say –

- it has been directed to do so by Cabinet or the responsible Minister
- it has been asked to do so by the Head of the instructing Agency
- it needs to obtain expert government advice to advance its work – eg an opinion from the Solicitor-General.

Draft statutory rules are, of course, sometimes circulated within government or publicly released for regulatory impact, consultative or other purposes, but responsibility for arranging that lies with the instructing Agency. Even so, an Agency that proposes to circulate a draft statutory rule outside government circles would be well advised to liaise with OPC beforehand.

EnAct allows for various kinds of legislative formatting [see chapter 3.1.4] and, moreover, it automatically endorses each draft as "confidential".

Accordingly, draft statutory rules should only be publicly released if –

- they are in a reasonably clean and polished form
- they contain any necessary warnings as to their draft status
- the confidentiality endorsement has been removed.

This will prevent public misunderstanding. In particular, rough notated working drafts should not be posted on official government websites.

3.4.5 Costing

Although legislative drafting is a core government function, OPC is required to recover the cost of some drafting services.

The CPC decides whether a charge should be imposed for a particular drafting service by reference to certain cost recovery guidelines. The assigned drafter is required to recheck that decision on being given the file.

OPC has to recover the full cost of drafting a statutory rule if –

- the drafting is for an off-budget Agency or statutory authority
- the drafting involves a matter that will produce a direct financial return to the State
- external funding is available.

Further, OPC has to recover part of the cost of drafting a statutory rule if –

- the drafting involves a major review or rewrite of the statutory rule (or major parts of the statutory rule)
- there is inadequate lead time.

If a charge is to be imposed for drafting a statutory rule –

- the assigned drafter should notify the instructing Agency (usually by means of the covering letter to the first draft)
- the assigned drafter and other OPC staff who work on the file will record the time spent on the task in daily costing sheets
- when the task is finished, OPC will tally up the cost and render its account.

Note that a failure to notify an Agency of a drafting charge (through clerical oversight, for example) does not mean that the charge can be waived.

Given the cost recovery guidelines, an instructing Agency should do everything it reasonably can to facilitate the drafting process and minimise its duration [see Schedules 4 and 5].

Conversely, an instructing Agency that hinders the drafting process may incur extra expense.

Similar principles apply to costing by OPC as to costing by legal practitioners in private practice. Partial costing is calculated according to an hourly rate by reference to the award or contract salary of the assigned drafter or administrative officer. Full cost recovery is calculated at an even higher rate because OPC's overall office costs on the file are factored in.

Costing ceases once a draft of a draft statutory rule has been settled and all quality-assurance checks have been completed. In other words, OPC does not charge for the post-execution processing or for minor incidental attendances like procedural enquiries.

3.4.6 Role of Solicitor-General

The drafting of any legislation necessarily requires the drafter to correctly identify, work through and solve the relevant legal issues.

But sometimes a legal issue of special difficulty arises or the instructing Agency and OPC may disagree.

When that happens, it may be necessary or expedient to seek an opinion from the Solicitor-General: the Crown's chief legal adviser.

Usually it is the instructing Agency's job to seek that opinion. When so doing, though, it is critical that the issue is correctly identified and that the correct questions are asked. Otherwise the Solicitor-General's time is wasted and the issue is not resolved.

Once obtained, the Solicitor-General's opinion is authoritative; it cannot be undone or ignored if the instructing Agency finds it inconvenient. In effect, the Solicitor-General's opinion becomes the government's stance on the issue unless and until a court of competent jurisdiction holds to the contrary or Cabinet gives a lawful contrary direction.

An Agency that provides OPC with a Solicitor-General's written opinion touching on a proposed statutory rule should attach a copy of the request for that opinion. Otherwise it may be hard for OPC to understand the opinion. Similarly, if the Solicitor-General gives an Agency oral advice, it is critical that the advice is relayed to OPC faithfully.

Before an Agency provides OPC or any other person with a copy of a Solicitor-General's opinion it should, as a courtesy and precaution, check that the Solicitor-General has no objection to it so doing.

The Solicitor-General does not charge Agencies for legal advice but, even so, instructing officers also need to be aware that there is a general government policy relating to the procurement of legal advice [see Treasurer's Instruction 1104 of 21 November 2005: "*Procurement of Legal Services*" (accessible through the Department of Treasury and Finance website)].

Moreover, many Agencies have strict internal controls on the commissioning of legal advice. So instructing officers should not approach the Solicitor-General without first checking on the relevant protocol; it may be necessary to clear the approach with, say, the Head of the Agency.

OPC sometimes finds it necessary to seek the Solicitor-General's advice independently on general or particular drafting issues. However, if the request could impact on a draft in progress, the assigned drafter is expected to keep the instructing Agency informed as a matter of courtesy.

Instructing Agencies should note that whilst OPC defers to the advice of the Solicitor-General on legal questions it is not bound to do so on matters of a purely drafting nature.

OPC operates, within the Premier's Department, as a discrete Crown legal office and it is not the job of the Solicitor-General to generally vet OPC's work or to review technical drafting decisions that have not found favour with instructing Agencies.

3.4.7 Complaints

When OPC receives instructions for a statutory rule it will try to process those instructions and settle a draft as speedily and as efficiently as time, workload, priorities and other circumstances allow. Drafters are expected at all times to be professional, courteous and open in their dealings with instructing Agencies and instructing officers.

If an instructing Agency is dissatisfied with how a matter is progressing it should raise its concerns in the first instance with the assigned drafter. If after that the Agency still has concerns it may contact the CPC.

Note, however, that the CPC will not entertain a complaint about a drafter merely because the drafter has given another Agency's work more time and attention consistent with the priorities of the government's legislative program or the drafter has, in good faith, made a professional judgment that is not to an instructing Agency's liking.

3.5 Drafting: Agency approval

Once an instructing Agency is satisfied with the draft of a proposed statutory rule, it must give OPC written notice to that effect [notice of approval].

The notice of approval may be given by any of the methods referred to in chapter 2.5.

OPC cannot and will not release the draft for execution by the rule-making authority until it has the notice of approval to hand.

The notice of approval is crucial because it signifies that the instructing Agency is, in effect, accepting that the draft will give legislative effect to the relevant policy. By giving OPC the notice of approval, the instructing Agency assumes responsibility for the proposed statutory rule and warrants that it is content for the draft to be put into final form for submission to the rule-making authority.

The notice of approval should be given to OPC by a senior executive officer of the instructing Agency [see chapter 2.1] or by the instructing officer. If given by the instructing officer, OPC will assume that that officer has sufficient authority to approve the draft even if he or she does not hold a senior executive position within the instructing Agency.

In other words, in the absence of extraordinary circumstances, OPC will accept the purported approval of a statutory rule as genuine and binding.

4. FINAL PREPARATION

4.1 Quality-assurance checking

Once the draft of a proposed statutory rule has been settled, the assigned drafter will have it checked by OPC's quality-assurance officer.

This quality-assurance [QA] check is compulsory and the instructing Agency will need to make allowance for it in its timetable.

The idea of the QA check is to have the settled draft independently vetted to ensure that as far as possible it is free of formatting, grammatical, syntactical and other blemishes.

The QA officer will also check that the settled draft generally conforms to the approved style for Tasmanian legislation and that the assigned drafter has followed any relevant "in-house" drafting instructions.

The QA officer will also check that, regardless of EnAct generated wording, any proposed amendments have been "formulated" in a sensible and intelligible way and that there are no competing prospective amendments.

However, the QA check will only be a safeguard; it will not relieve the assigned drafter of responsibility for the draft.

The time needed for the QA check will depend on such factors as the length and complexity of the draft and the amount of work that the QA officer has on hand at the time. Checking priorities can fluctuate daily, even hourly, and, at certain times, the QA officer may have to give priority to the checking of Bills. This is particularly so in the lead up to, and during, a Parliamentary session.

Nevertheless, large drafts of proposed statutory rules can usually be QA-checked inside one working week and, provided there is not too much competing work, small routine jobs like proclamations and declaratory orders can usually be QA-checked in an hour or so.

An Agency that wishes to know how long a QA check is likely to take should consult the assigned drafter; it should *not* directly approach the QA officer.

4.2 What happens after quality-assurance checking?

Once the QA officer has checked the settled draft of a proposed statutory rule, it will be given back to the assigned drafter together with a completed checking report.

If the draft is given the "all-clear", the assigned drafter can proceed to the next stage of the drafting process [see chapter 4.3].

If the QA check throws up any concerns, the QA officer will note them on the draft. It is then up to the assigned drafter to evaluate each of those concerns and exercise his or her professional judgment, firstly, as to whether the draft needs to be changed in any way and, secondly, whether any such change needs to be cleared with the instructing Agency.

If the QA check only identifies the need for a few minor corrections that do not affect the meaning of the draft, the assigned drafter is likely to make those corrections without further reference to the instructing Agency.

For anything more serious, the assigned drafter may have to consult the instructing officer. Depending on the circumstances, it may be possible to settle the necessary changes informally, perhaps by telephone, or it may be necessary to prepare a revised, corrected, draft of the proposed statutory rule.

It is important that instructing Agencies understand that, because of the QA process, the draft that they sign off on will not necessarily be *exactly* the same as the draft that finally emerges from OPC.

4.3 Final copies

Once a draft of a proposed statutory rule has been settled and QA checked, OPC will, if everything is in order, give the instructing Agency –

- final copies of the statutory rule – usually 5 – for submission to the rule-making authority and associated administrative purposes
- a CPC advice under section 7 of the SLA or, if that Act does not apply to the statutory rule, a corresponding advice of general application [see chapter 4.4]
- a draft Executive Council minute (if the statutory rule will be made by the Executive Council)
- a covering memorandum containing some instructions on how to proceed and, if applicable, some warnings about related requirements such as SLA certificates and Parliamentary tabling.

The final copies of the statutory rule will always be in a camera-ready format [see chapter 3.1.4].

Apart from the insertion of any necessary signatures, seals or dates on execution, the final copies of the statutory rule must *not* be altered in any way.

4.4 Chief Parliamentary Counsel's advice

The CPC's advice [see chapter 4.3] is formal advice to the effect that a proposed statutory rule –

- is generally within the power of the enabling Act
- does not, without clear authority, provide for anything contentious like subdelegations, taxes, imprisonable offences or retrospective operation
- is drafted to an acceptable standard.

For instruments that the SLA applies to, the advice is mandatory and is given under section 7(2) of that Act. That will be so if the instrument comes within the definition of "subordinate legislation" in section 3(1) of the SLA.

The SLA definition of "subordinate legislation" is reproduced in Schedule 3.

For instruments that the SLA does not apply to – generally proclamations, orders and notices – the CPC is not obliged to give the advice but will do so in practice.

This is done largely at the behest of the Executive Council because most of those instruments still need to be made, confirmed or approved by the Governor and the advice reassures the Executive Council that *prima facie* the draft meets certain minimum standards. The advice also serves as a useful internal control for OPC.

The advice is never given lightly: only on the signed written recommendation of the assigned drafter and after the CPC has done his own check.

The advice is an important document in the statutory rule-making process, especially for statutory rules that the SLA applies to [see sections 7, 8 and 9 of that Act]. It should therefore be safeguarded.

If the advice is lost or damaged, a replacement advice will be issued but *not* as a matter of course and *not* instantly. Usually a replacement is issued only after due inquiry has been made into the fate of the original.

A replacement advice, if issued, will be endorsed to show that it has that status.

A CPC advice is only good for the specific legislative instrument it is given for. So, if that instrument needs a last-minute revision to reflect, say, a sudden change in the State's administrative arrangements –

- the advice will have no validity as regards the revised instrument
- the advice should be returned to OPC or destroyed
- the CPC, on being satisfied that the advice has been properly disposed of, will consider giving a fresh advice for the instrument as revised.

4.5 Regulatory oversight

An Agency that is involved in the statutory rule-making process needs to be generally aware of the government's legislative review program [LRP].

More specifically, if the SLA applies to a proposed statutory rule [see chapter 4.4] the instructing Agency will need to comply with –

- some regulatory impact and related requirements under that Act before the statutory rule can be made
- some related requirements after the statutory rule is made.

The LRP requirements are central to the statutory rule-making process but, strictly, they fall outside the scope of the guidelines. Information about those requirements can be obtained from the ERU and there would be little point in replicating that information here.

The Department of Treasury and Finance maintains a special website to assist Agencies with LRP matters and that website can be accessed through: <http://www.treasury.tas.gov.au>

An *SLA Administrative Handbook* and *LRP Procedures and Guidelines Manual* are available through that website, as are several other useful publications.

Subject to the comments in chapter 3.1.2, OPC itself does not have any interest in or formal responsibility for assessing the administrative, economic or other regulatory impact of proposed new statutory rules. The CPC's role under section 7 of the SLA [see chapter 4.4] is rather more specific and technical and is really aimed at ensuring the legal probity of subordinate legislation.

OPC's only other significant involvement with the LRP comes from the automatic repeal process set out in section 11 of the SLA [see chapter 8.2].

5. EXECUTION

5.1 General principles

Once a draft of a statutory rule has been settled and checked and OPC has provided the instructing Agency with final copies [see chapter 4.3], the instructing Agency can arrange for it to be made by the rule-making authority.

This will usually be the Executive Council, but for some statutory rules it will be –

- a Minister
- the holder of a statutory office
- a statutory body.

Apart from the advice that it occasionally gives to the secretariats of rule-making authorities, OPC is not involved with this particular part of the statutory rule-making process.

It is therefore up to the instructing Agency to –

- check, if applicable, that the LRP has been complied with
- check on the availability of the rule-making authority and of any person who may need to endorse or ratify the statutory rule
- verify the rule-making authority's immediate status – eg there may be a Lieutenant-Governor, an acting Minister or a recent change in administrative arrangements
- comply with the rule-making authority's protocol
- comply with any preliminary formalities that may be required under statute – eg a Ministerial recommendation
- monitor the process continually so that key documents like the CPC's advice are not damaged or lost or left to moulder in some office in-tray
- keep an eye on any critical implementation deadlines
- alert OPC if events overtake the statutory rule or it cannot, for any reason, be made – eg if it is not submitted to the rule-making authority in good time or in the same year appearing in its title, or the Minister withdraws support for it.

In OPC's experience there can be difficulties at this stage of the statutory rule-making process, usually because the instructing Agency has not allowed sufficient time for the drafting or LRP stage or it has not taken into account such things as Ministerial movements and the Executive Council timetable.

As mentioned in chapter 1.3, guidance on this stage of the statutory rule-making process can be obtained from other sources [see too chapter 8.4]. Some Agencies have internal manuals or guidelines that instructing officers can consult on these matters.

5.2 Exposure/preliminary approval

Some statutory rules cannot be made unless they have been exposed in draft form and given some kind of formal preliminary approval, usually by Parliament [see, for example, *Nature Conservation Act 2002*, s.18].

In such cases it is the instructing Agency's responsibility to expose the draft and secure the preliminary approval; OPC's role is restricted to ensuring that the exposure draft is correctly drafted and formatted.

Also, the instructing Agency will need to take account of Parliamentary sitting schedules in the Agency's planning.

5.3 Consent/ratification

Some statutory rules need to be consented to or otherwise "ratified", usually by the Governor, after they are executed by the rule-making authority [see, for example, by-laws under the *Irrigation Clauses Act 1973*].

Such statutory rules are made so infrequently that it would not be worthwhile to explain the relevant procedures in the guidelines; OPC can advise on these procedures on a case-by-case basis.

Once again, though, the instructing Agency will need to factor the ratification requirement into its planning.

6. PROCESSING AND PROMULGATION

6.1 Numbering and distribution

After a statutory rule has been made, the original and several copies – usually 2 – are returned to OPC from the rule-making authority.

OPC then ensures that certain necessary (and to some extent overlapping) formalities are complied with under various Acts such as the *Rules Publication Act 1953*, *Acts Interpretation Act 1931* and *Legislation Publication Act 1996*. Broadly speaking, the instructing Agency does not have to worry about these formalities.

In general terms, OPC must arrange for the statutory rule to be –

- numbered in a manner approved by the CPC
- sent to a person approved by the CPC for the purposes of production or distribution.

More specifically, OPC will perfect the formatting of the statutory rule on EnAct by –

- allotting it the next available statutory rule (S.R.) number for the current year
- loading final particulars (like the date of execution, date of gazettal and names of signatories) onto the workflow to put the statutory rule in readiness for posting onto the Tasmanian electronic database and Tasmanian Legislation Website so that it can be electronically accessed by the public, free of charge, on the day of gazettal.

For the specific purposes of printing –

- the statutory rule is required to have the date of gazettal, the name of the administering department and certain other information printed on it: RPR, r.6
- the Government Printer is required to publish in the *Gazette* a notice signed by or on behalf of the CPC giving certain particulars about the statutory rule: RPA, r.7 [see chapter 6.2].

The Government Printer also needs to have hard copies of the statutory rule available for public purchase at its bookshops and at several other places on the day of gazettal.

6.2 Gazettal

6.2.1 Standard notification

After a statutory rule has been made, a specific notice to that effect must be placed in the *Gazette*: AIA, ss.38A(2)(b) & 47(3)(b).

In a sense this requirement is coextensive with the notification requirements mentioned in chapter 6.1 and, in practice, it is so treated.

In the case of regulations, rules and by-laws, the notice must be given within 21 days or the statutory rule *will* be void. There is no corresponding risk for other statutory rules but a failure to give such notice within a reasonable time could impugn their validity.

To avoid that risk, OPC will arrange for the making of a statutory rule to be notified in the first available normal (Wednesday) *Gazette* after it comes back from the rule-making authority.

So, for example, a regulation made by the Executive Council on a Monday (its usual meeting day) will ordinarily come back to OPC on Thursday of the same week, and then notification of its making will be given in the *Gazette* on Wednesday of the following week.

Ordinary notification cannot be given any sooner than that because of the Government Printer's (one week) publication deadline.

6.2.2 Special Gazettes

Occasionally, a statutory rule needs to be put in place quickly and so notification of its making cannot wait for a normal (Wednesday) *Gazette*. In such cases the instructing Agency needs to request and pay for a special *Gazette*. If another Agency also has an urgent matter then the cost of the special *Gazette* can be shared.

A request for a special *Gazette* needs to be –

- made to the Government Printer
- in writing
- signed by a senior executive officer of the instructing Agency.

The instructing Agency will also need to liaise with OPC's senior clerk because certain documents will have to be prepared and it may be necessary to chase up the executed copies of the statutory rule.

6.3 Parliamentary tabling

After a statutory rule has been made, it *must* be tabled in Parliament if –

- it is a regulation, rule or by-law; or
- the enabling Act or another Act says that it must be so tabled.

This means that the statutory rule must be laid before each House of Parliament within a certain number of sitting-days – usually 10 – after the making of the statutory rule is notified in the *Gazette*.

If a statutory rule has to be tabled in Parliament, OPC will warn the instructing Agency of that when it sends out the final copies of the statutory rule to be made by the rule-making authority. However, that warning is only a back-up and the instructing Agency *must* conduct its own check on tabling requirements.

Note that the instructing Agency is responsible for the actual tabling.

A failure to table a statutory rule does not automatically invalidate the statutory rule but the failure –

- breaches a statutory obligation
- leaves the instructing Agency and the government open to criticism from Parliamentarians, the Parliamentary Standing Committee on Subordinate Legislation and the news media
- means that the risk of Parliamentary disallowance is on-going.

Information on how to go about tabling a statutory rule in a House of Parliament can be obtained from its Clerk.

For more about tabling see, generally, AIA, s.47(3).

6.4 Filing

After a statutory rule has been made and processed –

- the executed original is filed by the CPC in the Department of Premier and Cabinet: RPR, r.9
- an executed copy is retained on OPC's working file (and eventually archived)
- an executed copy is retained by the Government Printer.

Note, though, that the executed originals of statutory rules made before 23 March 1998 – the date on which the *Legislation Publication Act 1996 [LPA]* commenced – were filed in the office of the Attorney-General and copies of them were retained on the relevant OPC file.

6.5 Legislative database [Authorised versions]

The CPC is required to establish and control an electronic database of the State's legislation, including statutory rules: LPA, s.5.

The State's statutory rules are to be taken in all circumstances and for all purposes to be as they appear from time to time in the authorised versions of the statutory rules: LPA, s.6(1).

At a given date, the authorised version of a statutory rule made on or after 23 March 1998 is the version on the database at that given date: LPA, s.6(5).

If a statutory rule made on or after 23 March 1998 is not on the database for any reason, the authorised version of that statutory rule is the copy filed and recorded by the CPC: LPA, s.6(6A) [see chapter 6.4].

To find out which is the authorised version of a statutory rule made before 23 March 1998 (whether it is on the database or not) see LPA, ss.6(7) & 6(8).

The CPC may approve the production of copies of authorised versions of statutory rules and copies of reprints of statutory rules in electronic or printed form by a person approved in writing by the CPC – namely the Government Printer – for the purposes of production or distribution: LPA, s.6(10).

For more about this matter see, generally, LPA, Pt.2.

6.6 Reprints

The CPC may authorise and cause a reprint of a statutory rule to be compiled: LPA, s.9.

For more about this matter see, generally, LPA, Pt.3.

6.7 Annual volume

The CPC must cause an annual volume of statutory rules to be prepared and published: RPR, r.8.

The annual volume contains –

- all of the statutory rules printed and numbered for the year [see chapter 6.1]
- a table of exempt instruments and exemption rulings [see RPA, s.4 and the definition of "statutory rule" in RPA, s.2(1)]
- such other information as the CPC determines.

The annual volumes can be purchased from the Government Printer. Most departmental libraries and law libraries hold copies of them.

7. SCRUTINY

7.1 Parliamentary disallowance

A statutory rule that has been tabled can be disallowed by Parliament if –

- it is a regulation, rule or by-law
- the specific enactment under which it is made renders it liable to disallowance.

Disallowance is effected by –

- in the case of regulations, rules and by-laws, the passage of a resolution to that effect by either House of Parliament
- in the case of other statutory rules, the method specified in the relevant enactment.

If a regulation, rule or by-law is disallowed, note that –

- it is void forthwith
- no statutory rule to the same or substantially the same effect can be made within 12 months except on certain conditions
- the disallowance will not, of itself, invalidate anything done under the statutory rule beforehand.

For more about disallowance see AIA, s.47.

If a statutory rule is disallowed, a note to that effect will be placed at the front of the annual volume of Tasmanian Statutory Rules [see chapter 6.7].

7.2 Subordinate Legislation Committee

The *Subordinate Legislation Committee Act 1969* [SLCA] provides for the establishment of a joint Parliamentary committee to scrutinise subordinate legislation: the Parliamentary Standing Committee on Subordinate Legislation.

Instructing Agencies should familiarise themselves with the functions and powers of the committee as set out in that Act.

Instructing Agencies also need to be mindful of the committee's LRP role. Specifically, section 9 of the SLA requires that, within 7 days after the making of a regulation, rule or by-law is notified in the *Gazette*, the responsible Minister must send to the committee –

- a copy of the CPC's advice [see chapters 4.3 and 4.4]
- a copy of the SLA section 6 certificate or, if such a certificate was not issued, a copy of the Minister's certificate certifying that section 4 of the SLA has been complied with
- if an SLA section 6 certificate was not issued and it was necessary to prepare a regulatory impact statement, a copy of the SLA section 5(1D) certificate together with a copy of the statement itself and of the comments and submissions received.

The committee has relevant scrutinising and investigative powers and, though rarely used, it also has power to force the amendment or rescission of some statutory rules or the suspension of their operation: SLCA, ss.8, 9 & 10.

7.3 Courts and the Solicitor-General

In deciding cases, courts sometimes make findings about the validity of statutory rules. The government has an obligation to act on such a finding, particularly if –

- the court is a superior tribunal like the Supreme Court, Federal Court or High Court
- the finding is central to the court's decision (the *ratio*) and not merely an incidental or secondary observation (*obiter*).

Similarly, the Solicitor-General sometimes advises Agencies on the validity or effect of statutory rules. Although such advice does not have the binding character of a determination made by a superior court, the Solicitor-General *is* the Crown's chief legal adviser.

Accordingly, if the Solicitor-General advises an Agency that a particular statutory rule may be wholly or partially invalid, that advice should be noted and promptly acted on.

7.4 Office of Parliamentary Counsel

OPC itself does not have any program to generally monitor or review statutory rules after they are made but –

- it does scrutinise them carefully, and afresh, if and when they fall due to be remade [see chapter 8.2]
- circumstances may sometimes force OPC to reassess their validity.

The fact that OPC has drafted and "signed off" on a statutory rule is not an ironclad guarantee that it will be prepared to redraft that statutory rule in exactly the same form – or at all – if and when it expires. This is true even if the enabling Act has not been amended in the interim.

Just as the common law evolves through the reinterpretation of settled legal principles in the light of new circumstances, OPC may sometimes need to reassess the validity and form of a statutory rule because of –

- an opinion given by the Solicitor-General
- a major shift in government policy
- a practical difficulty with the operation of the law
- a reappraisal of the relevant enabling power
- a change in Tasmania's drafting practices.

8. MISCELLANEOUS

8.1 Annual index

At the end of every year OPC publishes a booklet called *Indexes to the Legislation of Tasmania*. This can serve as a handy ready reference for Agencies and the public and also as a back-up to the Tasmanian Legislation Website.

Copies of this booklet can be purchased from the Government Printer.

8.2 Staged repeal

A statutory rule to which the SLA applies is automatically repealed on the tenth anniversary of the date on which it is made: SLA, s.11(2).

For the purposes of that section of the SLA, subordinate legislation is taken to have been made on the date on which it was published, or notification of its making was published, in the *Gazette*.

The automatic repeal can only be avoided or deferred by an Act of Parliament.

8.3 What to do if matter not proceeding

If an instructing Agency decides for any reason not to proceed with the drafting of a statutory rule it should tell OPC at once so that OPC can –

- close its file
- if necessary, cost the file and render an account
- remove the file from the EnAct workflow and other systems.

8.4 Further information

A person who is charged with instructing OPC on statutory rules on a frequent basis may find it helpful to read and familiarise themselves with the following:

- *Acts Interpretation Act 1931* (especially ss.38A and 47)
- *Legislation Publication Act 1996*
- *Rules Publication Act 1953* (and the regulations under that Act)

- *Subordinate Legislation Act 1992*
- *Subordinate Legislation Committee Act 1969*
- The information and resources available on the Office of Parliamentary Counsel website:
<http://www.dpac.tas.gov.au/divisions/opc/>
- The information and resources available on the Tasmanian Legislation website
- The Department of Treasury and Finance's LRP website [see chapter 4.5]
- The information set out at the front of each Annual Volume of Tasmanian Statutory Rules published by the Government Printer [see chapter 6.7]
- The annual Indexes to the Legislation of Tasmania [see chapter 8.1].

SCHEDULE 1 – DICTIONARY

In these guidelines –

"Agency" means a department or other instrumentality of the Tasmanian government

"AIA" means the *Acts Interpretation Act 1931*

"assigned drafter" means the drafter responsible for drafting a proposed statutory rule

"CPC" means the Chief Parliamentary Counsel

"drafter" means a legal practitioner (known as a Parliamentary Counsel) employed in OPC to draft legislation

"enabling Act" means the Act under which a statutory rule is made

"EnAct" means Tasmania's Legislative Drafting and Automatic Consolidation System

"ERU" means the Economic Reform Unit of the Department of Treasury and Finance

"Gazette" means the *Tasmanian Government Gazette*

"instructions" means the instructions for a proposed statutory rule

"instructing officer" means the person responsible for instructing OPC on a proposed statutory rule

"LPA" means the *Legislation Publication Act 1996*

"LRP" means the State Government's Legislation Review Program

"OPC" means the Office of Parliamentary Counsel

"QA" means quality-assurance

"RPA" means the *Rules Publication Act 1953*

"SGML" means the Standard Generalized Markup Language used for EnAct

"SLA" means the *Subordinate Legislation Act 1992*

"Tasmanian Legislation Website" means the website of that name at <http://www.thelaw.tas.gov.au>

SCHEDULE 2 – RPA DEFINITION OF "STATUTORY RULE"

"statutory rule" means –

(a) a regulation, rule, or by-law made under the authority of an Act by the Governor or by a rule-making authority;

(b) a proclamation or notice, or an order-in-council, order, or other instrument that fixes the date of commencement of an Act or enactment or that –

(i) repeals or amends; or

(ii) extends, restricts, varies, modifies, or affects the operation of –

the provisions, scope, or application of an Act or enactment; and

(c) an instrument of a legislative character made in the exercise of the prerogative rights of the Crown and having force in this State –

but does not include a regulation, rule, or by-law, or any other instrument of a legislative character, that is made by a local authority or by a person or body of persons having jurisdiction limited to a district, locality, or part of the State.

Notes –

1. The "rule-making authority" mentioned above is defined by the RPA as being: "a person (other than the Governor) or a body of persons, whether incorporated or unincorporated, authorized by or under an Act to make statutory rules, however described in that Act."

2. Section 2(2) of the RPA provides that a question as to whether an instrument or class of instruments is a statutory rule for the purposes of that Act can be conclusively decided by the Attorney-General.

3. Regardless of definitions, the RPA does not apply to certain instruments: those that are listed in section 4(1) of the Act and those that the Attorney-General, under section 4(2) of the Act, exempts from its operation.

SCHEDULE 3 – SLA DEFINITION OF "SUBORDINATE LEGISLATION"

"subordinate legislation" means –

(a) a regulation, rule or by-law that is –

(i) made by the Governor; or

(ii) made by a person or body other than the Governor but required by law to be approved, confirmed or consented to by the Governor; or

(b) any other instrument of a legislative character that is –

(i) made under the authority of an Act; and

(ii) declared by the Treasurer under subsection (2) to be subordinate legislation for the purposes of this Act;

Notes –

1. The subsection referred to in paragraph (b) above provides that: "The Treasurer, by notice published in the *Gazette*, may declare an instrument of a legislative character that is made under the authority of an Act to be subordinate legislation for the purposes of this Act."

2. A notice under that subsection is not a statutory rule within the meaning of the RPA.

SCHEDULE 4 – PROVIDING EFFECTIVE INSTRUCTIONS

PART 1

The effectiveness of instructions for a statutory rule will be enhanced if they –

- contain a fair draft of the statutory rule
- clearly explain what is being proposed, and why
- identify the legislative authority for the statutory rule and, if applicable, the precise authority for anything sensitive – eg retrospective operation, high fees, removal of common law rights, imprisonable offences
- identify, in the case of an *amending* statutory rule, the particular provisions proposed to be amended
- use language that matches that of the enabling Act
- alert OPC to any critical dates, priorities or commencement requirements
- alert OPC to any relevant political undertakings or elements of overarching government policies – eg *Tasmania Together*
- enclose any documents that are referred to in the instructions and/or are critical to a proper understanding of them
- say whether the proposal relates to, affects or potentially clashes with any other laws
- alert OPC to any necessary consequential amendments
- alert OPC to any necessary savings or transitional matters
- indicate whether jurisdictional issues are involved – eg does the proposal relate to something done or being done by the Commonwealth or another State?
- point out any cognate matters being or about to be drafted – eg is the proposal part of a package?
- state who the instructing officer will be and their contact details, and, if necessary, alert OPC to any likely absences and identify a back-up instructing officer.

PART 2

The effectiveness of instructions for a statutory rule will be impaired if they –

- have not been proofread
- do not follow a logical sequence
- are poorly laid out or written – eg in dense unbroken text
- are submitted in driblets or in inconsistent "blocks"
- are missing any necessary attachments
- consist of a hotchpotch of untidy documents – eg smudged photocopies, scribbly notes, blotchy recycled faxes, unformatted emails
- contain reams of prolix technical papers (in the expectation or hope that OPC will somehow be able to divine the policy from them)
- assume that OPC is as familiar with the policy background and technical issues as the instructing Agency
- seek amendments that are repugnant in style or content to the legislation proposed to be amended
- seek to implement major and/or contentious policies that really ought to be put squarely before Parliament in a Bill
- fail to identify necessary savings and transitional issues
- fail to identify necessary consequential amendments
- fail to give any or adequate guidance on offences and penalties, or propose offences and penalties that are unreasonable
- fail to explain proposals for new fees or fee increases
- seek anticipatory/retrospective operation without clear authority
- fail to note any changes or developments that are critical to the legislation – eg the amendment of corresponding interstate legislation, the reconstitution or renaming of a regulatory body, the issue of a new industry standard or code
- request OPC to adopt or adapt a law or policy of another jurisdiction heedless of whether the law or policy is suitable for, or even capable of being translated to, Tasmanian circumstances

SCHEDULE 5 – FACILITATING THE DRAFTING PROCESS

PART 1

As well as giving OPC effective instructions, an Agency can facilitate the drafting of a statutory rule by –

- responding promptly to requests for further or better instructions
- turning drafts around quickly
- ensuring that necessary preliminary consultations with other Agencies, officials or jurisdictions have been carried out
- planning to secure any recommendation or consent that may be legally required to enable the statutory rule to be made
- ensuring that any plans to be included in the draft are drawn up and registered in the Central Plan Register
- checking that no similar proposal has been disallowed by Parliament in the past year
- keeping an eye out for cognate matters from the same Agency
- not interrupting the assigned drafter unnecessarily.

PART 2

Agencies sometimes hinder the drafting of a statutory rule by doing one or more of the following:

- making major changes to the policy during the drafting process
- failing to invest the instructing officer with sufficient authority to clear drafts or confirm policy details, or repeatedly overriding advice or decisions given or made by the instructing officer
- changing instructing officers without reason
- appointing a team of instructing officers, each of whom has a different understanding of what needs to be done
- unnecessarily making a public commitment to an early and unrealistic implementation date without consulting OPC

- undertaking with third parties, and without consulting OPC, that the draft will be changed as regards matters (such as formatting) that are properly within the discretion of OPC
- sending the draft out for consultation for an extended period without telling OPC what is happening in the matter
- failing to arrange for required plans or diagrams to be prepared or failing to provide OPC with images
- leaving it to OPC to seek advice from the Solicitor-General on legal issues that, strictly, the Agency should have pursued
- worrying about minor spelling or formatting errors in what is clearly marked as "*Rough draft for discussion purposes*" or "*Subject to Alteration by Parliamentary Counsel*"
- worrying about the assigned drafter's *private notes* on working drafts
- repeatedly interrupting the assigned drafter to obtain progress reports
- assuming that the assigned drafter has no other files to work on.