

Victorian Guide to Regulation

Toolkit: Requirements and processes for making subordinate legislation

Contents

1.	Processes for legislative regulation making	1
1.1	Forms of regulation.....	1
1.2	Introduction to legislative processes	3
1.3	What constitutes a 'significant burden'?	5
1.4	Legislative impact assessments (LIAs).....	6
1.5	Regulatory impact statements (RISs).....	13
1.6	<i>Charter of Human Rights and Responsibilities Act 2006</i>	30
1.7	Consultation with local government.....	35
	Attachment 1. Documentation accompanying subordinate legislation	37
	Introduction	37
	Seeking an extension for statutory rules due to be revoked	37
	Documentation checklists and publication requirements	38
	Certificate templates	46
	Rules or instruments which refer to other documents	53

1. Processes for legislative regulation making

This toolkit details the forms of legislation and other instruments and the processes in place in Victoria to ensure appropriate scrutiny of legislative proposals. It discusses:

- Under what circumstances must a Legislative Impact Assessment be prepared? What are the processes involved in the preparation of a Legislative Impact Assessment?
- What are the purposes of Regulatory Impact Statements and when must they be prepared? What processes must be followed when preparing a Regulatory Impact Statement?
- How does the Government's *Charter of Human Rights and Responsibilities Act 2006* affect the legislative regulation-making process?
- Where it is intended that local government will administer or enforce proposed state government regulation, what consultation is required?

1.1 Forms of regulation

In developing good regulation to address problems, it is important to assess the appropriateness of all forms of legislation and other instruments.

Explicit government regulation: primary and subordinate legislation

Explicit government regulation is sometimes known as 'black letter law'. It attempts to change behaviour by detailing how regulated parties must act under the law, and it generally imposes punitive sanctions (such as fines or even custodial sentences) in instances of non-compliance with these regulations.

The two main types of explicit government regulation are:

- primary legislation, i.e. Acts of Parliament; and
- subordinate (or secondary) legislation, such as statutory rules (e.g. 'regulations' made under an authorising Act), orders-in-council, ministerial orders and determinations, proclamations and notices.

Primary legislation is usually drafted in general rather than specific terms, with a view to avoiding the need to make frequent changes.

The general rule is that matters of policy and general principle should be reserved for primary legislation, whereas matters of detail likely to change frequently should, where possible, be dealt with by subordinate legislation.

While significant matters should not be included in subordinate legislation, subordinate legislation may deal with the same issue in terms of enforcement or related matters of administration or implementation. Subordinate legislation can complete the details of a legislative scheme, but cannot add new aims or ideas.¹

Subordinate legislation can only cover matters that are permitted by its authorising Act, and must be consistent with the purpose and objective of that Act. Such matters are those that are either:

- authorised by the authorising Act, for instance, by use of the word 'prescribed';
- referred to in the regulation-making powers set out in the authorising Act; or

¹ Subordinate legislation cannot alter anything in the Act under which they are made, unless the Act expressly authorises a subordinate instrument to do so. However, in practice, this is a power that is seldom conferred and is not considered desirable.

- within the scope of a general regulation-making or prescription power of the authorising Act and necessary to enable the effective operation of that Act.

In determining the appropriate form of subordinate legislation (or type of legislative instrument) that can be made under each power contained in an Act and the process for making them, the following factors should be taken into account:

- **Could the instrument impose substantial burdens and, if so, would a formal analysis of options, and the associated costs and benefits, be beneficial?** Many instruments will cover technical or administrative matters, while others made under the same power may impose substantial burdens on a sector of the public. Where there is scope for a substantial burden (and commensurate benefits), the case for mandating rigorous analysis is stronger.
- **Would a requirement to consult the community on the proposed instrument be appropriate?** For most substantial regulatory requirements, consultation with stakeholders and the community after appropriate public notice, with an adequate period for comment and a requirement that comments be considered (as is required under the RIS process for statutory rules and legislative instruments), is likely to lead to better regulation.
- **Would the judgements involved in deciding on the instrument involve subjective judgements having regard to distributional impacts or trade-offs between competing objectives?** If so, the instrument would be more appropriately made by a Minister, while technical or objective assessments against specified criteria may be appropriately made by an independent regulator or departmental official.
- **Should the instrument be tabled in Parliament and subject to disallowance?** If the instrument is likely to have a significant impact on rights and obligations, there is a strong case for it to be subject to the review and Parliamentary disallowance that applies to statutory rules and legislative instruments.
- **Are new instruments or changes to existing instruments likely to be necessary frequently or very urgently?** Some instruments need to be introduced or changed very quickly, such as total fire bans, or bans of unsafe products. Such instruments should not be made by statutory rule. However, if the instrument is likely to impose substantial costs over an extended period, it may be appropriate to allow for the making of interim bans or other interim arrangements. Such arrangements should be followed by a formal review process within 12 months before any permanent ban/arrangement could be put in place.
- **Is there a strong reason not to mandate a formal review of the instrument every ten years?** Changes in markets, technology, community attitudes or expectations over time may affect the necessity for regulation, or its effectiveness. In other cases, at the time the regulation is made, there may be considerable uncertainty about its likely benefits and associated costs. A mandated 10-year sunset provision (such as that which applies to all statutory rules) is often appropriate to determine the ongoing need for regulation and allow consideration of potential improvements.
- **Is ready access to the instrument important?** All statutory rules are readily accessible. A notice of making is published in the Government Gazette and the full text of the regulations is available on a central website (www.legislation.vic.gov.au). The Office of the Chief Parliamentary Counsel also ensures they are available in a consolidated form following any amendments and printed copies are also available from Information Victoria. Other legislative instruments are not held centrally and, in the past, Acts did not always include a requirement that the text of a legislative instrument be published in the Gazette, or a notice of its making (although, as a minimum, the latter is now considered normal practice except in exceptional circumstances). Consequently, many legislative instruments can be difficult for the public to find. There is also no requirement for consolidating other instruments following amendment.

The answers to these questions should inform the choice of subordinate legislation when an Act is being drafted. If the answer to any of the above questions is yes, then a statutory rule or legislative instrument may be appropriate. In some cases, the judgement will be straightforward – for example, it would be impractical for total fire bans to be determined by statutory rule. In other cases,

judgements will need to be made between the benefits of the statutory rule making process, and its costs in terms of resources and delays.

1.2 Introduction to legislative processes

The rest of this toolkit focuses on process issues related to primary and subordinate legislative proposals.

The preparation of a Regulatory Impact Statement (RIS) is a well-established and critical feature of the regulation-making process in Victoria. The RIS formalises the steps that should be undertaken in policy formulation, and ensures that all relevant information is documented and that decision-making processes are transparent. It requires an assessment of the costs and benefits of each option, followed by a recommendation supporting the most effective and efficient option.

Good policy-making requires the assessment of all proposed options to determine the best policy response to a perceived problem. Where these options include the making or amendment of statutory rules ('regulations') as part of subordinate legislation, preparation of a RIS is **mandatory**² in Victoria if the proposed statutory rule imposes a significant economic or social burden on a sector of the public. Generally, proposals that impose total gross costs of \$2 million or more per year on any sector/s of the public would be considered to meet the RIS threshold. This requirement also applies to legislative instruments, such as ministerial directions and orders in council (among many others). The legislative backing for this requirement is the *Subordinate Legislation Act 1994*. The high degree of scrutiny provided by the RIS process – mandated within the *Subordinate Legislation Act 1994* – is necessary because the proposed measures assessed by RISs are not debated in Parliament.

In addition, government scrutiny of regulatory proposals also extends to the making or amending of primary legislation where there is potential for regulatory impacts. In cases where a legislative proposal (i.e. a Bill) has the potential to impose a significant economic or social burden on a sector of the public, a Legislative Impact Assessment (LIA) must be prepared. Generally, proposals that impose gross costs of \$2 million or more per year on any sector of the public would be considered to meet this LIA threshold. LIAs are based on the same methodology as the RIS process, although the content and processes are not specified in legislation, but rather agreed by Cabinet.

The overall aim of LIAs and RISs is to ensure a rigorous assessment of regulatory and legislative proposals, and other viable options, to better inform government policy decision making. The main differences in the process for preparing LIAs and RISs are the legislative backing, mandatory consultation and scrutiny arrangements (see Table 1). RISs provide the avenue for scrutiny of subordinate legislation by the Parliament, ensuring in the process that appropriate and transparent decision-making takes place. Because primary legislation is fully debated in Parliament, the role of LIAs is targeted more towards informing the Government in making its policy decisions.

As a key input to government policy, it is important for LIAs and RISs to provide sufficient detail to allow informed and evidence-based decision making. However, it is expected that the depth of analysis, and subsequently the resources used in impact assessment are proportionate to the size of the impact of the regulatory/legislative proposal being assessed.

A more proportionate approach to impact assessment aims to assist departments in:

- ensuring that resources and specialist technical expertise are focused on high-impact proposals; and
- avoiding a disproportionate amount of time and effort being spent on those proposals with smaller impacts.

Therefore, greater clarity regarding a proportionate approach to impact assessment has been included for the analysis of legislative or regulatory proposals. The Victorian Guide to Regulation describes the criteria for indicating whether a proposal is low- or high-impact and the indicative requirements for preparing low-/high-impact LIAs and RISs. Practical guidance (in the form of

² There are limited exemptions, as detailed in Section 1.5.2 of this toolkit.

‘proportionality tables’ to indicate the appropriate level of analysis) for each relevant stage of the LIA/RIS process has also been included.

To promote greater policy coherence and proportionate use of resources, it is beneficial for LIAs and RISs to be prepared by the government department or agency supporting the responsible Minister (possibly with the assistance of appropriately qualified consultants³ where there is a lack of expertise for the analysis required). Where LIAs and RISs are prepared by regulatory agencies that are arm’s length from government, it is important that the relevant government departments are advised and consulted on any LIA or RIS processes that are being undertaken within their portfolios. It should also be remembered that, in the case of LIAs, the analysis informs Cabinet deliberations and, as such, the information included in an LIA must be treated as confidential to Government.

The independent assessment of LIAs and RISs is undertaken by the Commissioner for Better Regulation (the Commissioner), supported by the Office of the Commissioner for Better Regulation (OCBR). The provision of assistance and advice by the Commissioner, including feedback on LIAs and RISs, combined with training initiatives, are contributing to a strengthening of LIA and RIS preparation skills within departments and regulatory agencies. Departments should engage the Commissioner as early as possible in the LIA/RIS process. The Government expects this to lead to improvements in regulatory outcomes from proposals undergoing LIAs and RISs over time.

A broad overview of the processes for RISs and LIAs is presented in Table 1. The remainder of this toolkit discusses the LIA and RIS processes in more detail. It is essential that departments and agencies allow sufficient time to undertake these processes, and guidance about timing considerations is provided in Section 1.4.5 (in the case of LIAs) and Section 1.5.6 (for RISs).

In addition, this toolkit details other requirements that need to be taken into account during the making of regulation. These requirements relate to:

- the human rights impact assessment required under the Government’s *Charter of Human Rights and Responsibilities Act 2006* (see Section 1.6); and
- consultation processes that are expected where local government is expected to administer and/or enforce state legislation/regulation (see Section 1.7).

Table 1: Overview of LIA and RIS processes

	Legislative impact assessments (LIAs)	Regulatory impact statements (RISs)
Legislative backing	None	<i>Subordinate Legislation Act 1994</i> (‘the Act’)
Coverage	Primary legislation	Statutory rules (mainly ‘regulations’) and legislative instruments
Trigger for preparation	Significant economic or social impact on a sector of the public	Significant economic or social impact on a sector of the public
Who decides when an LIA/RIS is required?	Responsible Minister	Responsible Minister (Sections 7 and 12E of the Act)
Exemptions	Exceptional circumstances only, as agreed by the Premier in consultation with responsible Minister	Limited (Sections 8, 9, 12F and 12G of the Act)
Preparation	Departments/consultants	Departments/consultants
Analysis required	Similar to RIS analysis, including explicit assessment of impact on small business See guidance on proportionality in the VGR.	Outlined in Section 10 of the <i>Subordinate Legislation Act 1994</i> See guidance on proportionality in the VGR.

³ Where consultants are used to prepare or assist in the preparation of an LIAs or RISs, they should be engaged according to the policies concerning the engagement and management of consultants, issued by the Victorian Government Purchasing Board.

Independent assessment	Commissioner for Better Regulation	Commissioner for Better Regulation
Certification	The Commissioner provides advice on adequacy	Responsible Minister certifies RIS compliance with the Act
Public release	With agreement of the Premier and responsible Minister	Must be publicly released for comment before statutory rule or legislative instrument is made (Sections 11 and 12I of the Act)
Reporting	The Commissioner reports annually to the Treasurer on compliance with published policies applying to LIAs	The Commissioner reports annually to the Treasurer on compliance with published policies applying to RISs
Scrutiny	LIAs are used as a tool to inform government decision-making. The primary legislation to which the LIA relates is fully debated in Parliament.	Scrutiny of Acts and Regulations Committee is supplied with copies of the RIS and Commissioner's assessment letter, the statutory rule or legislative instrument, all public submissions, and the departmental response to main issues raised in public submissions

1.3 What constitutes a 'significant burden'?

What constitutes 'a significant economic or social burden'?

The test as to what constitutes 'a significant economic or social burden' is not defined prescriptively; rather, it is a matter for judgement. Nevertheless, the guidelines for RISs (which have the same burden threshold as LIAs) produced under section 26 of the SLA (the SLA Guidelines) provide some assistance with this determination. (The guidance below should be read in conjunction with the SLA Guidelines available at www.betterregulation.vic.gov.au.)

In order to assist judgements of 'significant burden' the SLA Guidelines advise that:

- all potential impacts must be assessed, regardless of how readily quantifiable those impacts are, with scope for analysis to include both quantitative and qualitative dimensions [SLA Guidelines, paras 224-225 and 229];
- in general, any quantifiable cost (this refers to gross costs, not net costs) greater than \$2 million per year⁴, compared to the relevant base case, is considered to be a significant burden [SLA Guidelines, paras 227-228]; and
- in certain situations, a statutory rule or legislative instrument may impose a significant burden on a sector of the public even if it imposes quantifiable costs of less than \$2 million per year – for example, if the impact is concentrated on a particular group, region or industry [SLA Guidelines, para 228].

It is important to remember that an LIA or RIS has to be prepared if any one sector of the public is likely to suffer a significant cost or burden as a result of the regulatory proposal. In other words, an LIA or RIS is required if any sector suffers a significant burden, with the overall impact of on the community as a whole to be assessed later as part of the actual LIA/RIS process.

Guidelines as to what constitutes a 'significant burden'

In considering whether proposed legislation, statutory rules or legislative instruments impose a significant cost or burden on a sector of the public, consideration must be given as to:

⁴ The SLA Guidelines state this indicative threshold may be reviewed from time to time.

- the impact of the regulatory proposal relative to the base case, which for example:
 - in the case of new legislation means the impact if the legislation was not passed;
 - in the case of a new or re-made rule or instrument means the impact if the rule or instrument were not made;
 - in the case of amended legislation means the impact of the existing legislation; and
 - in the case of an amended rule or instrument means the impact of the existing (unamended) rule or instrument;
- whether the regulatory proposal has the requisite impact on a ‘sector of the public’. The regulatory proposal must have an impact on the whole community or on groups of people within the community, although the question of how many people constitute a ‘sector’ of the public is a matter of judgement; and
- whether the regulatory proposal imposes a significant cost or burden on that sector of the public.

The burden needs to be something of consequence and more than just theoretical. There must be an actual impact. A burden that is very minor, inconsequential or of little importance will not be a significant burden (SLA Guidelines, para 220).

In considering whether a regulatory proposal will impose a significant burden or cost, the questions that must be considered include:

- Does it impose a measurable cost impact on any sector of the public of greater than \$2 million per year, or impose other significant but non-quantifiable costs?
- Does it impose significant penalties for non-compliance?
- Does it impact on individual rights and liberties?
- Will business, community groups or individuals have to spend funds or devote time to compliance activities, change current practices or seek external advice?

If the answers to one or more of the questions above (or other questions provided in the SLA Guidelines, para 230) is ‘yes’, then the size of the burden must be considered.

- If a fee or charge is imposed by legislation (noting this would normally be prescribed in a rule or instrument), consideration must be given to the level of the fee, the impact it may have on an individual, community group or business. As a guide, if the cumulative impact of a new fee (including where a sunset regulation is remade) or fee increase is \$2 million or more per year, then is likely to impose a significant burden and require a RIS (SLA Guidelines, para 235).

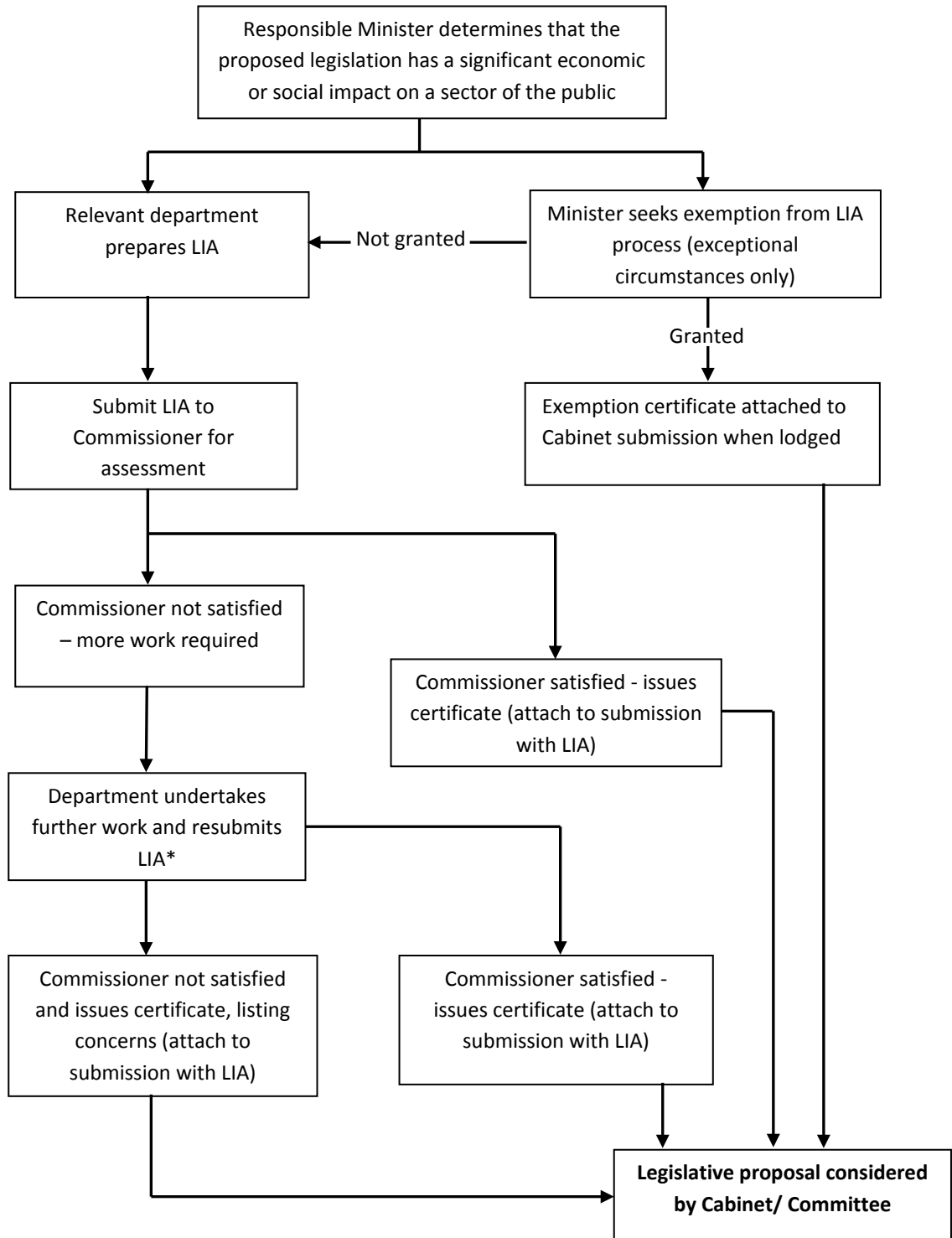
1.4 Legislative impact assessments (LIAs)

This section discusses the various elements of the LIA process. It includes:

Discussion item	What is covered?	Refer to
What is the purpose of the LIA process?	<ul style="list-style-type: none"> • The role of the LIA process in scrutinising primary legislative proposals 	Section 1.4.1
When should an LIA be prepared?	<ul style="list-style-type: none"> • The circumstances that require preparation of an LIA • Submission of an LIA • Exemptions from the process 	Section 1.4.2
The role of consultation in the LIA process	<ul style="list-style-type: none"> • The benefits of consultation, where appropriate 	Section 1.4.3
Assessing the adequacy of the LIA	<ul style="list-style-type: none"> • Independent assessment of LIAs by the Commissioner for Better Regulation 	Section 1.4.4
Timing considerations	<ul style="list-style-type: none"> • Guidance about the amount of time that should be allowed for the different stages of the LIA process 	Section 1.4.5

Figure 1 provides a simplified guide to the various stages involved in the LIA process.

Figure 1: Flow chart of the LIA process



*Note: This may be an iterative process—i.e. the LIA may be re-submitted to the Commissioner a number of times

1.4.1 Purpose of the LIA process

To further strengthen its scrutiny of regulation that could potentially impact on business productivity, competition and growth in Victoria, the Government has introduced a mandatory requirement for the assessment of new or amended primary legislation (i.e. Parliamentary ‘Bills’ that become ‘Acts’ if approved by Parliament).

Primary legislation with potentially ‘significant effects’ must now undergo a Legislative Impact Assessment (LIA) process.

An LIA is a formal assessment of the impacts of a proposed primary legislative measure on business and/or competition, and is intended to improve the robustness of policy-making in Victoria. LIAs enhance the identification and understanding of the impacts of a legislative proposal on business and/or competition. The LIA process brings Victoria closer to international best practice in scrutinising legislative proposals.

Information below summarises the details that must be included in an LIA.

Components of an LIA

- A description and assessment of the nature and the extent of the problem being addressed.
- A statement of the objectives of the proposed legislation.
- A description of the legislative proposal and its expected effect on key stakeholders.
- An assessment of the costs and benefits of the proposal and other practical means of achieving the objective.
- A description of the distribution of costs and benefits, particularly the impact on small business.

1.4.2 When must an LIA be prepared and submitted?

An LIA must be prepared and submitted where the responsible Minister determines that a primary legislative proposal (either entirely new legislation, amendments to existing legislation) imposes a potentially significant economic or social burden on a sector of the public. An LIA may also be required if the proposed legislation is enabling rather than enforcing. However, under certain circumstances, exemptions to the requirement to prepare an LIA may be granted.

Does an LIA need to be prepared for enabling legislation?

The purpose of the LIA process is to encourage better decisions, by improving the understanding and identification of the impacts of legislative proposals. Legislation can enable future burdens to be imposed, rather than directly imposing a burden – i.e. the substantive effect of the legislation may come about through regulations/codes of practice/orders in council/ministerial orders that are enabled by the legislation, but which may not be considered by Cabinet. Consequently, for Cabinet to be adequately informed about the consequences of a legislative proposal, it needs to be aware of the potential impacts of instruments that could be implemented under the legislation, particularly if these may not be subject to a Regulatory Impact Statement (RIS).

An LIA is required when an effect of the legislation would be to enable regulatory instruments that would have a significant economic or social impact. If the instruments are of a type which would not otherwise be subject to a RIS, the LIA must provide sufficient information about the effects of the instruments to enable Cabinet to make an informed decision, bearing in mind that the instruments will not be subject to public scrutiny before they are implemented.

When the sole or primary purpose of the legislation is to enable the making of subordinate legislation that would subsequently be subject to a RIS, an LIA is still required if the regulation or legislative instrument would have a significant economic or social impact. This is because by formally making provision for regulation, the Government may explicitly or implicitly be constraining the use of non-regulatory options. However, the LIA can be less detailed in this case – although still commensurate with the likely impact – given that there will be subsequent public scrutiny through a RIS.

The LIA must in all cases set out the magnitude and scope of the potential effects resulting from the enabling provision in the legislation (i.e. the number of potential parties expected to be affected, the costs imposed and any flow-on impacts etc).

At what stage must an LIA be submitted?

The LIA must be attached to any submissions made to Cabinet or the relevant Cabinet Committee in order to assist in decision making. The Commissioner's assessment of the adequacy of the LIA (see section 1.4.4 below) must also be attached. Timing considerations are discussed in section 1.4.5.

It is also preferable for LIAs, where possible, to be attached to early drafts of submissions distributed to departments for coordination comments. At the latest, the LIA and Commissioner's assessment letter should be attached to the Cabinet submission at Approval-in-Principle stage.

Where a Minister proposes to release an exposure draft of proposed legislation for consultation,⁵ a two-stage LIA process must be adopted:

- Stage one: a preliminary LIA would be prepared, assessed by the Commissioner, and presented (along with the Commissioner's assessment) to Cabinet or the relevant Cabinet Committee at the initial approval stage before the exposure draft is released. The LIA would discuss regulatory options (including the proposed legislative approach and other forms of regulation) as well as non-regulatory measures.
- Stage two: Following the consultation process, the LIA would be revised to include any further evidence received about the costs and benefits of the proposed legislation and other viable options, and to take into account any subsequent revisions to the proposed approach. This revised LIA would again be assessed by the Commissioner, and then be attached (along with the Commissioner's assessment) to any subsequent submissions to Cabinet or Cabinet Committees.

In general, LIAs are treated as Cabinet-in-Confidence. There may be occasions where the responsible Minister, the Premier and the Treasurer agree that the LIA should be publicly released.

Exemptions from the LIA requirement

COAG/national processes/other equivalent processes

If a COAG/national RIS has been recently prepared (say, within the last three to five years) and it has been assessed as adequate at the decision-making stage by the Commonwealth Government's Office of Best Practice Regulation, it may be attached to the submission in lieu of an LIA.⁶ The RIS would need to have covered all issues required for an LIA (including the impact on small business). Similarly, any other equivalent analysis that has been conducted may be grounds for exemption from requiring an LIA (similar to the RIS exemption under SLA s12F (1)(g).)

Where departments are participating in national reform processes that involve developing national impact assessments (i.e. COAG/national RISs), they should engage with the Commissioner as early as possible. In this way, it would be hoped that areas where early draft RISs do not meet Victorian standards of adequacy can be satisfactorily addressed by the time final documents are released for public comment.

As outlined in section 1.5.2 below, the Commissioner must be provided with a copy of the draft COAG/national RIS when it is released for consultation after assessment by the Office of Best Practice Regulation (this would also apply to any other equivalent analysis being used as a grounds for exemption). Any comments on the COAG/national RIS made by the Commissioner must be taken into account when determining whether an LIA is required. The Commissioner must also be provided with a copy of the decision COAG/national RIS.

⁵ Exposure drafts are sometimes used to seek feedback from stakeholders, test implementation, check any unanticipated impacts of the proposed legislation etc.

⁶ There may be advantages in undertaking a national impact assessment because the resources and expertise can be pooled with counterparts in other jurisdictions dealing with similar issues. More details about the COAG/national RIS process can be found on the Office of Best Practice Regulation website at <http://ris.dpmc.gov.au/>

Premier's exemption

Even where a legislative proposal does have 'significant effects', there may be exceptional circumstances that require its exemption from the LIA requirement (for example, due to the urgency of the proposed legislation). In such cases, the responsible Minister must gain an exemption from the Premier, who has discretion to exempt legislative proposals from an LIA. A request for an exemption must be made to the Premier in writing, with full details of why an exemption is being sought.

Where granted, the Premier's exemption must be attached to the appropriate Cabinet Committee submission.

Exemptions will be granted sparingly. While an exemption will generally be granted where a Bill is urgent, it will not be granted where a department should have foreseen a need to complete an LIA.

All correspondence regarding requests for LIA exemptions must be forwarded to the Economic Policy Branch in the Department of Premier and Cabinet. To assist in the timely granting of exemptions, departments must notify the Economic Policy Branch as soon as an exemption is being sought.

Where a Premier's exemption from undertaking an LIA is granted:

- the relevant department must prepare an evaluation strategy consistent with the approach outlined in the Victorian Guide to Regulation; and
- an evaluation of the legislation must be undertaken within three years of commencement. Evaluations will be assessed by the Commissioner.

1.4.3 Role of consultation in the LIA process

LIAs are not subject to the same formal consultative arrangements that apply to the RISs (which are stipulated in the *Subordinate Legislation Act 1994* and discussed in section 1.5.4 below).

Nevertheless, it is good practice to consult, where appropriate, since consultation with key affected stakeholders during the initial stages of the LIA process can assist in the examination of costs and benefits of the proposed legislation and the assessment of other options.⁷ However, consultation is not always appropriate – for example, there may be instances where consultation may compromise the intention of any proposed legislative measure. In cases where consultation is not undertaken, other sources of information about costs and benefits may be used.

In general, LIAs should be publicly released. There may be occasions where it is decided that the information contained within an LIA should be treated as Cabinet-in-Confidence. In such cases, the responsible Minister, the Premier and the Treasurer can agree that the LIA should not be publicly released.

1.4.4 Assessing the adequacy of the LIA

The Commissioner independently assesses the adequacy of all LIAs prior to consideration of the associated legislation by Cabinet or Cabinet Committee. The Commissioner provides advice on the adequacy of LIAs, and any concerns that remain unresolved. Where the Commissioner is not satisfied that the LIA meets the appropriate standards, the LIA is referred back to the originating government department/agency for further work, amendment and re-submission. Government departments and agencies are encouraged to consult with the Commissioner early in the LIA process so that the Commissioner's assessment and guidance can be provided in a timely fashion.

The responsible Minister can still submit the proposal to Cabinet or the relevant Cabinet Committee even if the Commissioner is not completely satisfied about the adequacy of the LIA. However, details of the Commissioner's concerns must be attached to the submission, and would therefore be taken into account in the Cabinet/Cabinet Committee decision-making process.

The Commissioner's role in the LIA process is illustrated in Figure 1.

⁷ Section 1.5.4 below discusses other reasons why consultation may be beneficial.

The Commissioner reports annually to the Treasurer on the nature and extent of compliance with the published policies currently applying to government bodies in relation to Regulatory Impact Statements and Legislative Impact Assessments.

Section 1.5.5 below discusses issues in relation to the Commissioner's assessment of cost-benefit analysis that are relevant to its evaluation of LIAs as well as RISs.

1.4.5 Timing considerations

Experience to date suggests that the preparation of an LIA will not have any substantive effect on overall timelines when this requirement has been factored into the planning of the policy development process. The time taken to prepare an LIA (which can be undertaken concurrently with other key tasks) will depend on the complexity of the proposal, the available data and analysis, the skills and experience of those assigned to the task (or those of any external resources used), and the planned consultation and clearance processes of each particular department/agency. The time required will also depend on how much prior notice the Commissioner is given of the upcoming proposal, and the extent and quality of engagement at the early stages. The quality of the arguments and the evidence presented in any LIA will typically reflect this early planning and the level of resourcing assigned to the task.

Departments and agencies are advised to allow a minimum of four weeks between the Commissioner receiving the first draft of an LIA and the Commissioner issuing a final assessment. This allows for time for agencies to consider the Commissioner's comments on drafts, and revise the LIA as required, minimising the issues likely to be noted in the final assessment. Experience has shown that the time taken (and number of iterations needed) to complete assessments can differ markedly depending on the quality of an LIA and on the time taken to incorporate the Commissioner's comments – some have been assessed in one week, while some have taken up to nine weeks before they were assessed as being adequate.

Where preliminary discussion on an LIA has occurred with the department, the Commissioner will generally assess low-impact proposals within three full working days and require no more than one revision. Similarly, LIAs for high-impact proposals will be turned around within five full working days, with the number of iterations required depending on the complexity of the proposal. It is expected that the overall time between the Commissioner's receipt of a first draft and issue of a final assessment may be reduced for low-impact LIAs under the new two-level process, but this will depend greatly on the factors described above.

In drafting timelines that encompass the LIA process, departments and agencies should also be mindful of time constraints imposed by the processes for gaining Ministerial approval and for Cabinet/Cabinet Committees, including the possibility of a coordination comments stage. The finalised and assessed LIA must be attached to the associated cabinet submission when it is to be considered by Cabinet/Cabinet Committee. However, if the Submission is to be distributed for coordination comments, it is preferable that the finalised and assessed LIA is attached for consideration at the coordination comments stage.⁸ Table 2 summarises the timing requirements for the different elements of the LIA process.

⁸ Attaching the LIA at the earliest possible stage of the process is consistent with the role of LIAs in informing Cabinet decision-making.

Table 2: LIA timing considerations

Element of LIA process	Timing requirement	Comment
1. Development of policy proposal and preparation of the LIA	At beginning of process	The length of time for this step will vary considerably. For example, this stage could include a review of the current legislative requirements, preparation of a discussion/issues paper, implementation of data collection strategies and/or consultation with stakeholders. Consultations with the Commissioner at this early stage will help to identify the nature of information that should be collected to inform the subsequent policy making and LIA process.
2. First draft of the LIA provided to the Commissioner	At least four weeks before finalised LIA and submission provided to the responsible Minister	Will depend on the quality of the draft LIA. (Experience has shown that some have been assessed in one week, while some have taken up to nine weeks before they were assessed as being adequate.)
3. Commissioner provides written comments on draft LIA	Within five working days for all types of proposals (high and low impact)	Depends on the impact of the legislative proposal and the quality of the initial draft LIA. Also depends on how much notice the Commissioner is given of the proposal, and the extent and quality of early engagement.
4. Next draft of the LIA provided to the Commissioner	Varies	Will depend on the nature of any outstanding issues. Steps 3 and 4 may need to be repeated if outstanding issues remain.
5. Commissioner's final assessment received	Within five working days from receipt of latest draft, and no later than the day before the submission and LIA will be considered by the responsible Minister	Where the assessment letter is likely to raise substantive issues, the Commissioner will aim to provide a draft final assessment letter for comment/feedback on factual matters.
6. Lodgement with responsible Minister's office for consideration of submission and LIA	Typically one week prior to lodgement for either coordination comments for Cabinet/Cabinet Committee consideration	Time required for this element of the process usually depends on which Minister is the proponent of the Bill.
7. Lodgement of submission and LIA for comments (if required)	Typically two weeks prior to lodgement for Cabinet/Cabinet Committee consideration	Must be lodged with Cabinet Secretariat. Relevant if coordination comments stage is to be used.
8. Final lodgement of submission, LIA and Commissioner's adequacy letter	Typically one week prior to the date of Cabinet/Cabinet Committee meeting	Must be lodged with Cabinet Secretariat.

1.5 Regulatory impact statements (RISs)

This section discusses the various elements of the RIS process, including:

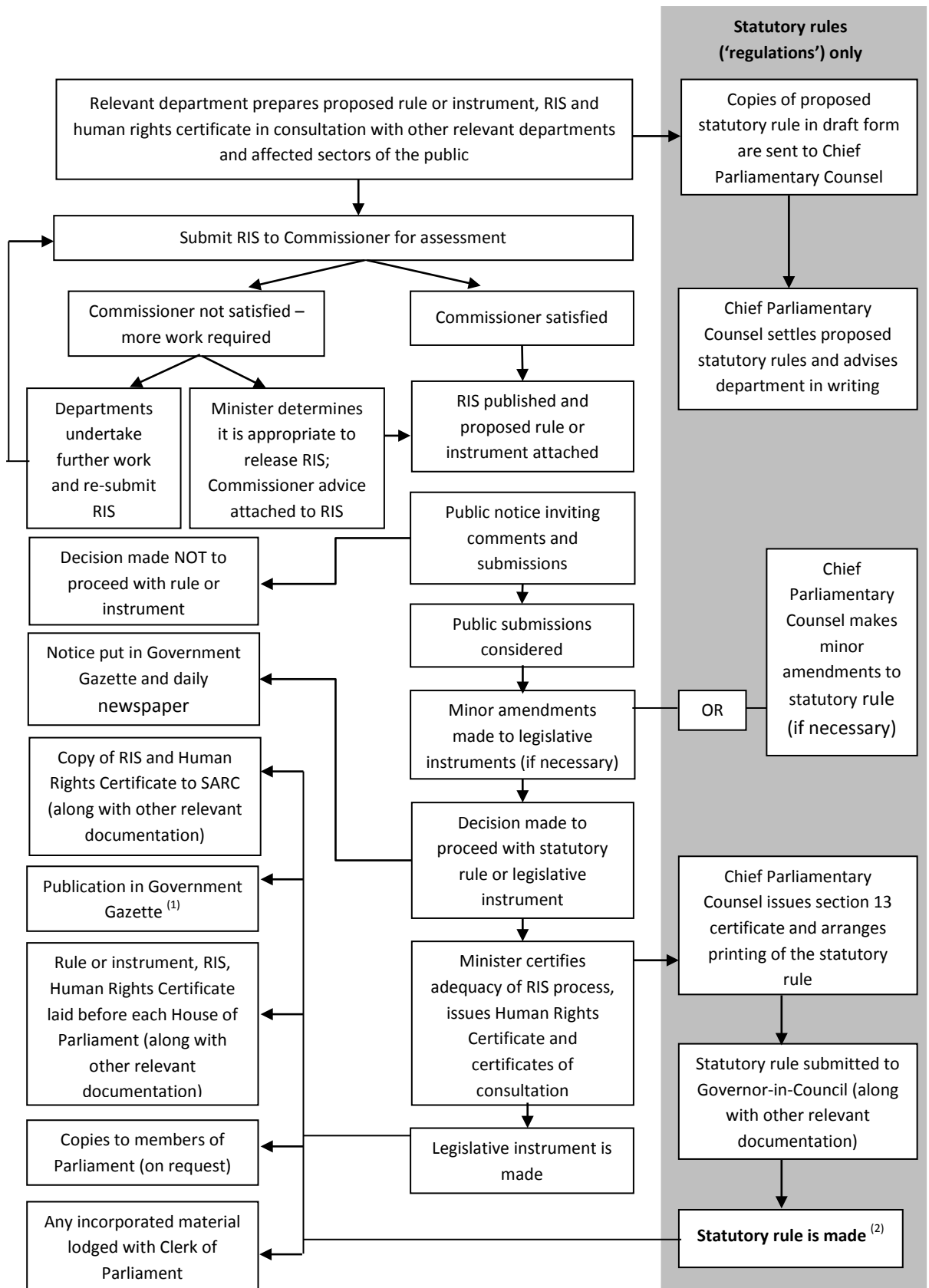
Discussion item	What is covered?	Refer to
What is the purpose of the RIS process?	<ul style="list-style-type: none"> The role of the RIS process in regulatory policy development 	Section 1.5.1
When must a RIS be prepared?	<ul style="list-style-type: none"> The circumstances that require preparation of a RIS Definition of statutory rules and legislative instruments Exemptions from, the RIS process 	Section 1.5.2
Specific RIS requirements for different types of regulations	<ul style="list-style-type: none"> Differences in emphasis required when preparing RISs for the different types of regulations, including: <ul style="list-style-type: none"> the establishment of new regulations replacement of sunseting regulations amendments to existing regulations regulations imposing a fee or charge 	Section 1.5.3
The role of consultation in the RIS process	<ul style="list-style-type: none"> Requirements for consultation during the initial stages of the RIS process Requirements for consultation after the RIS document is prepared The benefits of consultation 	Section 1.5.4
Assessing the adequacy of the RIS document	<ul style="list-style-type: none"> Requirements to check the adequacy of a RIS, including: <ul style="list-style-type: none"> independent assessment Ministerial RIS compliance certification review by the Scrutiny of Acts and Regulations Committee 	Section 1.5.5
Timing considerations	<ul style="list-style-type: none"> Guidance about the amount of time that should be allowed for the different stages of the RIS process 	Section 1.5.6

The various stages involved in making subordinate legislation (statutory rules and legislative instruments) is set out in Figures 2 and 3 below. Figure 2 outlines the process where a RIS is required and Figure 3 covers the process where the responsible Minister exempts the subordinate legislation from the RIS process.

Please note that any additional processes set out in the enabling legislation must also be complied with.

Figure 2: Flow chart of the subordinate legislation making process where a RIS is required

Note: Boxes shaded in grey only apply to statutory rules (commonly referred to as 'regulations'). Provisions relating to legislative instruments come into effect on 1 July 2011.

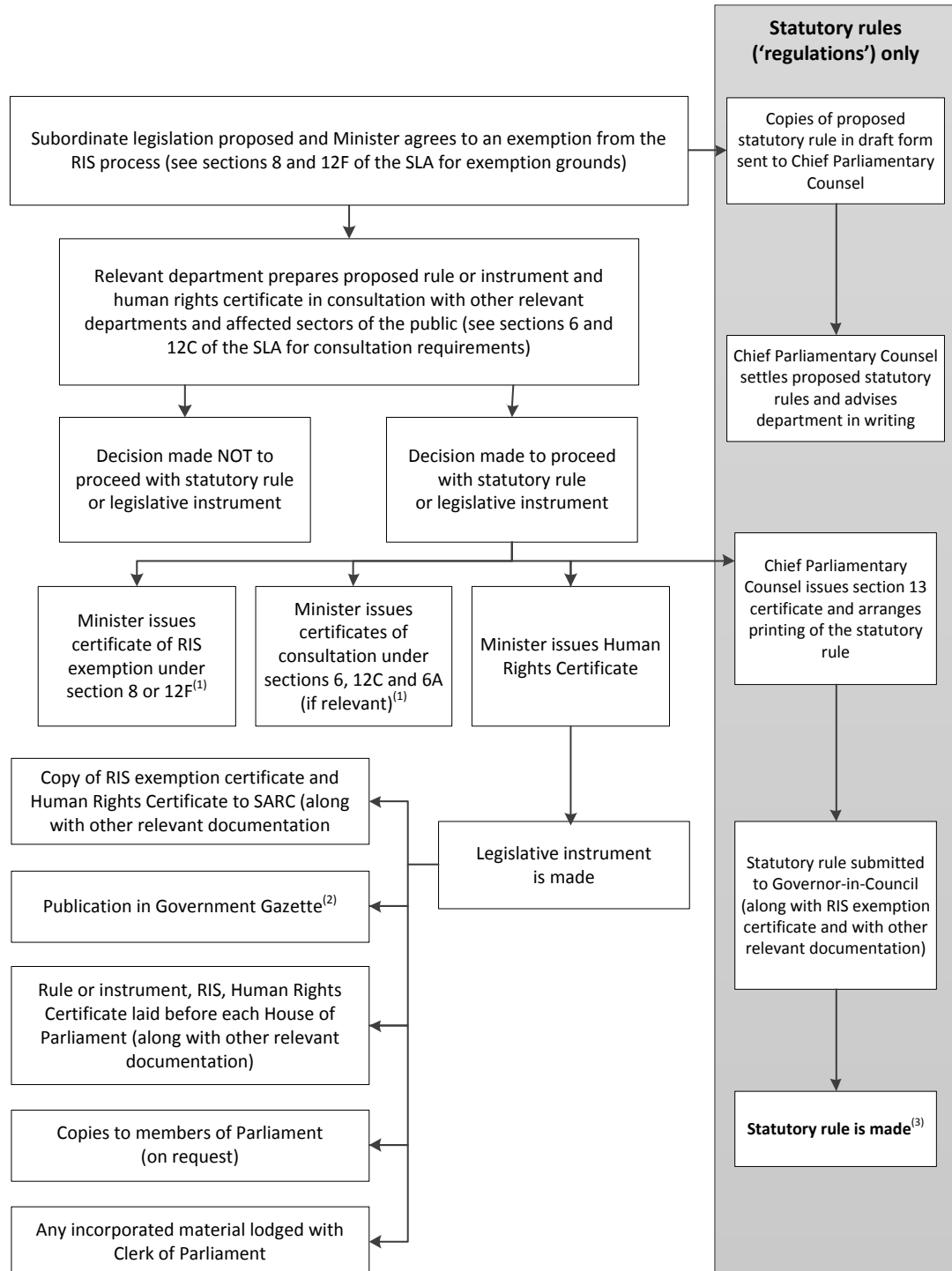


(1) For statutory rules, a notice in the Gazette is all that is required. Legislative instruments must generally be gazetted in full. See the Premier's Guidelines for exceptions. <http://www.betterregulation.vic.gov.au/Guidance-and-Resources>

(2) For statutory rules: The Office of the Chief Parliamentary Counsel and the Government Printer arrange for the allocation of a statutory rule number and for the printing, circulation and notification in the Government Gazette.

Figure 3: Flow chart of the subordinate legislation making process – RIS exemption by a Minister

Note: Boxes shaded in grey only apply to statutory rules (commonly referred to as ‘regulations’). Provisions relating to legislative instruments come into effect on 1 July 2011.



(1) The SLA permits composite certificates incorporating certificates required under sections 6, 6A, 8, 12C and 12F.
 (2) For statutory rules, a notice in the Gazette is all that is required. Legislative instruments must generally be gazetted in full. See the Premier’s Guidelines (Attachment 2) for exceptions.
 (3) **For statutory rules:** The Office of the Chief Parliamentary Counsel and the Government Printer arrange for the allocation of a statutory rule number and for the printing, circulation and notification in the Government Gazette.

1.5.1 Purpose of the RIS process

The basic purpose of the RIS process is to ensure that: regulation is only implemented when there is a justified need; only the most efficient forms of regulation are adopted; and there is an adequate level of public consultation in the development of regulatory measures.

The RIS process is a critical part of developing regulatory measures because it requires policy makers to consider:

- the appropriateness or otherwise of government regulatory action in any particular circumstance;
- the most effective form that government intervention might take to achieve a desired objective;
- the magnitude of the costs and benefits of regulation; and
- who in the community will reap the benefits or incur the costs of regulation.

For a regulatory measure to represent the most efficient solution to an identified problem, it must be demonstrated through the RIS that the proposed measure:

- is likely to yield benefits greater than the costs it imposes; and
- yields greater net benefits (i.e. total benefits less total costs) than any of the other viable options.

The RIS document needs to provide enough information and analysis for the costs and benefits of the proposed regulation and other viable options to be understood. The aim of the RIS is not to 'promote' the particular proposal; rather, it should attempt to recognise and consider the views of affected parties where competing interests are involved.

The RIS should contain sufficient information to allow a decision to be made about whether the proposed regulatory measure is justified, and it must adequately explain the reasons for the regulatory change. The RIS must examine other approaches and contain information as to the options that have been considered. (Of course, if a non-regulatory option is determined to be the best solution, this should have been identified in the early stages of the development of the regulatory objective.)

Regulations that have been developed taking into account the factors discussed in the Victorian Guide to Regulation are more likely to result in benefits greater than costs – and hence will be able to demonstrate through the RIS process that they represent the most efficient approach to solving the identified problem.

1.5.2 When must a RIS be prepared?

As discussed in Section 1.2, the RIS process provides a useful analytical framework for the development of government policy. If proposed actions to address a perceived problem include the imposition of a statutory rule or legislative instrument, then explanations of these actions must be included in a RIS.⁹

Section 10 and section 12E of the SLA require that RISs must be prepared for proposed statutory rules or legislative instruments respectively, unless an exemption certificate is issued. One of the grounds for an exemption is if the proposed rule is not likely to impose 'a significant economic or social burden on a sector of the public'. Section 1.3 outlines what constitutes 'a significant economic or social burden'.

What is a statutory rule?

The legal definition of a statutory rule, as specified in the SLA, is provided below. Statutory rules are a form of subordinate legislation – for example, the 'regulations' made under primary legislation.

⁹ The analysis undertaken as part of the RIS process and consultation with relevant parties may demonstrate that a non-regulatory response is the best solution to address the identified problem. If this is the case, the need to submit a RIS is clearly eliminated.

(However, as discussed in the section on exemptions below, not all types of statutory rules require the preparation of a RIS.)

What is a statutory rule?

The definition of a statutory rule, as defined in section 3 of the *Subordinate Legislation Act 1994*, is as follows.

'statutory rule' means—

- (a) a regulation—
 - (i) made by the Governor-in-Council; or
 - (ii) made with the consent or approval of the Governor-in-Council; or
 - (iii) which the Governor-in-Council has power to disallow – other than a regulation made by a local authority or by a person or body with jurisdiction limited to a district or locality; or
- (b) a rule relating to a court or tribunal or the procedure, practice or costs of a court or tribunal; or
- (c) an instrument or a class of instruments prescribed to be a statutory rule or statutory rules under section 4(1)(a); or
- (d) an instrument or class of instrument that is deemed to be a statutory rules by the authorising Act – but does not include an instrument or class of instrument specified in paragraph (a) or (b) which is exempted under section 4(1)(b).'

What is a legislative instrument?

'Legislative instrument' is a term to describe the broad range of subordinate legislation that became subject to the SLA RIS requirements from 1 July 2011.¹⁰ The requirement to prepare a RIS for these instruments, in addition to statutory rules, has been introduced as a number of these other instruments can impose a significant burden on a sector of the public.

What is a legislative instrument?

A legislative instrument is defined in section 3 of the SLA as follows.

'legislative instrument' means an instrument made under an Act or statutory rule that is of a legislative character but does not include

- (a) a statutory rule; or
- (b) a local law made under Part 5 of the Local Government Act 1989 and any other instrument made by a council under that Act or any other Act; or
- (c) a proclamation of commencement of an Act or any provision of an Act; or
- (d) a planning scheme or an amendment to a planning scheme under the Planning and Environment Act 1987; or
- (e) the Victoria Planning Provisions within the meaning of the Planning and Environment Act 1987; or
- (f) a practice note or practice direction issued by or on behalf of a court or tribunal or an instrument which relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal; or
- (g) an instrument of purely administrative character; or

¹⁰ The SLA was amended in 2010 to require the process for statutory rules to apply to a wider range of legislative instruments that were not previously subject to scrutiny. The effect of these amendments is to ensure that a fuller range of government-imposed instruments that place a significant economic or social burden on the community are subject to rigorous analytical assessment and public scrutiny.

(h) a prescribed instrument or a prescribed class of instrument'

Exemptions to the RIS requirement

Exemption by regulation

To find out whether a statutory rule or (from 1 July 2011) a legislative instrument is exempt by regulation from the requirements of the SLA, please consult the regulations made under sections 4 and/or 4A of the Act (SLA Regulations). The SLA Regulations will specify which, if any, SLA requirements apply to those rules and instruments. For legislative instruments, exemption by regulation generally means that the instrument will be exempt from all of the provisions of the SLA except gazettal.¹¹

Rules or instruments exempted from the SLA requirements by regulation will still need to comply with any requirements set out in their enabling legislation.

Exemption by Ministerial certificate

To exempt a statutory rule or legislative instrument by Ministerial certificate, the Minister must certify that in his or her opinion, one or more of the exemptions in section 8 (for statutory rules) or section 12F (for legislative instruments) applies. Further information about this process is provided in the Premier's Guidelines issued under s 26 of the SLA. An example Ministerial certificate is provided in Attachment 1.

Sections 8 and 12F of the SLA specify that a regulation or legislative instrument (respectively) will be exempt from the requirement to prepare a RIS if the responsible Minister certifies in writing that in his/her opinion the proposed statutory rule or legislative instrument satisfies certain conditions. While a RIS may not need to be prepared for full public consultation, some consultation requirements may still apply. For further information on consultation requirements, please refer to the most recent version of the Premier's Guidelines.

Under section 8(1) of the SLA, exemptions from the RIS requirement for **statutory rules** may be applicable where the responsible Minister issues an exemption certificate certifying that, in the Minister's opinion:

- (a) The proposed statutory rule would not impose a significant economic or social burden on any sector of the public.
- (b) The proposed statutory rule relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal.
- (c) The proposed statutory rule is fundamentally declaratory or machinery in nature.¹²
- (d) The proposed statutory rule only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget.
- (e) The proposed statutory rule –
 - (i) only prescribes under section 4(1)(a) an instrument or class of instrument to be a statutory rule; or
 - (ii) only exempts under section 4(1)(b) an instrument or class of instrument from the operation of this Act; or
 - (iii) is an extension regulation.
- (f) The proposed statutory rule is required under a national uniform legislation scheme, and an assessment of the costs and benefits has been undertaken under that scheme.

¹¹ The *Subordinate Legislation Act 1994* allows the creation of regulations exempting certain subordinate legislation from the operation of the Act. See section 4 for statutory rules and section 4A for legislative instruments.

¹² These refer to 'housekeeping' changes that clarify or correct a provision, without changing procedural requirements (e.g. replacing an obsolete definition/reference, revising opening times for government offices or prescribing addresses for service).

- (g) The proposed statutory rule deals with administration or procedures within, or between, departments or declared authorities within the meaning of the *Public Administration Act 2004* (or its successor) or within the meaning of the *Parliamentary Administration Act 2005* (or its successor).
- (h) Notice of the proposed statutory rule would render the rule ineffective, or would unfairly advantage or disadvantage any person likely to be affected by the proposed rule. (For example, this exemption would relate to situations such as the requirement for urgent environmental or species protection where advance notice of the statutory rule would allow a scarce resource to be exploited pending operation of the rule.)

In the case of **legislative instruments**, section 12F of the SLA provides for the responsible Minister to issue an exemption certificate from this requirement, certifying in writing that, in the opinion of the Minister;

- (a) The proposed legislative instrument would not impose a significant economic or social burden on any sector of the public.
- (b) The proposed legislative instrument is fundamentally declaratory or machinery in nature.¹³
- (c) The proposed legislative instrument only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget.
- (d) The proposed legislative instrument would only impose a burden on a public sector body.
- (e) The proposed legislative instrument is an order made under the *Administrative Arrangements Act 1983*.
- (f) The proposed legislative instrument is required under a national uniform legislation scheme, and an assessment of the costs and benefits has been undertaken under that scheme.
- (g) The proposed legislative instrument is required to undergo, or has undergone, an analytical and consultation process which, in the opinion of the responsible Minister, is equivalent to the process for a RIS normally required.
- (h) The proposed legislative instrument is of not more than 12 months duration and is necessary to respond to—
 - (i) a public emergency; or
 - (ii) an urgent public health issue or an urgent public safety issue; or
 - (iii) likely or actual significant damage to the environment, resource sustainability or the economy.
- (i) The proposed legislative instrument deals with administration or procedures within, or between, departments or declared authorities within the meaning of the *Public Administration Act 2004* (or its successor) or within the meaning of the *Parliamentary Administration Act 2005* (or its successor).
- (j) Notice of the proposed legislative instrument would render the proposed legislative instrument ineffective, or would unfairly advantage or disadvantage any person likely to be affected by the proposed legislative instrument.
- (k) The proposed legislative instrument is made under a statutory rule and the regulatory impact statement for that statutory rule has adequately considered the impact of the proposed legislative instrument.

All exemptions require the completion of an exemption certificate, which is to be presented to the SARC and to both Houses of Parliament (see Attachment 1). Reasons supporting the Minister's opinion that the rule be exempted must be specified in the certificate.

¹³ These refer to 'housekeeping' changes that clarify or correct a provision, without changing procedural requirements (e.g. replacing an obsolete definition/reference, revising opening times for government offices or prescribing addresses for service).

It should be noted with respect to legislative instruments that a ground for exemption under section 12F(1)(k) is where the proposed legislative instrument is made under a statutory rule and the regulatory impact statement for that statutory rule has adequately considered the impact of the proposed legislative instrument.

It should be remembered that sections 8 and 12F do not require a Minister to exempt any given proposed statutory rule or legislative instrument from the RIS process, but only enable a Minister to do so. The RIS process must still be undertaken if the Minister believes that it is appropriate or desirable.

In providing advice to Ministers regarding whether a statutory rules and legislative instrument fall under any of the above exemption criteria, Departments are encouraged to seek the Commissioner's views.

Rules and Instruments exempt by Ministerial certificate are exempt only from the RIS process; all other SLA requirements must be complied with.

The flow chart at Figure 3 sets out the process for making subordinate legislation which is exempt from the requirement to prepare a RIS.

Special circumstances: exemption via Premier's certificate

Sections 9(1) and 12G(1) of the SLA give the Premier the power to exempt a proposed statutory rule or legislative instrument (respectively) from the RIS process where the Premier is of the opinion that, in the special circumstances of the particular case, the public interest requires that the proposed statutory rule or legislative instrument be made without complying with the normal RIS process. This power is for use in cases of emergency or overriding public interest only. Furthermore, such an exemption can only be given if the proposed rule is to expire on or before 12 months after its commencement date (as stipulated in section 9(2)(a) and section 12G(2)(b) of the SLA).

Requests for a Premier's certificate should not be made lightly. The Premier's power to grant exemptions is not intended to operate as an alternative means of making statutory rules or legislative instruments. The purpose of this form of exemption is to ensure that matters of genuine public interest can be made without delay. Accordingly, the application for a Premier's certificate must set out sufficient evidence to enable the Premier to form the requisite opinion. There are no set criteria for determining the public interest, and each case must be argued on its own merits.

If granted, copies of the Premier's certificate must be forwarded to SARC and laid before each House of Parliament (see Attachment 1).

If a Premier's certificate is granted, the RIS process will still need to be commenced and completed within the lifetime of the certificate. Only in exceptional circumstances will more than one certificate be granted. Moreover, the duration of the certificate will be the shortest possible period to enable the RIS process to be undertaken (unless exceptional circumstances are involved). In practice, a six-month period is often the maximum period granted.

Rules and instruments exempted by Premier's certificate are subject to all the processes of the SLA, except the RIS requirements.

COAG/national RIS process exemptions

Included among the exemptions are proposed statutory rules or legislative instruments that are required under a national uniformity scheme, and where an assessment of costs and benefits has been undertaken as part of a COAG/national RIS for that scheme. It would be expected that the COAG/national RIS had been recently prepared (say, within the last three to five years) and assessed as adequate at the decision-making stage by the Commonwealth Government's Office of Best Practice Regulation.¹⁴ In determining whether a separate RIS might need to be undertaken in

¹⁴ There may be advantages in undertaking a national impact assessment because the resources and expertise can be pooled with counterparts in other jurisdictions dealing with similar issues. More details about the COAG/national RIS process can be found on the Office of Best Practice Regulation website at <http://ris.dpmc.gov.au/>.

Victoria, consideration must be given to whether the regulation or legislative instrument to be introduced in Victoria would have the same impacts as were identified in the COAG/national RIS (including the assessment of any fees), and the time that has lapsed since the national assessment was conducted.

It is generally advisable to seek comment from Victorian-based stakeholders on the national RIS assessment when this is released for consultation to assess whether the national RIS adequately reflects the likely impact in Victoria. The Commissioner must be provided with a copy of the draft COAG/national RIS when it is released for consultation after assessment by the Office of Best Practice Regulation. The Commissioner must also be provided with a copy of the decision COAG/national RIS.

Where departments are participating in national reform processes that involve developing national impact assessments (i.e. COAG/national RISs), they should engage with the Commissioner as early as possible. In this way, it would be hoped that areas where early draft RISs do not meet Victorian standards of adequacy can be satisfactorily addressed by the time final documents are released for public comment.

Any comments on the COAG/national RIS made by the Commissioner must be taken into account when determining whether to seek an exemption from Victoria's requirements. In particular, where it is considered that the costs and benefits of a regulation or legislative instrument, as adopted in Victoria, are likely to differ substantially from those of the 'model' regulation contained in a national RIS, then a separate RIS must be completed under Victorian processes.

A Victorian RIS will be required for those aspects that were not covered by the COAG RIS.

1.5.3 Specific RIS requirements for different types of regulations

Unless exemptions have been made, RISs will need to be prepared for proposed statutory rules and legislative instruments made under the following circumstances:

- the establishment of new regulations;
- the replacement of sunseting regulations;
- amendments to existing regulations; and
- regulations imposing fees and charges.

The Act does not specifically differentiate between RIS requirements applying to different circumstances. However, as discussed in the following paragraphs, there are some differences in emphasis that should be taken into account in order to ensure the clarity and usefulness of the resulting document, and to ensure that the requirements of the Act are fully met in the specific case in question.

New regulations

RISs dealing with the regulation of an area not previously regulated should take care to establish the 'threshold question' is adequately answered – i.e. the discussion of the nature and extent of the problem being addressed must make it clear there is an issue which clearly requires public policy intervention. Comparisons with the approaches taken to the same issue in other jurisdictions may be helpful in making this case. Furthermore, the examination of other viable options is particularly important in the assessment of new regulations.

The cost-benefit analysis undertaken in the RIS should be conducted in relation to the base case of there being no regulation.

The issue of the likely extent of compliance will also require careful examination, as there will clearly be little relevant experience upon which to rely. Inter-jurisdictional comparisons may also be helpful here.

Replacement of sunseting regulations

In order to replace sunseting regulations, it is important to provide a strong and clear demonstration that each restriction imposed by regulation is still required. When replacing sunseting regulation, whether in similar or modified form, particular attention should be given to the following requirements during the preparation of the RIS:

- demonstrating that the nature and extent of the problem still require a regulatory response;
- evaluating the actual effectiveness of the existing regulatory regime;
- substantiating that the particular regulatory response remains the best solution;
- presenting an option that reduces the burden imposed on business and/or the community as outlined in the Victorian Guide to Regulation; and
- conducting the cost-benefit analysis in terms of a comparison with the base case of an unregulated situation.

Undertaking cost-benefit analysis against an unregulated situation is essential to ensure that the policy development process considers the full impact on society, in terms of costs and benefits, of the regulatory proposal and other viable options. A particular focus here should be to ensure that the RIS does not simply re-state the problem that underpinned the existing regulations, but instead takes account of developments that have occurred over time – for example, in relation to factors such as market structure, technological advances and community expectations. A policy development process that follows this approach will focus on developing a regulatory proposal that maximises the net benefit to society, rather than simply remaking the previous regulations.

Describing the nature of the problem in the ‘unregulated situation’ should be possible using the framework set out in the Victorian Guide to Regulation. Quantifying the extent of the problem in the absence of regulation may be more difficult, particularly where the existing regulations have been in place for some time. Data sources that should be examined to quantify the extent of the problem in the absence of regulation include:

- **an evaluation of the existing regulations** – this requires an understanding of the policy and data baseline prior to the regulations being in place as well as comprehensive review of the effectiveness of the existing regulations in addressing the original problem (see below for an example);
- **consultation with stakeholders** (for example, on what would happen in the absence of the regulations as part of normal business practices or other regulatory requirements);
- **experience in other jurisdictions** – particularly those with different regulatory frameworks; and
- **academic research** – which may also evaluate regulatory effectiveness and contain cross-jurisdictional comparisons.

Where amendments are being made to sunseting regulations, the specific problems that the proposed amendments are intended to address must also be explicitly identified, and the analysis of other approaches must compare the remaking of sunseting regulations to the proposed amended regulations.

Assessing the unregulated situation through evaluation of existing regulations – occupational licensing example

Occupational licensing is a common form of regulation for certain professional services (e.g. medical services) because consumers may not be able to make fully informed choices regarding the choice of providers and may be unable to effectively monitor the performance of providers. (This problem is sometimes referred to as ‘information asymmetries’). As a result, consumers may experience harm or losses in an unregulated environment.

For the purposes of replacing sunseting occupational licensing regulations, the associated cost-benefit analysis should attempt to quantify the harm or losses suffered under an unregulated scenario. This could be achieved by undertaking an evaluation of the existing regulatory framework.

This evaluation could examine enforcement data (including complaints investigated, offences committed, compensation or damages awarded and fines or penalties imposed), focusing on any differences between licensed and (illegally) unlicensed providers. The unlicensed providers could provide a 'proxy' for what would occur under an unregulated environment, with the number of investigations and prosecutions, and the level of damages or fines imposed on unlicensed providers providing a quantifiable indication of the extent of the problem in an unregulated situation.

Amendments to existing regulations and legislative instruments

Where a RIS relates to amendments to existing regulations and legislative instruments, the cost-benefit analysis must focus on the incremental costs and benefits of moving from the existing regulations to those proposed.

In some instances, the benefit may simply be to clarify understanding, which may result in a higher level of compliance or reduce the likelihood for confusion. In such a case, the costs of the amendment may be negligible. It is the change, not the principal regulation that has to be justified.

Fees and charges

The guidelines made under section 26 of the SLA state that statutory rules and legislative instruments that impose fees or charges may impose a significant burden within the meaning of the Act. As a general rule, a RIS is likely to be required for proposals that:

- introduce new fees or remake sunseting regulations that recover \$2 million or more in fee revenue per year; and
- increase existing fees that generate additional revenue of \$2 million or more per year.

In these instances, the likely impact of a proposal on an individual, community group, or business will need to be considered in determining whether it imposes a significant burden.

Statutory rules or legislative instruments that reduce existing fees or charges would not be expected to impose a significant burden so as to require the preparation of the RIS (provided that the statutory rules or legislative instruments do nothing else that would warrant the need for a RIS). However, there are exceptions where the reduction in fees or charges is the result of shifting costs to other sectors (for example, where a reduction in fees lowers the level of cost recovery, which is then made up through general taxation).

The central issue will be the accuracy of the costing of service provision. The RIS must describe and justify each task involved in providing the service. These tasks must be costed, with both direct and indirect costs, including overheads and capital related to providing the service. For further guidance on costing approaches, please refer to DTF's *Cost Recovery Guidelines* available at www.dtf.vic.gov.au.

Furthermore, in discussing the allocation of costs, the RIS needs to demonstrate adherence to the Government's competitive neutrality policy.

Finally, note that under the SLA, the RIS must include a table comparing new and old fees and charges.

1.5.4 Role of consultation in the RIS process

Consultation is an integral part of the RIS process. Appropriate consultation is important to determine whether a statutory rule or legislative instrument should be made and, if so, the nature of that rule. The Act requires that consultation take place in appropriate cases at the initial stages of the RIS process (i.e. before the final RIS document has been prepared) and after the RIS has been completed, so that the analysis and assessments contained in the RIS can be tested in the community.

Timing considerations for the various elements of the public consultation process are summarised in Section 1.5.6 below.

Consultation during initial stages of RIS process

Consultation in the early stages of the RIS process is important because the RIS document must address a range of policy options that may not be identified or developed until there has been at least some initial consultation with persons and bodies potentially affected by the proposed statutory rule or legislative instrument.

Consultation is required with:

- **Any other Ministers whose area of responsibility may be affected by a proposed statutory rule or legislative instrument.**

If a proposed statutory rule or legislative instrument may impinge upon or affect the area of responsibility of another government Minister, department, agency or statutory body, consultation must take place with a view to ensuring that any differences are reconciled, and that there is no overlapping or duplication of, or conflict with, legislation, statutory rules or legislative instruments, or stated government policies administered by that other body. Such consultation must take place before external consultation is undertaken and before a public notice of the RIS is made (see below). Any areas of significant disagreement must be referred to Ministers for resolution, or brought to Cabinet, or the appropriate committee of Cabinet, for consideration.

- **Any sector of the public on which a significant economic or social burden may be imposed by a proposed statutory rule or legislative instrument.**

If the proposed statutory rule or legislative instrument is likely to impose any significant burden, cost or disadvantage on any sector of the public, consultation must take place with that sector (e.g. business groups, community groups, consumer groups, special interest groups). This consultation should include discussion of the need for and method of the proposed regulation.

The level of consultation required under section 6 of the Act and the consultation procedures adopted depend upon the nature of the proposed statutory rule or legislative instrument, and is a matter for the responsible Minister. Factors to be taken into account when determining the appropriate level of consultation include:

- Is the measure being introduced into a previously unregulated area?
- What is the nature of the industry that will be affected by the measure? Does it have peak bodies that should be consulted?
- Is the proposed measure replacing an existing regime (e.g. a voluntary code of conduct)?
- Will the proposed measure impose criminal or civil penalties?
- Is there likely to be substantial controversy over the acceptability of the proposed measure?
- Are there many different stakeholder groups that will be affected by the proposed measure?
- Are there community or environmental groups or other peak bodies that should be consulted?
- Are the potential impacts subject to considerable uncertainty?

Clearly, more consultation will be required in areas that were previously unregulated than those where the proposed rule or instrument is merely fine-tuning existing regulation.

As RISs are final consultation documents, consultation should occur prior to the advertisement of RISs. Such consultation may take the form of focus groups and briefing sessions with key stakeholders before deciding that a regulatory proposal is the most appropriate response to an issue. It is important that peak industry bodies are notified during the development of regulatory proposals. Issues papers can be used as a preliminary vehicle for communication.

The SARC must be provided with a certificate of consultation once the proposed statutory rule or legislative instrument has been made.

As discussed in Section 1.5.4, consultation is also required in most cases where consideration is given to whether a proposed statutory rule or legislative instrument should be exempt from the RIS process.

Consultation after RIS document is prepared

Once the RIS document is prepared and independent advice from the Commissioner has confirmed its adequacy (discussed in Section 1.5.5 below), a notice must be placed in:

- the Government Gazette;
- a daily newspaper circulating generally throughout Victoria; and
- in a relevant trade, professional or public interest publication if the responsible Minister considers it appropriate.

As stipulated in section 11(2) and section 12I of the SLA, the notice must:

- state the reason for, and the objectives of, the proposed statutory rule or legislative instrument;
- summarise the results of the RIS;
- specify the locations (including government website) where a copy of the RIS and the proposed statutory rule or legislative instrument can be obtained; and
- invite public comments or submissions.

It is good practice to send a copy of the RIS document, along with the accompanying assessment letter from the Commissioner, to key stakeholder groups, or at least advise them directly of its availability.

Under the Act, there is to be a minimum 28-day period from the publication of the notice about the availability of the RIS to the receipt of public comments and submissions. However, wherever feasible, a longer time period for public submissions is encouraged as part of the Victorian Government's pursuit of a best practice regulatory regime. To this end, a consultation period of at least 60 days is recommended.

To ensure a transparent process, good practice dictates that the RIS should make it clear that submissions are generally considered public documents, and are available to other stakeholders, either on request, or by being posted on the agency's website.

Consideration of public submissions

Sections 11(3) and 12I(4) of the SLA require the responsible Minister to consider all submissions and comments received about a statutory rule or legislative instrument where a RIS has been prepared.

Departments/agencies must provide reasons for the direction taken in final regulations that broadly address any general issues raised in submissions. This statement of reasons must be published on a government website (e.g. the Commissioner's website or that of the responsible department/agency) and be made available in hard copy format. The effort of providing detailed explanations for proceeding in a particular direction (and rejecting particular suggestions) can result in the greater community acceptance of the final regulations.

In addition, the Scrutiny of Acts and Regulations Committee (SARC) of Parliament has indicated that it expects departments and agencies to send responses 'to those who have taken the time and effort to send in a submission'.¹⁵ This response should provide a clear demonstration that matters raised in submissions have been considered. Where there are a large number of submissions, a general letter with an attachment covering the various issues raised, and documenting how each issue has been addressed, can be used. Such a considered response contributes to the transparency of the regulatory process.

The failure of a department or agency to adequately address any valid criticisms or suggestions made may be highlighted by the SARC which, under sections 15A(1)(c) and 16C(1)(d) of the Act, must be

¹⁵ Scrutiny of Acts and Regulations Committee, August 2012, *Annual Review 2011, Regulations 2011*, page 11.

provided with a copy of all comments and submissions received in relation of the RIS. It is also good practice to forward copies of the public comments and submissions to the Commissioner.

After consideration of the public comments and submissions, a notice advising of the decision to make or not make the proposed statutory rule or legislative instrument must be published in:

- the Government Gazette; and
- a daily newspaper circulating generally throughout Victoria.

This notice must be forwarded to the SARC, along with the other documentation listed in Attachment 1.

In addition, a statement is to be prepared explaining how the general issues raised in the public comments/submissions have been addressed. This statement is to be provided to the SARC and be published on the same government website used to consult on the RIS and be available in hard copy format on request. It is up to the discretion of departments/agencies about how to provide responses to authors of individual submissions.

Benefits of consultation

An important role of consultation in the RIS process – particularly with business and community groups – is to gain information to assist the examination of the costs and benefits of the proposed statutory rule or legislative instrument and other options being considered, as well as to identify other methods of achieving the stated objective. For example, the people involved in a particular industry build up a wealth of knowledge about its historical development, current operation and future direction, and the interrelationships with other industries and economic activities. They can greatly assist in the identification of innovative techniques for dealing with the particular concerns about the industry.

Business has extensive knowledge about the costs of regulatory proposals. For example, a firm may be able to estimate the impact of a new statutory rule or legislative instrument on the costs of its operations. Information of this kind greatly assists in evaluating other viable options.

Through consultation, the RIS process gives business and the wider community an opportunity to communicate to government any concerns it may have about regulations affecting its activities. It provides a mechanism to draw on information and comment from the widest possible sources, thereby exposing any subjectivity or faulty reasoning in the regulatory proposal, and ensuring that competing interests are recognised and considered.

As such, it is important that processes for consultation are designed so they are widely accessible to all sections of the community (including, for example, people with disabilities and those from culturally diverse backgrounds).

1.5.5 Assessing the adequacy of the RIS

The Act requires three levels of checks on the adequacy of a RIS. These are:

- an independent assessment must be sought;
- on the basis of the above assessment, and any other relevant advice, the responsible Minister must certify the adequacy of the RIS; and
- after the regulations are made, the SARC reviews the regulations and the adequacy of the RIS.

These are discussed in more detail below.

Independent assessment

Section 10(3) and section 12H(3) of the Act stipulate that the responsible Minister must seek independent advice to confirm that the RIS adequately meets the requirements of the legislation (i.e. it states the objectives of the regulation; explains its effects; identifies other measures; assesses costs and benefits; and discusses why other options are not appropriate). The guidelines issued under section 26 of the SLA state that the Commissioner undertakes the independent assessment of all RISs.

The RIS must not be released for public comment until the responsible Minister has received independent advice from the Commissioner regarding the adequacy with which the RIS addresses the matters required to be included in the RIS under the legislation. If the advice of the Commissioner is that it considers the RIS to be inadequate, further work may be undertaken on the RIS by the appropriate department or agency, or the Minister may determine it is appropriate to release the RIS for public consultation, in which case the Commissioner's assessment must be attached to the RIS.

The normal process is for each RIS to be subject to approximately 3-4 iterations with the Commissioner's advice to be provided within 10 working days for the first iteration. When the last iteration that addresses outstanding issues is received, it will be 2-3 days or less between receipt of the final draft¹⁶ and the Commissioner's final letter.

The Commissioner encourages departments and agencies to make contact early in the RIS process so that its assessment can be planned and necessary guidance can be provided in a timely fashion. Independent regulators preparing regulation and RISs must ensure that their Minister's department is briefed on the proposal. The Commissioner will often seek the department's assistance on issues arising from its examination of the RIS, particularly in terms of the interaction of the proposed regulatory measure with other regulation and policy initiatives.

Validation of the RIS document by the Commissioner should not be taken to mean that the assessment of costs and benefits contained in the RIS is necessarily comprehensive and/or accurate. Rather, the Commissioner assesses the analysis of the costs and benefits presented in the RIS as being adequate for consultation (i.e. the data appear appropriate and the assumptions explicit and reasonable), thereby representing the Government's best estimate at that time. Other issues relevant to the Commissioner's assessment of cost-benefit analyses are outlined below.

Assessment of moral judgements and technical specifications by the Commissioner

Cost-benefit analysis of social regulation may require moral judgements to be made – for example, where the benefits of the regulation include the benefits to the community of prohibiting activities that society considers offensive or inappropriate. In its assessment of such cost-benefit analyses, it is not the role of Commissioner to evaluate the validity of the moral/social judgements, or the weights given to the views of various groups in the community; such judgements are the responsibility of government. Rather, the Commissioner's concern is to ensure that the RIS:

- transparently provides information on the basis on which those judgements have been made;
- gathers information and evidence to support those judgements, where possible; and
- has a consultation process that is sufficiently comprehensive to canvas the full spectrum of relevant views.

Another issue is the approach taken by the Commissioner in the assessment of a cost-benefit analysis where the regulations contain **technical specifications**. Often, the Commissioner and the OCBR would not have the technical expertise necessary to assess the adequacy of an analysis of the costs and benefits of highly technical standards. In such cases, the Commissioner would look for the RIS to demonstrate that the process undertaken to set the technical standard was consistent with the requirements of the RIS to demonstrate that the benefits of the proposed regulation outweigh the costs. For example, a process that is likely to generate this outcome would have:

- assessment criteria that are consistent with the objectives of balancing costs and benefits;
- access to the technical expertise necessary to set the standards;
- transparent decision-making processes; and
- an appropriate level of consultation.

¹⁶ The 'final' RIS is defined as the version that the relevant government department/agency considers to have addressed all the issues raised by the Commissioner in its penultimate version, and where the drafting of the statutory rule has been settled by the Office of the Chief Parliamentary Counsel.

As discussed above, an important reason for releasing the RIS for public consultation is to gather feedback from affected parties on the size and nature of potential impacts arising from the proposed approach. This feedback must be taken into account when making the final decision as to whether or not to proceed with the proposal. Copies of the public submissions received on the RIS, and documentation on how these comments have been subsequently addressed, should be provided to the Commissioner for information, to assist it in improving its assessment processes in the future.

Copies of the Commissioner's assessment of RISs must be forwarded to the SARC, along with other relevant documentation (as detailed in Attachment 1).

The Commissioner's role in the RIS process is illustrated in Figure 2 above.

Ministerial RIS compliance certification

Section 10(4) and section 12H(4) of the Act require the responsible Minister to provide a compliance certificate in writing, specifying:

- the requirements relating to the RIS process have been complied with; and
- in the opinion of the responsible Minister, the RIS adequately assesses the likely impact of the proposed statutory rule or legislative instrument.

Attachment 1 contains an example of this certificate and details its lodgement process.

Role of the Scrutiny of Acts and Regulations Committee

After statutory rules or legislative instruments are made, the SARC must be supplied with copies of the RIS, the Commissioner's final assessment letter for the RIS, the regulations or legislative instruments, all public comments received during the consultation period, and the relevant department/agency's response to the main issues raised in the public comments. The SARC will review the regulations in accordance with the criteria relating to the adequacy of the statutory head of power authorising the regulations; their consistency with principles of justice and fairness; and conformity with the processes for regulation-making specified in the Act.

The Act provides that, if it is of the belief that any of these criteria has not been met, the SARC may make any recommendations to Parliament that it considers appropriate, including the disallowance of the regulation, wholly or in part, and the suspension of the regulation. In practice, however, the SARC has indicated that, where it is considered that a statutory rule can be rectified by amendment, the Committee will approach the Minister privately to seek amendment rather than report to Parliament.

1.5.6 Timing considerations

The time taken to prepare the RIS document is largely in the hands of regulating agencies, and will clearly depend on the complexity of the proposed regulation. The quality of the arguments and evidence presented in any RIS will also reflect the time taken on its preparation. As a rough rule of thumb, departments should allow about three months between commencement of the writing of the document and having it cleared within a department/agency for assessment by the Commissioner.

There are also timing considerations for the public consultation process.

Departments and agencies should be mindful that, in general, statutory rules will sunset or expire on the tenth anniversary of their making. It is important, therefore that accurate dates are maintained of the sunset for all statutory dates administered by the Ministers to which departments/agencies reports, and that sufficient time is allowed for the review of the continued appropriateness of the statutory rule and for the completion of the associated RIS, where appropriate. (Further discussion of processes relevant to the sunseting and extension of statutory rules can be found in Part Five of the *Subordinate Legislation Act 1994* Guidelines).

Table 4.3 attempts to summarise the timing requirements for the different elements of the RIS process. The table identifies those timings that are mandated by legislation (i.e. the *Subordinate Legislation Act 1994*) by referring to the relevant section of the Act.

Departments are advised to allow around six months between the beginning of a RIS process and the making of the associated statutory rule or legislative instrument.

Table 3: RIS timing considerations¹⁷

Element of RIS process	Timing requirement	Comment
Inform the Commissioner	At beginning of process	To ensure that the Commissioner can plan its assessment processes and can provide guidance in a timely fashion, it should be informed of the intention to prepare a RIS at the beginning of the process. Early engagement will also help to facilitate the preparation of a robust, proportionate and timely RIS, and the implementation of better solutions.
Settle drafting of the regulations with Office of the Chief Parliamentary Counsel (OCPC)	At beginning of process – may take several weeks or months (depending on complexity). Changes to the Regulations may be made during the development of the RIS, where the analysis points to a different (improved) approach. Thus, the process of drafting the Regulations may be an iterative process.	The OCPC should be consulted as early as possible for assistance in drafting the regulations. This is particularly important during peak demand times (e.g. in the lead up to Parliamentary sessions). Even a simple set of regulations may take several weeks to settle; major or complex regulations may take months to draft and settle. ¹⁸
Writing of RIS document (including initial consultations)	Around three months	Will depend on the complexity and impact level of the proposed regulation. Discussions with the Commissioner and provision of draft RIS documents should occur during this stage to facilitate timely assessment. Draft RISs will be turned around within 10 working days.
Independent assessment of RIS	28 days	If assessment cannot be completed within this timeframe, the Minister may seek alternative independent advice.
Notice that RIS has been prepared	At least eight weeks before statutory rule or legislative instrument is to be made	Sufficient time is needed to take into account: a minimum public submissions period; consideration of the submissions; and time for the printing and for the Chief Parliamentary Counsel to give a certificate on a statutory rule under section 13 of the Act.
Public comments and submissions	At least 28 days, but preferably 60 days	Sections 11(2)(d) and 12(2)(d) of the SLA mandate the 28-day minimum period. The Victorian Government encourages longer time periods (preferably 60 days), where feasible.

¹⁷ In addition to the considerations for the RIS process, departments and agencies may need to be allocate time for training and/or informing affected parties about how to comply with new regulations. The length of time to perform this task will clearly depend upon the complexity of the proposals, but could take several months. This is discussed further in the Victorian Guide to Regulation.

¹⁸ For further information about the regulatory drafting process, please refer to the OCPC's Notes for Guidance on the Preparation of Statutory Rules (available at www.legislation.vic.gov.au).

Element of RIS process	Timing requirement	Comment
Consideration of public submissions	At least one week, but often four weeks	Based on experience. Clearly, this will depend on the number of submissions received and their level of detail.
Notice of a decision not to make a proposed statutory rule or legislative instrument	As soon as practicable after the decision has been made	As mandated in sections 12(2) and 12J(1) of the SLA.
Notice of a decision to make a proposed statutory rule or legislative instrument	Before the statutory rule or legislative instrument is made	As mandated in sections 12(3) and 12J(4) of the SLA.
Time for printing and for the Chief Parliamentary Counsel to give a certificate on the statutory rule under section 13 of the Act	At least three weeks	Based on guidance notes on statutory rules prepared by the Office of the Chief Parliamentary Counsel, Victoria.

1.6 *Charter of Human Rights and Responsibilities Act 2006*

The *Charter of Human Rights and Responsibilities Act 2006* ('the Charter Act') provides a framework for the protection and promotion of human rights in Victoria. The range of rights and freedoms that are protected by the Charter Act are shown below.

Human rights and freedoms that are protected in the Charter Act

- recognition and equality before the law;
- right to life;
- protection from torture and cruel, inhuman or degrading treatment;
- freedom from forced work;
- freedom of movement;
- privacy and reputation;
- freedom of thought, conscience, religion and belief;
- freedom of expression;
- peaceful assembly and freedom of association;
- protection of families and children;
- rights to take part in public life;
- cultural rights;
- property rights;
- right to liberty and security of person;
- humane treatment when deprived of liberty;
- rights of children in the criminal process;
- right to a fair hearing;
- rights in criminal proceedings;
- right not to be tried or punished more than once; and
- retrospective criminal laws.

The Charter Act is intended to be an integral part of policy development. In addition to legislative proposals, it applies to a broad range of policy proposals, operational guidelines and other programs that are put before Cabinet. Because of this broad scope, separate guidance material has been developed for government departments and agencies by the Human Rights Units of the Department of Justice, and training in the obligations under the Charter Act is being provided to the legal areas of government departments/agencies.

Because the Charter Act applies to the preparation of new Bills, statutory rules and legislative instruments, this section of the guide provides an overview of the Act's key features and the obligations it imposes, focusing on the implications for primary and subordinate legislation. This overview is intended primarily to raise awareness about the Charter Act, but in no way should be treated as a substitute for the more extensive guidance material that is being developed for government departments/agencies by the Department of Justice (see contact details at the end of this section).

1.6.1 Overview of the human rights impact assessment process

There are a number of steps involved to ensure that a proposal (whether it be a policy proposal, Bill or proposed subordinate legislation) is compatible with the Charter Act. The first is to consider whether the proposal raises any human rights issues, and identify each human right that the proposal might impact upon.

Secondly, the scope of the each human right raised by the proposal should be considered. At this stage, account should be taken of any specific limitation or express exceptions that appear in the section providing for that right in the Charter Act.

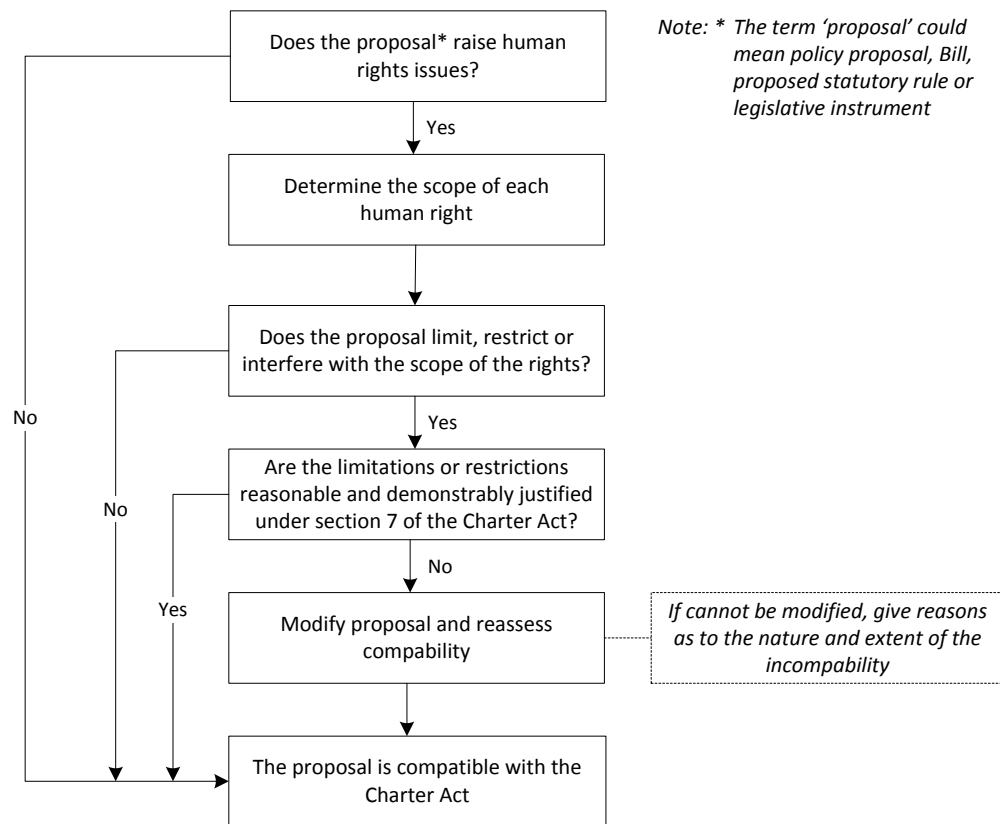
The third step is to consider whether the proposal limits, restricts or interferes with the scope of the right.

The fourth step is to consider whether that limitation or restriction is reasonable and demonstrably justified under section 7 of the Charter Act (see the following sub-section for further details). This would require identification of all the reasons why the limitation or restriction on the right is justified. These may be extensive. This information is required for the preparation of a Statement of Compatibility or Human Rights Certificate (discussed in Attachment 1 below).

If it is determined that any limitations or restrictions are not reasonable or demonstrably justified, then the fifth step is to modify the proposal. On some occasions, which are likely to be rare, it may not be possible to modify the proposals. In these situations, reasons will need to be given as to the nature and extent of the incompatibility.

Figure 4 illustrates the various stages involved in the human rights assessment process.

Figure 4: Flow chart of human rights impact assessment



Reasonable limitations – section 7 of the Charter Act

All of the human rights in the Charter Act are subject to a general limitations clause (section 7 of the Act), which means that the human rights not absolute. In other words, the Charter Act recognises that, under certain circumstances, a human right may be limited, and there may be grounds for a policy or legislative proposal to limit, restrict or interfere with human rights if:

- the limit is provided under law (e.g. an Act, regulation or the common law);
- it is considered reasonable; and
- its imposition on the human right must be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

In determining whether a limit is reasonable, section 7 states that all relevant factors should be taken into account, including (but not limited to) those identified below.

Relevant factors to take into account in determining whether a limit to a human right is 'reasonable'

- The nature of the right: if the right is a robust and important right (e.g. an absolute right in international law, such as the right to life or protection from torture), then more weight should be given to the human right when it is being balanced against the proposed limit, restriction or form of interference.
- The importance of the purpose of the limitation: a specific rather than general area of public or social concern should be addressed by the limit and that area of concern should be important, not trivial.

- Nature and extent of the limitation: it is necessary to ascertain the precise way in which the limit constrains the right.
- Relationship between the limitation and its purpose: for a limitation to a right to be reasonable, there should be a rational connection between the nature and extent of the limitation and the purpose which that limitation seeks to achieve. There should also be proportionality between the purpose of the limitation and the means employed to achieve that purpose.
- Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve: to be reasonable, the limit must impair the right no more than is reasonably necessary. If there is another available way that the purpose for which the limitation has been imposed could be achieved which would have a lesser adverse impact on the human right, then the limit may be deemed to be unreasonable.

1.6.2 Impact of the Charter Act on the preparation of legislation

This section summarises the various process that now have to be followed for both primary legislative proposals ('Bills') and subordinate legislation (in the form of statutory rules and legislative instruments) to demonstrate compatibility with the Charter Act.

It is important that these processes are followed, and that compatibility is adequately demonstrated, because the functions of the Scrutiny of Acts and Regulations Committee now include considering whether any Bill introduced is incompatible with human rights and whether any statutory rule or legislative instrument is incompatible with human rights.

Primary legislative proposals ('Bills')

Cabinet Submissions for **approval-in-principle** of a legislative proposal must include a detailed overview of the human rights impacts of the proposal. Officers should identify which human rights issues the proposed legislation raises; whether the department has sought advice in relation to the proposal; and whether the proposal can be developed compatibly with the Charter Act.

At the **Bill-at-Cabinet stage**, Submissions for final approval of Bills must state whether or not the Bill is compatible with the Charter Act. **The Statement of Compatibility** (see below) must be attached to the Cabinet Submission. The recommendations in the Submission must include a recommendation that Cabinet note the Statement of Compatibility.

Statements of compatibility

All new Bills introduced into Parliament must be accompanied by the **Statement of Compatibility** in both Houses. The Statement must set out whether, in the opinion of the Minister (or the Member of Parliament introducing the Bill), the Bill is compatible with the human rights that are set out in the Charter Act. In addition, reasons must be provided in the Statement to demonstrate how a Bill is compatible – or otherwise to explain the nature and extent of any incompatibility. The Statement of Compatibility must be tabled in Parliament before the second reading speech.

If a Bill is amended by Parliament, the Statement will need to be updated before the Bill is introduced into the next House if the amendments raise human rights issues.

A template for the Statement of Compatibility is provided below.

Template for Statement of Compatibility

Charter of Human Rights and Responsibilities Act 2006

Statement of Compatibility

[Insert name of Bill]

In accordance with section 28 of the **Charter of Human Rights and Responsibilities Act 2006**, I make this statement of compatibility with respect to the [.....] Bill 200X.

In my opinion, the [.....] Bill 200X, as introduced to the Legislative [Assembly/Council], is compatible with the human rights protected by the Charter Act. I base my opinion on the reasons outlined in this statement.

Overview of Bill

[Provide an overview of the Bill and state its general purpose.]

This is the central section of the statement of compatibility.

Human Rights Issues

1. Human rights protected by the Charter Act that are relevant to the Bill

[Identify each human right that the Bill will have an impact upon or engage.]

[For each relevant right, identify the relevant clause or clauses of the Bill that will have an impact upon that human right.]

[Analyse how the clause interacts with the right – e.g. the degree to which it will restrict the operation of the right or whether the scope of the right is unaffected.]

[It may be clear at this stage that the Bill, or a specific clause of the Bill, is compatible with the relevant right or rights it has an impact upon.]

2. Consideration of reasonable limitations – section 7(2)

[If a clause of the Bill limits or restricts or interferes with the relevant human right that has been identified, analyse in detail whether the limitation is reasonable and can be demonstrably justified in a free and democratic society under section 7(2) of the Charter Act. All relevant factors should be taken into account, including:

- (a) What is the nature of the right being limited (e.g. what are the values underlying the human right? Is it an 'absolute' right in international law?)*
- (b) What is the importance of the purpose of the limitation? (Does the purpose of the limitation or restriction address a public or social concern that is pressing and substantial? Where possible, provide empirical data that demonstrates that the limitation of restriction is important.)*
- (c) What is the nature and extent of the limitation? (In what ways does the Bill or a clause in the Bill limit or restrict the right? How far does this limitation or restriction go?)*
- (d) What is the relationship between the limitation and its purpose? (Is there a rational connection between the limitation or restriction on the right and the purpose it seeks to achieve? Is there proportionality between the purpose of the limitation and the means used to achieve that purpose?)*
- (e) Are there any less restrictive means reasonably available to achieve its purpose? (Describe how the rights-limiting clause is within the range of reasonable solutions to the problem, including any safeguards that are incorporated.)*
- (f) Are there any other relevant factors? (E.g. does the Bill replace previous legislation which provided for a regime with less strict safeguards for the protection of rights?)*

Conclusion

[This section should contain the conclusion about why the Bill is compatible with human rights.]

.....

[Print name and title of Member of Parliament responsible for introducing the Bill]

Note:

1. In the unlikely event that, in the opinion of the member, the Bill is incompatible with the Charter Act, the statement should describe under the headings the nature and extent of the incompatibility.

Subordinate legislation: Statutory rules and legislative instruments

It is important to ensure that subordinate legislation is developed in a way that is compatible with the Charter Act, particularly as the operational matters detailed in subordinate legislation will often affect human rights. Furthermore, if subordinate legislation is inconsistent with the Charter Act, it may be found to be beyond the regulation- or instrument-making power conferred by the principal Act.

Human Rights Certificates

A **Human Rights Certificate** must be prepared for proposed statutory rules and legislative instruments (including amending statutory rules and instruments), unless they are exempt under section 12A(3) or section 12D(3) of the *Subordinate Legislation Act 1994*¹⁹ or Regulations made under the Act. The statutory requirements for this Certificate are set out in sections 12A and 12D of the SLA.

The Certificate must specify, in the opinion of the responsible Minister, whether the proposed statutory rule or legislative instrument does or does not limit any human right set out in the Charter Act. If the statutory rule or legislative instrument does limit a Charter Act right, the Certificate must provide a detailed justification that the limit is reasonable, using the same criteria as set out in section 7 of the Charter Act (as discussed in Figure 4 above).

Templates for the Human Rights Certificate and exemptions for this Certificate are provided in Attachment 1.

1.6.3 Further information and advice about the Charter Act

As indicated in the introduction to this section, more extensive guidance material about the Charter Act for government departments/agencies is being developed by the Department of Justice (see details below).

Where Charter Act issues are identified and there is uncertainty about the scope of a right or the application of the reasonable limitations clause, it is recommended that officers consult with the legal branch within their departments/agencies or with the Human Rights Unit in the Department of Justice (tel. 8684 0859).

For legislative proposals, it is anticipated that the legal officer responsible for instructing Parliamentary Counsel or drafting regulations will be the person directly involved in drafting the Statement of Compatibility or the Human Rights Certificate. If policy officers are working on legislative proposals, it is recommended that they consult with a legal officer within their department about preparing the Statement of Compatibility or the Human Rights Certificate. It is best to consult with those officers early in the process, as well as at the time when the proposal is being refined, or during the drafting of the Bill, when many of the human rights issues will emerge more clearly.

1.7 Consultation with local government

In some cases, local government can play an important role in administering and enforcing state legislation/regulation for which state ministers are ultimately accountable to the Parliament of Victoria. (Food safety and planning regulations are good examples of where local governments play a key role in the administration and enforcement of state regulation/ legislation.)

In this context, the resources available to, and capability of, local governments, particularly the availability of staff with appropriate training and skills, to efficiently administer and enforce state regulation is of utmost importance to the Government.

¹⁹ An example of an exemption is when statutory rules are being extended that would otherwise sunset under the *Subordinate Legislation Act 1994*.

Accordingly, where the Victorian Government intends for local government to administer or enforce new primary legislation, or new or revised regulation, the relevant lead department should consult with local government on:

- the resources required for the efficient administration and enforcement of the regulation;
- how those resources will be funded;
- the training and assistance which will be made available to local governments;
- how the performance of the local governments in the efficient administration and enforcement will be assessed;
- how the responsible state minister will account for local government performance; and
- an appropriate mechanism to publish the agreed resourcing, funding, training and performance monitoring arrangements.

How these matters are to be addressed should be detailed in associated ministerial briefings and Cabinet submissions, and included in relevant steps of an associated LIA or RIS.

For example, any local government impacts associated with the administration and enforcement of regulation needs to be identified for relevant options in an LIA or RIS and included in the cost-benefit analysis undertaken for those options (and subject to scrutiny by the Commissioner) – see the Victorian Guide to Regulation. Furthermore, if the preferred regulatory option involves an administrative and/or enforcement role for local government, this needs to be addressed in an implementation plan. These aspects are covered in the Victorian Guide to Regulation.

Attachment 1. Documentation accompanying subordinate legislation

Introduction

There are slightly different processes and documentation requirements depending upon whether or not the proposed subordinate legislation requires the preparation of a Regulatory Impact Statement (RIS) under section 7 or 12E of the *Subordinate Legislation Act 1994*.

In each case, this attachment provides the following information:

- checklists of the documentation required to be submitted during the subordinate legislation-making process;
- examples of the various types of certificates that may be created during the subordinate legislation-making process.

In addition, the attachment provides information on:

- exemptions from the requirement to prepare a RIS and how to apply for the relevant exemption certificates; and
- guidance on how to seek an extension for statutory rules due to be revoked (otherwise known as 'sun-setting regulations').

The final section of the attachment provides guidance on how to incorporate external material into a statutory rule or legislative instrument.

This attachment does *not* address matters relating to the drafting of statutory rules, such as guidelines as to the style and language to be used. Readers should refer to the Office of the Chief Parliamentary Counsel's publication: *Notes on the Preparation of Statutory Rules* for this information. (It is available from the Office's website www.ocpc.vic.gov.au).

Seeking an extension for statutory rules due to be revoked

Under section 5 of the SLA, statutory rules ('commonly referred to as regulations') are automatically revoked 10 years after their commencement. Section 5A, however, allows the Governor in Council to make a regulation extending the operation of a statutory rule for up to 12 months beyond this 10 year period. A statutory rule can only be extended in this way if the SLA requirements for the replacement rule cannot be completed before the expiry of the existing statutory rule. The extension effectively provides more time for the completion of Part 2 requirements, including (where applicable) completion of a RIS.

Before the Governor in Council can make such a regulation extending the existing statutory rule, the following steps must be taken:

1. The Minister must be satisfied that:
 - due to special circumstances, there is insufficient time to enable compliance with Part 2 in respect of a proposed statutory rule before the rule it is intended to replace is to be revoked by section 5; and
 - the statutory rule which would otherwise be revoked should be extended for a specified period not exceeding 12 months.
2. The Minister must request the Premier to issue a certificate under section 5A(3) specifying that the Premier has agreed that the statutory rule should be extended for the specified period. The statutory rule maker should consult the Department of Premier and Cabinet's Legal Branch as soon as it becomes evident that a Premier's certificate may be required. After consultation, the responsible Minister may request that the Premier issue a certificate in writing. Unless there are

exceptional circumstances, requests should be made at least 28 days before the date on which the statutory rule is sought to be made. The Minister's request should provide sufficiently detailed information to satisfy the Premier that special circumstances exist that require the extension of the statutory rule.

3. Once a Premier's certificate has been obtained, the Minister may issue a certificate under section 5A(1). The certificate must contain the following information:
 - a statement that the Minister is satisfied that, due to special circumstances, there is insufficient time to enable compliance with Part 2 in respect of a proposed statutory rule before the rule it is intended to replace is to be revoked by section 5;
 - a statement that the Minister is satisfied that the statutory rule which would otherwise be revoked should be extended for a specified period not exceeding 12 months; and
 - a description of the special circumstances that apply and the reasons why the extension is necessary.

The special circumstances giving rise to the need for the extension must also be provided on the Explanatory Memorandum to the Governor in Council. Matters such as delay or oversight are *not* sufficient to justify a certificate under this section.

Documentation checklists and publication requirements

This section provides various checklists setting out the documents and certificates which must accompany statutory rules and legislative instruments.

Figure 5 on the following page provides a checklist of all documents accompanying subordinate legislation. The checklist specifies who these documents must be submitted to and the timeframes for submission. Boxes shaded in grey apply only to statutory rules (commonly known as 'regulations').²⁰

The following documents are **not** applicable where subordinate legislation is exempt from the RIS process:

- certificate of RIS compliance (10(4) or 12H);
- copies of public submissions/comments;
- the Commissioner's assessment of RIS; and
- competition policy certificate.

²⁰ Section 3 of the SLA contains a more detailed definition of the term 'statutory rule'.

Figure 5: Documentation required to accompany subordinate legislation

Boxes shaded in grey apply only to statutory rules (commonly known as ‘regulations’)

<i>Documentation and relevant section of the Act</i>	Description	Submitted to	When
Certificate recommending extension of statutory rule (if applicable) <i>section 5A</i>	Responsible Minister certifies if he/she is satisfied that, due to special circumstances, there is insufficient time to comply with Part 2 of the Act (i.e. consultation, preparation of RIS) before automatic revocation of existing statutory rule	Governor-in- Council (via Clerk of the Executive Council)	Before automatic revocation of existing statutory rule
Certificate of consultation ²¹ <i>section 6 or section 12C</i> <i>NB Under sections 12B and 12K, this certificate can be made a ‘composite certificate’ and combined with certificates made under sections 6A, 8, 10(4), 12F or 12H of the Act.</i>	Responsible Minister certifies consultation in accordance with Premier’s Guidelines with any other Minister whose area of responsibility may be affected, and any sector of the public on which a significant economic/social burden may be imposed. Details of parties consulted should be provided.	Governor-in- Council (via Clerk of the Executive Council) SARC Parliament	When proposed statutory rule is submitted to the Governor in Council Within 10 working days of the making of the rule or instrument* When rule or instrument is laid before Parliament (on or before the 6 th sitting day after gazettal)#

Continued on next page

²¹ An example certificate is provided below. Depending on the nature of the exemption, a consultation certificate may not always be necessary. In such cases, it is good practice for the explanatory memorandum prepared for the statutory rule to clearly state that the consultation was not required in the circumstances. The Premier’s Guidelines issued under section 26 of the SLA provide more detail on consultation requirements.

Documentation and relevant section of the Act	Description	Submitted to	When
Infringements offence consultation certificate (if applicable) <i>section 6A</i> <i>NB Under section 12B, this certificate can be made a 'composite certificate' and combined with any certificates made under section 6, 8 or 10(4) of the Act.</i>	Where a proposed statutory rule provides for the enforcement of an offence against the statutory rule by an infringement notice, the responsible Minister must certify that the Department of Justice has been consulted about the suitability of the proposal, and that the Attorney-General's guidelines made under the <i>Infringements Act 2006</i> have been taken into account in the preparation of the proposed rule and the Minister is satisfied that the proposed rule meets the requirements of the guidelines. ²²	Governor-in- Council (via Clerk of the Executive Council)	When proposed statutory rule is submitted to the Governor in Council
		SARC	Within 10 working days of the making of the statutory rule*
		Parliament	When statutory rule is laid before Parliament (on or before the 6 th sitting day after gazettal)#
Human Rights Certificate <i>section 12A or 12D or exemption certificate under s12A(3) or 12D(3)</i>	Responsible Minister certifies that the proposed statutory rule or legislative instrument does or does not limit any human right set out in the Charter of Human Rights and Responsibilities Where a human rights exemption certificate is issued, the Minister must specify which of the exemption categories in section 12A(3) or 12D(3) applies to the rule or instrument.	Governor-in- Council (via Clerk of the Executive Council)	When proposed statutory rule is submitted to the Governor in Council
		SARC	Within 10 working days of the making of the rule or instrument*
		Parliament	When rule or instrument is laid before Parliament (on or before the 6 th sitting day after gazettal)#

Continued on next page

²² The Department of Justice's Infringements System Oversight Unit is the contact point for consultation on all infringement offence proposals. The Unit should be contacted as early on in the development of the proposal as possible. It should be contacted when new infringement offences are proposed, when higher infringement penalties for existing offences are being considered and when existing infringement offences are being reviewed or re-made. Section 6A also provides for the situation where the Minister wishes to certify that the requirements of the guidelines have not been met but that the statutory rule should be made despite not meeting those requirements. It is expected that this option will be rarely exercised by Ministers. Any certification to this effect should be justified in detail by the Minister in the certificate.

Documentation and relevant section of the Act	Description	Submitted to	When
Certificate of RIS compliance <i>section 10(4) or 12H or</i>	Responsible Minister certifies that requirements relating to RIS and guidelines have been met, and RIS adequately assesses the likely impact of the proposed statutory rule or legislative instrument.	Governor-in- Council (via Clerk of the Executive Council)	When proposed statutory rule is submitted to the Governor in Council
Certificate of RIS exemption under <i>sections 8, 9, 12F or 12G</i> <i>NB Under section 12B and 12K, Minister's certificates under section 10(4) or 12H can be made as a 'composite certificate' combined with any certificates made under section 6, 6A or 12C of the Act.</i>	Where a certificate of RIS exemption is issued under section 8 or 12F, the responsible Minister certifies that the proposed rule/instrument meets the conditions for exemption from the RIS process, as specified in the Act. Where a certificate is issued under section 9 or 12G, the Premier certifies that it is in the public interest that the rule/instrument be exempt from the RIS process.	SARC (submitted along with copy of RIS) Parliament	Within 10 working days of the making of the rule or instrument* When rule or instrument is laid before Parliament (on or before the 6 th sitting day after gazettal)#
Commissioner's assessment of RIS (where RIS has been prepared) <i>Required under Guidelines made under section 26</i>	Copy of the Commissioner's independent assessment of the adequacy of the RIS	SARC	As soon as practicable after the statutory rule or legislative instrument is made.
Copies of all public comments and submissions on RIS (where RIS has been prepared) <i>section 15A(1)(c) and section 16C</i>	Copies of all public comments/submissions received during consultation period after RIS is published, and the response to the comments by the relevant body	SARC and the Commissioner	Within 10 working days of the making of the rule or instrument

Continued on next page

<i>Documentation and relevant section of the Act</i>	Description	Submitted to	When
Chief Parliamentary Counsel certificate section 13[†]	Chief Parliamentary Counsel issues a certificate having regard to the matters listed in Section 13 of the Act (which relate to the legality and effectiveness of the proposed rules)	Issued by Chief Parliamentary Counsel and submitted to Governor-in- Council (via Clerk of the Executive Council)	When proposed statutory rule is submitted to the Governor in Council Request for a section 13 certificate must be made at least two weeks before the date on which it is proposed to submit the statutory rule to the Minister for recommendation
		SARC	Within 10 working days of the making of the statutory rule*
		Parliament	When statutory rule is laid before Parliament (on or before the 6 th sitting day after gazetta)#
Competition policy certificate <i>Required under clause 5(1) of Competition Principles Agreement</i>	Certifies that the proposed statutory rule: a) does not contain a restriction on competition; or b) does contain a restriction(s) but the objective can only be achieved by restricting competition, and benefits to the community outweigh costs	Governor-in- Council (via Clerk of the Executive Council)	When proposed statutory rule is submitted to the Governor in Council

Notes:

* Or within 10 working days after the establishment of SARC, whichever is the later.

See sections 15 and 16B of the SLA.

† The Office of the Chief Parliamentary Counsel also issues 'Notes for Guidance: The Preparation of Statutory Rules' which provide more detail on section 13 certificates.

Documents to be submitted to the Clerk of the Executive Council

If the enabling legislation for a statutory rule requires that it be made by, or with the approval or consent of, the Governor in Council, the following documents must be submitted to the Clerk of the Executive Council before the statutory rule can be made.

Document	Statutory rule – with RIS	Statutory rule – no RIS
Agenda sheet	✓	✓
Minister's recommendation	✓	✓
Section 13 certificate, issued by the Chief Parliamentary Counsel (with the proposed rule attached)	✓	✓
Three copies of the proposed statutory rule (these must be identical to the copy to which the section 13 certificate is attached)	✓	✓
Copy of section 6 consultation certificate	✓	✓
Copy of section 6A infringements offence consultation certificate (if proposed statutory rule provides for the enforcement of an offence by an infringement notice)	✓ (relevant rules only)	✓ (relevant rules only)
Copy of RIS compliance certificate (under section 10(4))	✓	
Copy of RIS exemption certificate under section 8 or 9.		✓
Copy of extension certificate and Premier's certificate under section 5A(3) (if proposed statutory rule is an extension regulation)	✓ (extension rules only)	✓ (extension rules only)
Copy of human rights certificate (under section 12A), or a copy of a human rights exemption certificate (under section 12A(3)).	✓	✓
A copy of the recommendation if the proposed statutory rule is to be made on the recommendation of a Board, Committee, or body	✓	✓
An explanatory memorandum for the statutory rule or legislative instrument which: <ul style="list-style-type: none"> • details the purpose and operation of the rule; and • if the rule amends or substitutes fees, sets out the previous fees (for the purposes of comparison) 	✓	✓
A copy of the appropriate competition policy certificate	✓	

Documents tabled in Parliament

On or before the 6th sitting day after publication of the subordinate legislation or notice of its making has been published in the Government Gazette, a copy of the statutory rule or legislative instrument must be laid before **each House of the Parliament** along with the documents set out in the table below. Departments are responsible for arranging for the tabling of statutory rules and legislative instruments.

As soon as possible after being laid, a copy of the statutory rule or legislative instrument must be posted or delivered to each Member of Parliament who has requested a copy of that statutory rule or legislative instrument.

Document	Statutory rule – with RIS	Statutory rule – no RIS	Legislative instrument – with RIS	Legislative instrument – no RIS
Copy of the statutory rule or legislative instrument	✓	✓	✓	✓
Copy of the section 13 certificate of the Chief Parliamentary Counsel	✓	✓		
Copy of section 6 (for statutory rules) or section 12C (for legislative instruments) consultation certificate	✓	✓	✓	✓
Copy of section 6A infringements offence consultation certificate (if proposed statutory rule provides for the enforcement of an offence by an infringement notice)	✓ (relevant rules only)	✓ (relevant rules only)		
Copy of RIS exemption certificate (under section 8 or 9 for statutory rules, or section 12F or 12G for legislative instruments).		✓		✓
Copy of RIS compliance certificate (under section 10(4) for statutory rules or section 12H(4) for legislative instruments)	✓		✓	
Copy of human rights certificate (under section 12A for statutory rules or section 12D for legislative instruments), or copy of human rights exemption certificate (under section 12A(3) for statutory rules or section 12D(3) for legislative instruments)	✓	✓	✓	✓
Copy of extension certificate and Premier's certificate under section 5A(3) (if proposed statutory rule is an extension regulation)	✓ (extension regulations only)	✓ (extension regulations only)		
Copy of the Minister's recommendation to the Governor in Council to make the statutory rule	✓	✓		

Documents submitted to SARC

The documents set out below should be provided to the **Secretary of the Scrutiny of Acts and Regulations Committee**. The majority of these documents are required to be provided within 10 days after the making of the statutory rule or legislative instrument.

Document	Statutory rule – with RIS	Statutory rule – no RIS	Legislative instrument – with RIS	Legislative instrument – no RIS
Copy of the statutory rule or legislative instrument	✓	✓	✓	✓
Copy of the section 13 certificate of the Chief Parliamentary Counsel	✓	✓		
Copy of section 6 (for statutory rules) or section 12C (for legislative instruments) consultation certificate	✓	✓	✓	✓
Copy of section 6A infringements offence consultation certificate (if proposed statutory rule provides for the enforcement of an offence by an infringement notice)	✓ (relevant rules only)	✓ (relevant rules only)		
Copy of the RIS document and RIS compliance certificate (under section 10(4) for statutory rules or section 12H for legislative instruments)	✓		✓	
Copy of the Commissioner's assessment of the RIS (required by the Premier's Guidelines).	✓		✓	
Copies of all comments and submissions received in relation to the RIS	✓		✓	
Copies of Notices published in the Government Gazette and daily newspaper	✓	✓	✓	✓
Copy of RIS exemption certificate under section 8 or 9 for statutory rules, or section 12F or 12G for legislative instruments.		✓		✓
If instrument is exempted by Premier's certificate, the reasons given by the responsible Minister to the Premier as to why it is in the public interest that the instrument should be exempt		✓		✓
Copy of human rights certificate (under section 12A for statutory rules or section 12D for legislative instruments), or copy of human rights exemption certificate (under section 12A(3) for statutory rules or section 12D(3) for legislative instruments)	✓	✓	✓	✓

Document	Statutory rule – with RIS	Statutory rule – no RIS	Legislative instrument – with RIS	Legislative instrument – no RIS
Copy of extension certificate and Premier’s certificate under section 5A(3) (if proposed statutory rule is an extension regulation)	✓ (extension regulations only)	✓ (extension regulations only)		
Copy of the Minister’s recommendation to the Governor in Council to make the statutory rule	✓	✓		
If the proposed rule or instrument is setting new fees or charges, a table comparing the new and old fees/charges, including an indication of the percentage increase or decrease of each fee.	✓	✓	✓	✓
Seven copies of the explanatory memorandum that was sent to the Clerk of the Executive Council	✓	✓		

Certificate templates

Composite certificates

When preparing certificates, keep in mind that a composite certificate can be made that incorporates:

- In relation to statutory rules, the certificates required by sections 6, 6A, 8 and 10(4) of the SLA (i.e. the consultation certificate, the infringements offence consultation certificate, and the RIS exemption certificate or RIS compliance certificate), or any combination of those certificates. (See section 12B).
- In relation to legislative instrument, the certificates required by sections 12C, 12F and 12H(4) (i.e. the consultation certificate and the RIS exemption certificate or RIS compliance certificate), or any combination of those certificates. (See section 12K).

An example of a composite certificate is provided below.

Certificate of consultation – section 6 (statutory rules) or 12C (legislative instruments[#])

Subordinate Legislation Act 1994

CERTIFICATE OF CONSULTATION UNDER [INSERT EITHER: SECTION 6 or SECTION 12C*]
[Title of Regulations/Legislative instrument]

I, [Minister's name], Minister for [Portfolio], and Minister for the administration of the [Title of Authorising Act and Year], certify under [insert either section 6 or 12C*] of the ***Subordinate Legislation Act 1994*** that:

- a) there has been consultation in accordance with the Premier's Guidelines made under the ***Subordinate Legislation Act 1994***, and the matters to be dealt with under the proposed [Title of Regulations/legislative instrument] do not impinge upon or unduly affect the area of responsibility of any other Minister, and there is no overlapping or duplication of, or conflict with, the legislation, statutory rules or stated government policies administered by other agencies; and
- b) the need for, and scope of the proposed [Title of Regulations/legislative instrument] have been considered and relevant sectors of the public have been consulted in accordance with the Premier's Guidelines made under the ***Subordinate Legislation Act 1994***.

The parties who have been consulted are: [list parties]

Dated:
Signature of Minister
Title

Infringements offence consultation certificate – section 6A (statutory rules only)

Subordinate Legislation Act 1994

INFRINGEMENTS OFFENCE CONSULTATION CERTIFICATE UNDER SECTION 6A
[Title of Regulations]

I, [Minister's name] Minister for [Portfolio] and Minister responsible for administering the [Title of Authorising Act and Year], certify under section 6A of the ***Subordinate Legislation Act 1994*** that:

- the Department of Justice has been consulted about the enforcement of the proposed statutory rule by infringement notice and the suitability of the proposed statutory rule to be an infringement offence enforced under the ***Infringements Act 2006***

and

- that the Attorney-General's guidelines within the meaning of the ***Infringements Act 2006*** have been taken into account in the preparation of the proposed statutory rule

and

- [I am satisfied that the proposed statutory rule meets the requirements of those guidelines.]

or

- [I am satisfied that the proposed statutory rule does not meet the requirements of those guidelines but should be made despite not meeting those requirements. The reasons for forming this opinion are (insert details of the requirements in the guidelines which have not been made and a detailed justification for the statutory rule to be made despite not meeting the requirements of the guidelines).]

Dated:
Signature of Minister
Title

[#] Applies as of 1 July 2011.

* Note: this provision comes into effect on 1 July 2011.

Certificate of RIS compliance – section 10(4) (statutory rules) or section 12H(4) (legislative instruments[#])

<p style="text-align: center;">Subordinate Legislation Act 1994</p> <p style="text-align: center;">CERTIFICATE OF COMPLIANCE UNDER [INSERT EITHER: SECTION 10(4) <u>or</u> SECTION 12H(4)[*]] [Title of Regulations/Legislative instrument]</p> <p>I, [Minister's name], Minister for [Portfolio], and Minister for the administration of the [Title of Authorising Act and Year], certify under [insert either: section 10(4) or s 12H(4)[*]] of the <i>Subordinate Legislation Act 1994</i> that, in respect of the proposed [Title of Regulations/Legislative instrument]:</p> <ul style="list-style-type: none">a) the requirements relating to Regulatory Impact Statements in the <i>Subordinate Legislation Act 1994</i> and the guidelines have been complied with; andb) in my opinion, the Regulatory Impact Statement prepared under the <i>Subordinate Legislation Act 1994</i> adequately assesses the likely impact of the proposed Regulations/legislative instrument. <p>Dated: Signature of Minister Title</p>

Minister's RIS exemption certificate – section 8 (statutory rules) or section 12F (legislative instruments[#])

<p style="text-align: center;">Subordinate Legislation Act 1994</p> <p style="text-align: center;">CERTIFICATE OF EXEMPTION UNDER [INSERT EITHER: SECTION 8 or SECTION 12F[*]] [Title of Regulations/Legislative Instrument]</p> <p>I, [Minister's name], Minister for [Portfolio] and Minister responsible for administering the [Title of Authorising Act and Year], certify that under [insert either section 8 or 12F[*]][(Relevant Subsection)] of the <i>Subordinate Legislation Act 1994</i> that the proposed [Title of Regulations/Legislative instrument] in my opinion [are/is] exempted from the requirement to prepare a Regulatory Impact Statement under [insert either section 7 or section 12E[*]] of that Act.</p> <p>The reasons for forming this opinion are that the proposed rule/instrument [explain why the subordinate legislation is within the exemption, and outline the nature and effect of the proposed rule or instrument, including the proposed operative date and, if relevant, the reason for that date. Where the exemption is made on the grounds that the proposed subordinate legislation would not impose a significant economic or social burden on a sector of the public, <i>detailed</i> reasons must be provided to support this opinion].[†]</p> <p>Dated: Signature of Minister Title</p>
--

[†] Note: It is **not** sufficient to simply assert that there is no significant burden.

[#] Applies as of 1 July 2011.

^{*} Note: this provision comes into effect on 1 July 2011.

Human Rights Certificate – section 12A (statutory rules) or section 12D (legislative instruments[#])

Subordinate Legislation Act 1994
(INSERT EITHER: Section 12A or Section 12D*)
HUMAN RIGHTS CERTIFICATE
[Title of Regulations/Legislative instrument]

I, [Minister's name], Minister for [Portfolio], certify under [insert either: section 12A(2) or 12D(2)*] of the ***Subordinate Legislation Act 1994*** that, in my opinion –

- the proposed [Title of Regulations/legislative instrument] [do/does] not limit any human rights set out in the Charter of Human Rights and Responsibilities

OR

- the proposed [Title of Regulations/legislative instrument] [do/does] limit one or more human rights set out in the Charter of Human Rights and Responsibilities as follows –
[here, set out in respect of each human right limited]
 1. the nature of the human right limited;
 2. the importance of the purpose of the limitation;
 3. the nature and extent of the limitation;
 4. the relationship between the limitation and its purpose; and
 5. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Dated:
Signature of Minister
Title

- *delete if inapplicable*

Exemption certificate (Human Rights) – section 12A(3)(b) (statutory rules)

Subordinate Legislation Act 1994
EXEMPTION CERTIFICATE
(Section 12A(3)(b))
[Title of Regulations]

I, [Minister's name], Minister for [Portfolio], certify under section 12A(3) of the ***Subordinate Legislation Act 1994*** that, in my opinion, the proposed [Title of Regulations] –

- prescribe under section 4(1)(a) of the Act an instrument or class of instrument to be a statutory rule –
- exempt under section 4(1)(b) of the Act an instrument or class of instrument from the operation of the Act –
- prescribe under section 4A(1)(a) an instrument or a class of instrument for the purposes of paragraph (h) of the definition of *legislative instrument* –
- prescribe under section 4A(1)(b) an instrument or a class of instrument to be, or not to be, a legislative instrument or class of legislative instrument for the purposes of the Act or any specified provisions of the Act –
- is an extension regulation –

and [are/is] therefore exempted from the requirement to prepare a human rights certificate under section 12A(1) of the Act.

Dated:
Signature of Minister
Title

- *delete if inapplicable*

[#] Applies as of 1 July 2011.

* Note: this provision comes into effect on 1 July 2011.

Exemption certificate (Human Rights) – section 12D(3) (legislative instruments[#])

<p style="text-align: center;"><i>Subordinate Legislation Act 1994</i> EXEMPTION CERTIFICATE (Section 12D(3)) [Title of Legislative Instrument]</p> <p>I, [Minister's name], Minister for [Portfolio], certify under section 12D(3) of the <i>Subordinate Legislation Act 1994</i> that, in my opinion, the proposed [Title of Legislative Instrument] is of 12 months duration or less and is necessary to respond to –</p> <ul style="list-style-type: none">• a public emergency –• an urgent public health issue or an urgent public safety issue –• likely or actual significant damage to the environment, resource sustainability or the economy – <p>and is therefore exempted from the requirement to prepare a human rights certificate under section 12D(1) of the Act.</p> <p>Dated: Signature of Minister Title</p> <ul style="list-style-type: none">• <i>delete if inapplicable</i>

Competition test – where subordinate legislation does not restrict competition

<p style="text-align: center;">SUBORDINATE LEGISLATION THAT DOES NOT RESTRICT COMPETITION [Title of Regulations]</p> <p>I, [Minister's name], Minister for [Portfolio], and Minister for the administration of the [Title of Authorising Act and Year], certify that the proposed [Title of Regulations]:</p> <ol style="list-style-type: none">a) have been assessed in accordance with the guidelines contained in the <i>Victorian Guide to Regulation</i> and the results documented in the Regulatory Impact Statement prepared for these proposed regulations; andb) the assessment shows that the proposed subordinate legislation does not restrict competition. <p>Dated: Signature of Minister Title</p>

[#] Applies as of 1 July 2011.

Competition test – where subordinate legislation does restrict competition

SUBORDINATE LEGISLATION THAT RESTRICTS COMPETITION
[Title of Regulations]

I, [Minister’s name], Minister for [Portfolio], and Minister for the administration of the [Title of Authorising Act and Year], certify that the proposed [Title of Regulations]:

- a) have been assessed in accordance with the guidelines contained in the *Victorian Guide to Regulation*, and the results documented in the Regulatory Impact Statement prepared for these proposed regulations;
- b) restricts competition; and
- c) each restriction on competition has been assessed in accordance with the guidelines with the result that:
 - the objectives of the legislation can only be achieved by restricting competition; and
 - the benefits of the restriction to the community as a whole outweigh the costs.

Dated:
Signature of Minister
Title

Example of composite certificate under section 12B (statutory rules) or 12K (legislative instruments[#])

Subordinate Legislation Act 1994

CERTIFICATE OF CONSULTATION UNDER [INSERT EITHER: SECTION 6 or 12C*] and COMPLIANCE UNDER [INSERT EITHER: SECTION 10(4) or 12H(4)*]
[Title of Regulations/Legislative Instrument]

I, [Minister’s name], Minister for [Portfolio], and Minister for the administration of the [Title of Authorising Act and Year], certify under [insert either: section 6 or 12C*] of the *Subordinate Legislation Act 1994* that:

- a) there has been consultation in accordance with the Premier’s Guidelines made under the *Subordinate Legislation Act 1994*, and the matters to be dealt with under the proposed [Title of Regulations/Legislative Instrument] [do/does] not impinge upon or unduly affect the area of responsibility of any other Minister, and there is no overlapping or duplication of, or conflict with, the legislation or stated government policies administered by other agencies; and
- b) the need for, and scope of the proposed [Title of Regulations/legislative instrument] have been considered and relevant sectors of the public have been consulted in accordance with the Premier’s Guidelines made under the *Subordinate Legislation Act 1994*.
The parties who have been consulted are: [list parties]

I also certify under [insert either: section 10(4) or 12H(4) *] of the *Subordinate Legislation Act 1994* that:

- c) the requirements relating to Regulatory Impact Statements in the *Subordinate Legislation Act 1994* and the guidelines have been complied with; and
- d) in my opinion, the Regulatory Impact Statement prepared under the *Subordinate Legislation Act 1994* adequately assesses the likely impact of the proposed Regulations.

Dated:
Signature of Minister
Title

[#] Applies as of 1 July 2011.

* Note: this provision comes into effect on 1 July 2011.

Minister's extension certificate – section 5A(1) (statutory rules)

<p style="text-align: center;"><i>Subordinate Legislation Act 1994</i></p> <p style="text-align: center;">CERTIFICATE OF SPECIAL CIRCUMSTANCES TO EXTEND REGULATIONS UNDER SECTION 5A(1) [Title of Regulations]</p> <p>I, [Minister's name], Minister for [Portfolio], and Minister responsible for administering the [Title of Authorising Act and Year], certify under section 5A(1) of the <i>Subordinate Legislation Act 1994</i> that, due to special circumstances, I am satisfied that there is insufficient time to enable compliance with Part 2 of the <i>Subordinate Legislation Act 1994</i> in respect of proposed Regulations to replace [Title of Regulations due to Sunset] before those Regulations are to be revoked by virtue of section 5(1) of that Act.</p> <p>[Insert details of the circumstances that justify the extension of the regulations which would otherwise sunset]</p> <p>Dated: Signature of the Minister Title</p>

Premier's extension certificate – section 5A(1)(3) (statutory rules)

<p style="text-align: center;"><i>Subordinate Legislation Act 1994</i></p> <p style="text-align: center;">CERTIFICATE OF SPECIAL CIRCUMSTANCES TO EXTEND REGULATIONS UNDER SECTION 5A(3) [Title of Regulations]</p> <p>I, [Premier's name], Premier of Victoria, certify under section 5A(3) of the <i>Subordinate Legislation Act 1994</i> that I agree that the [Title of Regulations due to sunset], which would otherwise be revoked by section 5(1) of the Act on [specify date of revocation], should be extended for a period of [specify period no more than 12 months] from that date.</p> <p>Dated: Signature of the Premier Title</p>

Rules or instruments which refer to other documents

Publication and lodgement requirements

Statutory rules and legislative instruments will sometimes incorporate extrinsic material by reference to an external document ('incorporation by reference'). A specific power in the authorising Act is required to allow incorporation by reference.

The requirements applying to material incorporated by reference into a statutory rule or legislative instrument are dealt with in section 32(3) of the *Interpretation of Legislation Act 1984*.²³ The Act requires:

- a copy of the incorporated material to be lodged with the Clerk of the Parliaments as soon as practicable after the statutory rule or legislative instrument is tabled;
- publication of a notice in the Government Gazette outlining the documents which have been lodged with the Clerk of Parliament;
- a copy of the Government Gazette notice to be laid before each House of the Parliament as soon as practicable after it is published; and
- a copy of the incorporated material to be kept for inspection during normal office hours without charge at the principal office of the Department or body responsible for administering the subordinate legislation.

These procedures are designed to guarantee the availability of any material that is incorporated into subordinate legislation by reference to ensure that the public may have access to the legislation with which they must comply.

Specific considerations – incorporating material

When incorporating pre-existing standards in statutory rules, consideration needs to be given as to whether the reference to an Australian Standard should be a specific standard (e.g. AS 1234) or to a specific version of a standard by reference to its date (e.g. AS 1234, 2004). The former approach may result in significant changes to the effect of the statutory rule, with no automatic mechanism to review the changes to the costs and benefits of the statutory rule. The latter approach means that if a later amended version of a standard is to be adopted, it will require the amendment of the statutory rule and the undertaking of the RIS process.

It also needs to be remembered that the incorporated material may not be a single document. For example, the drafting standard adopted by the *Standards Australia* often means that these standards are not self-contained, but adopt the provision of other standards. This can create a chain of material incorporated by reference, and it is important to ensure that all relevant material is published or lodged in accordance with the requirements set out above.

In deciding whether to incorporate material by reference, agencies need to take care to balance the drafting convenience with ease of access to the incorporated material and understanding of it by those affected by it or required to comply with it. Agencies should reserve the use of incorporated detailed and extensive technical material to regulations concerning industries familiar with and using the material. The use of the material then has the benefit of removing duplication. In such cases, agencies should also consider whether performance standards are the more appropriate means of regulation.

The Office of the Chief Parliamentary Counsel's document, *Notes for guidance: The preparation of statutory rules* (www.ocpc.vic.gov.au), contains further information about when it is appropriate to incorporate material by reference into subordinate legislation.

²³ Statutory rules and legislative instruments are generally subject to the requirements of the *Interpretation of Legislation Act 1984* relating to subordinate instruments. See the definition of 'subordinate instrument' in section 38 of that Act.

Formatting of statutory rules which incorporate external material

The Subordinate Legislation Regulations 2004 require statutory rules which incorporate material by reference to include a special footnote²⁴. The footnote must contain a table which:

- specifies which document is being incorporated; and
- indicates the provision of the statutory rule to which the matter relates.

The form of this table is presented below.

Table of Applied, Adopted or Incorporated Matter		
The following table of applied, adopted or incorporated matter is included in accordance with the requirements of regulation 5 of the Subordinate Legislation Regulations 2004.		
Statutory rule provision	Title of applied, adopted or incorporated document	Matter in applied, adopted or incorporated document
Insert the provision of the statutory rule which incorporates etc the matter (e.g. Regulation 5(6); Schedule 6, Item 13)	Insert full title of document incorporated etc, together with reprint or edition number (if applicable) (e.g. Australian Standard AS1250-1975, SSA Steel Structures Code, Greater Melbourne Melway Street Directory, edition 18, 1988)	Indicate whether the whole document is incorporated etc or if only part of a document is incorporated. Insert the appropriate page, section or item reference.

²⁴ See Regulation 5 of the Subordinate Legislation Regulations 2004.