



The Legislative Process Handbook

Office of the Chief Parliamentary Counsel (Victoria)

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Part 1: Introduction

1.1: Overview

1. This handbook is about the process of developing Acts of Parliament from the perspective of those involved, directly or indirectly, with the Office of the Chief Parliamentary Counsel (OCPC). The handbook is primarily aimed at people responsible for instructing on legislation and other people who work with legislation.
2. OCPC came into existence in 1879. Currently, it is an administrative office attached to the Department of Premier and Cabinet employing around 20 lawyers and a similar number of administrative, editorial, printing, publishing and IT staff. Further information about OCPC may be found at <https://www.vic.gov.au/developing-legislation-chief-parliamentary-counsel>.
3. OCPC provides a wide range of services related to the development, drafting, publication and implementation of legislation. OCPC—
 - drafts all government Bills for the Victorian Parliament;
 - provides legislative services to non-government members on a confidential basis;
 - drafts/settles and certifies all statutory rules that are Regulations made by the Governor in Council;
 - maintains the database of Victorian legislation;
 - manages the contracts under which legislation is printed and published;
 - prepares tables of Act and Statutory Rule related information;
 - provides advice on legislative matters.
4. However, this handbook focuses on the drafting of Bills only. Attachment 1 shows how OCPC fits into the overall process of making Acts of Parliament. OCPC's role runs from discussing the proposed make-up of the legislative program for particular sittings right through to the publication of the final product of the legislative process.
5. The handbook has 2 main components.

The first component is a basic user's guide to finding one's way around an Act of Parliament. This component, which is covered in Parts 2 and 3—

- examines some basic features of Acts;
- draws attention to some Acts that are of general application.

The other component, which is covered in Parts 4 to 7—

- sets out the process by which authority to draft a Bill is obtained;
- looks at the role of the drafter and the drafting process itself including the preparation of Bill at Cabinet submissions;
- goes through the procedures relating to the introduction of government Bills into Parliament;
- highlights the role of the Scrutiny of Acts and Regulations Committee (SARC);
- steps through the procedure for the passage of Bills by Parliament.

Particular attention is paid to the roles of the instructor and the drafter in the legislative process.

1.2: General comments on drafting

6. All government Bills are drafted by OCPC. OCPC also drafts almost all amendments to Bills proposed in Parliament, including those proposed by non-government members. In some circumstances Bills for non-government members are also drafted by OCPC.
7. In drafting a Bill, we aim to draft a Bill that is legally effective and readily understandable, and that effectively implements the intended policy. We also draft legislation consistent with plain English principles.
8. The Chief Parliamentary Counsel (CPC) sets priorities for drafting Bills in accordance with the government's legislative program approved for each sitting year of Parliament.
9. The drafting of a complex Bill may take many months and the drafting of even relatively simple Bills can take longer than expected. Therefore, instructing officers should not predict the completion time of a draft without first consulting the CPC. The time allocated for drafting a Bill is determined by the Cabinet Office in consultation with the CPC. Attachment 2 summarises the role of the drafter and the instructor in the drafting process.

1.3: Abbreviations

10. The following abbreviations are used in this handbook—

AIP	Approval in Principle
BAC	Bill at Cabinet
CPC	Chief Parliamentary Counsel
OCPC	Office of the Chief Parliamentary Counsel
SARC	Scrutiny of Acts and Regulations Committee
LDMS	Legislative Document Management System

Part 2: Basic features of Acts

2.1: What is an Act?

11. An Act is an expression of the Parliament's legislative intention that states or alters the law in some respect. For example, an Act of the Victorian Parliament may establish rights and responsibilities of Victorian citizens, it may impose penalties and sanctions or it may impose taxes.
12. There are 2 sorts of Acts—Principal Acts and amending Acts. Both kinds of Acts are considered in this Part.
13. A Principal Act sets up a legislative scheme. The title of a Principal Act reflects the subject matter of the Act (for example: **Electronic Transactions (Victoria) Act 2000**, **Domestic Building Contracts Act 1995**).
14. An amending Act amends one or more existing Principal Acts, (occasionally, an amending Act may also amend a previous amending Act if the amendments in the previous amending Act have not yet come into operation). All amending Acts have the word "Amendment" in their titles following the name of the Principal Act(s) being amended (for example: **Public Prosecutions Amendment Act 2007**). The title of an amending Act may also indicate the subject-matter of the amendments (for example **Control of Weapons Amendment (Penalties) Act 2007**).
15. Many new Principal Acts also amend existing Acts as a consequence of the new legislative scheme that is established by the new Principal Act (for example: **Equal Opportunity Act 2010**).

2.2: Terminology—Acts and Bills

16. An **Act** is a piece of primary legislation that has been passed by both Houses of Parliament and has received Royal Assent. At any time before receiving Royal Assent (for example, when it is being drafted or is in Parliament), it is a **Bill**. The following notes refer to Acts, but apply also to Bills. Special considerations for Bills are mentioned separately.

2.3: What an Act looks like

The basics

17. The first page of an Act sets out the title of the Act and the date of Royal Assent, followed by the rest of the text of the Act (which includes any Schedules to the Act).
18. All Acts are printed with a table of provisions. In the past, new Principal Acts were printed with the explanatory memorandum that accompanied the Bill for the Act, but that is no longer done.
19. Traditionally, some things appearing in a printed Act such as tables of provisions, indexes, section headings, marginal notes, footnotes, endnotes and punctuation did not legally form part of the Act. That means they are not part of the law, even though they can be used as aids to interpretation. However, amendments to interpretation legislation in Victoria in 2000 have resulted in many of these things now forming part of the Act (for Acts passed on or after 1 January 2001). Generally speaking, everything that appears before the double lines, which occur on the page preceding the heading "ENDNOTES" (or "NOTES" in older Acts) will legally form part of the Act (except the table of provisions at the front of the Act or the explanatory memorandum, if it is printed with the Act).

Formats and standard features

20. There are a number of aspects of Acts that are fixed, and we have to work within them. These include—
 - the matters discussed in paragraphs 17, 18 and 19;
 - the format (for example, of sections, Schedules etc.);
 - conventions about the way text is grouped (for example, into Parts and Divisions) and broken up (for example, into subsections and paragraphs);
 - the numbering system;
 - the content of headers and footers;
 - other standard features (for example, the presence of a (long) title and a short title and of the enacting words).
21. Over the years, we have developed new formats for legislation. These were developed in response to the realisation that the layout of the print on the page can be a significant factor influencing how effectively the legislative message is communicated. If you are looking at older legislation, you may find that it is in the

older, denser format.¹ Also, Acts made before 1984 did not contain section headings, but instead had marginal notes next to each section with a short summary of the content of the section.

Extra information included

22. In prints of Acts prepared by OCPC and published by authority of the Government Printer, there is some extra information—
- the date of the Minister's second reading speech—this can be a useful way of tracking down the second reading speech which outlines the policy principles behind the Act;
 - the date of any statement under section 85(5) of the **Constitution Act 1975**—this can be a useful way of determining if the Act limits the jurisdiction of the Supreme Court.

This information can be found in the Endnotes at the back of the Act.

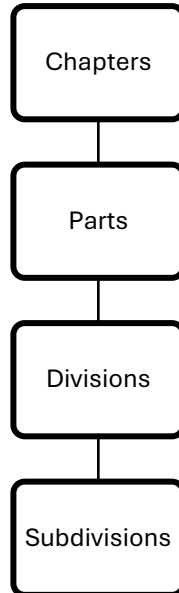
23. In consolidated versions of Principal Acts prepared by OCPC there is also a table of amendments, which sets out all the Acts that have amended the Principal Act and been incorporated in the version, including the commencement date of each amendment.

¹ For example, compare the repealed **Appeal Costs Fund Act 1964** and the **Appeal Costs Act 1998**. Compare also Parts III and IV of the **Property Law Act 1958** (Part III dates from 1958—but its antecedents go back to at least 1864; the current Part IV was enacted in 2005).

2.4: Structure of an Act

Chapters, Parts and Divisions

24. An Act may be divided into Chapters, Parts, Divisions or Subdivisions, as follows—



25. The purpose of dividing an Act in this way is to group the subject-matter so that it is more easily comprehended. Short Acts, particularly short amending Acts, are often not divided. Also, an Act is generally only divided into Chapters if the Act deals with a great deal of information on discrete topics. For example, the **Duties Act 2000** and the **Gambling Regulation Act 2003**.
26. Subdivisions are generally avoided if possible.

Sections and Schedules

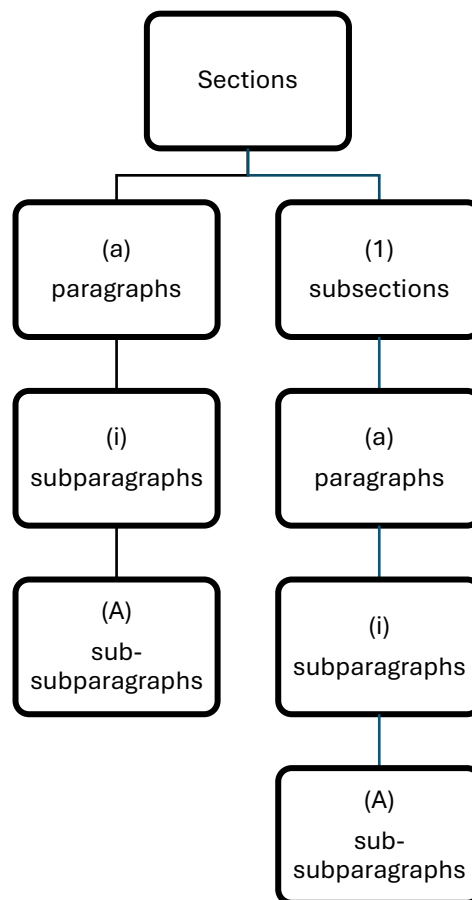
27. The text of an Act is contained in individual sections². A section is identified by a bolded section number and heading. There are no specific rules about how much information can be put into a single section—this is up to the drafter (although sections should not deal with too much information: long sections are to be avoided as they do not assist with comprehension of the Act).
28. Many Acts also include Schedules. These appear at the end of an Act and always depend on, or "hang off", a section. Schedules have a number of uses—
- ***amendments of other Acts*** can be set out in Schedules;

² In a Bill a section is referred to as a clause. It becomes a section when the Bill becomes an Act.

- ***treaties or agreements*** referred to in an Act that implements or relies on a treaty or agreement are often set out in Schedules;
 - ***procedural or administrative matters*** are sometimes set out in Schedules.
29. The legal effect of something is not reduced by setting it out in a Schedule rather than a section.
30. Substantive matters such as offences are not suitable for inclusion in a Schedule.

Dividing sections

31. Sections can be further divided, as set out below, to assist comprehension.



32. Sub-subparagraphs are avoided if possible.

Grouping and dividing Schedules

33. An Act can contain as many separate Schedules as are needed. In an amending Act, separate Schedules may be a convenient way of grouping amendments according to their topic or commencement dates (for example, see the **Statute Law Amendment (Relationships) Act 2001**). Some other comments relating to grouping and dividing in Schedules are—

- **amending Schedules**—each amendment is made by an item;
- **other Schedules**—schedules setting out treaties and agreements are presented in a way that is similar to the original treaty or agreement;
- **Schedules setting out procedural or administrative matters or transitional provisions**—each provision is a **clause**. Clauses can be grouped together in Parts or Divisions (although Divisions in Schedules are rare), or divided into subclauses or paragraphs, etc., in a similar way to sections.

Numbering system

34. Acts have their provisions numbered in accordance with a standard numbering system used by OCP. The standard numbering system is shown below.

Chapters, Parts, Divisions and Subdivisions—1, 2, 3 etc.

Sections³

- sections—1, 2, 3 etc.
- subsections—(1), (2), (3) etc.
- paragraphs—(a), (b), (c) etc.
- subparagraphs—(i), (ii), (iii) etc.
- sub-subparagraphs—(A), (B), (C) etc. (these are avoided if possible).

Schedules

- Schedules—1, 2, 3 etc.
- amending items—1, 2, 3 etc.
- non-amending clauses (other than in a treaty or agreement)—these are numbered in the same way as sections.
- provisions of a treaty or agreement—these are numbered in exactly the same way as in the original treaty or agreement.

The effect of amendments

The insertion of new provisions by amendments, or the repeal of provisions, will upset the neat, sequential numbering of an Act. If a new provision is inserted between 2 existing provisions, it will be given the number of the first provision, plus a letter of the alphabet (generally A). For example, a new subsection between (1) and (2) will be (1A), and a new paragraph between (b) and (c) will be (ba). Sometimes multiple amendments mean that the numbering becomes rather unwieldy—the **Building Act 1993** contains a section numbered 221ZZZBA.

On the other hand, a repeal may leave a gap in the numbering.

³ Some large Acts use decimal numbering (for example, the **Gambling Regulation Act 2003**).

Examples and notes

35. The **Interpretation of Legislation Act 1984** was amended in 2000 to provide for Acts to include examples and notes. Examples may be included where they would be helpful to the reader in explaining the operation of the provisions. For example, section 175A(1) of the **Children, Youth and Families Act 2005** contains an example of its operation—

175A Secretary may specify certain issues

- (1) The Secretary may specify issues relating to a child in out of home care about which a person who has care of the child may be authorised to make decisions.

Example

The Secretary may specify issues including but not limited to—

- the signing of school consent forms; or
- obtaining routine medical care for the child, including immunisation on the recommendation of a registered medical practitioner, nurse, midwife or pharmacist in the lawful practice of their profession; or
- the day to day treatment of a child who suffers from a chronic or serious health condition.

36. Section 36A of the **Interpretation of Legislation Act 1984** provides that an example of the operation of a provision is not exhaustive and may extend, but does not limit, the meaning of the provision.

37. Notes at the foot of a provision in an Act also now form part of the Act (section 36(3A) of the **Interpretation of Legislation Act 1984**). For example, section 77(1) of the **Retail Leases Act 2003**—

77 Unconscionable conduct of a landlord

- (1) A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all the circumstances, unconscionable.

Note

Section 78 deals with unconscionable conduct by a tenant.

2.5: Standard kinds of provisions

38. This part of the handbook outlines some standard provisions, some of which are found in all Acts and some of which are found in particular types of Acts.

Preamble

39. If an Act contains a preamble, it appears before the enacting words and explains the background to the Act or the reasons why its enactment is considered desirable. A preamble may be compared to the recitals of a contract.
40. In Victoria a preamble is used—

- in Acts that are so important that the background to them needs to be stated as part of the Act (for example, the **Charter of Human Rights and Responsibilities Act 2006**);
 - in Acts that ratify agreements (for example, the **Mines (Aluminium Agreement) Act 1961**);
 - in Acts dealing with particular pieces of land (for example, the **Melbourne Lands (Yarra River North Bank) Act 1997**);
 - in all private Acts⁴ (for example, the **Anglican Welfare Agency Act 1997**);
 - as a matter of parliamentary procedure in local Acts that are not private Acts.
41. In older Acts, preambles began with the word "Whereas". This practice has stopped in Victoria and now it is merely necessary to use the heading "Preamble".
42. A preamble is part of an Act and may be used as an aid in its interpretation⁵. However, material should not be included in the preamble that should properly be included in the purpose or objective provisions of the Act.

For example—

Lord Mayor's Charitable Foundation Act 2017

Preamble

- (1) The Lord Mayor's Fund for Metropolitan Hospitals and Charities was established in 1923 by the then Lord Mayor, Sir John Swanson.
- (2) Under the **Lord Mayor's Fund Act 1930** a corporation by the name of "The Lord Mayor's Fund for Metropolitan Hospitals and Charities" was constituted to administer the Fund.
- (3) Further provision was made for the management and administration of the Fund by the **Lord Mayor's Charitable Fund Act 1996** which repealed and re-enacted with amendments the **Lord Mayor's Fund Act 1930** and established a new body corporate, being the Board of Management of the Lord Mayor's Charitable Fund.
- (4) It is expedient that the **Lord Mayor's Charitable Fund Act 1996** is repealed and new provision should be made for the governance, management, powers and object of the body corporate that administers the Fund and for the administration of the Fund.

⁴ See Part 6 for a discussion of private Acts.

⁵ In *Wacando v Commonwealth* (1981) 37 ALR 317 at 333 Mason J said: "It has been said that where the enacting part of a statute is clear and unambiguous it cannot be cut down by the preamble. But this does not mean that a court cannot obtain assistance from the preamble in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object."

Long title of a Bill

43. The long title of a Bill must comply with Order 3 of the Joint Standing Orders of the Victorian Parliament which states that—
3. Every Bill must begin with a long title which sets out in general terms the object and scope of the Bill.
44. To comply with this Order, care must be taken in framing the long title to make it wide enough to cover all the provisions of the Bill and at the same time not so wide so as to allow the proposal of amendments that are irrelevant to the real substance of the Bill.
45. The long title of a Bill commences with the words "A Bill for an Act" on page 1 of the Bill.

For example—

A Bill for an Act to amend the **Control of Weapons Act 1990** to increase the penalties for certain offences relating to prohibited and controlled weapons and for other purposes.

46. In most cases the words "and for other purposes" are included to ensure that the scope for amendment of the Bill is not unduly restricted by the long title.
47. The long title of a Bill does not form part of the Act if the Act—
- was passed on or after 1 September 1985; and
 - does not authorise its citation by a short title.
48. The long title of the Bill appears in the Endnotes to an Act once it is passed. It may be used as an aid to the interpretation of the Act. See section 35 of the **Interpretation of Legislation Act 1984**. For an Act passed on or after 1 September 1985, the long title cannot be amended, however the purposes of the Act may be amended.

Short title of Bill /title of Act

49. The short title of a Bill appears above the long title and should reflect the Bill's subject matter. From 2007, the short title of the Bill includes the year the Bill was introduced into Parliament.
50. The short title of a Bill becomes the title of the Act when the Bill receives the Royal Assent⁶. From 2007, all amending Acts have the word "Amendment" in their titles

⁶ See section 10(2A) of the **Interpretation of Legislation Act 1984**.

following the name of the Principal Act(s) being amended. The title of an amending Act may also indicate the subject-matter of the amendments.

For example—

- **Graffiti Prevention Act 2007;**
- **Murray-Darling Basin Amendment Act 2007;**
- **Control of Weapons Amendment (Penalties) Act 2007.**

Commencement

51. Most Acts contain a section stating when the Act commences. If there is no commencement section, section 10A(4) of the **Interpretation of Legislation Act 1984** provides for the Act to commence on proclamation or the first anniversary of the day on which the Act receives the Royal Assent, whichever is earlier.
52. The main options for commencement are—
 - on Royal Assent;
 - on the day after Royal Assent;
 - on a specified future or past (retrospective) day;
 - on a day or days to be proclaimed by the Governor in Council (generally with a 6 to 12 month limit on the power to proclaim);
 - on the commencement of another related piece of legislation.
53. Note that the whole of an Act does not have to commence at the same time. Different provisions in it may be given different commencements.
54. Some matters to bear in mind regarding which commencement option to choose—
 - provisions creating offences or imposing obligations should generally not commence on Royal Assent. The theory behind this is that the public should have time to obtain a copy of the Act and consider its implications before being required to change their behaviour. Acts are published on the Internet on the day that they receive Royal Assent at <http://www.legislation.vic.gov.au> (Statute Book);
 - the need to have regulations drafted, or to set up administrative systems, may also mean that commencement should be delayed to some time after Royal Assent;

- a retrospective commencement date should only be chosen if absolutely necessary, and the reason for a retrospective commencement should be explained in the explanatory memorandum. Failure to do so will result in criticism by SARC;
- as a general rule, if commencement is by proclamation, a restriction should be placed on the period within which proclamation must take place. The commencement provision will state that if the proclamation is not made before a specified day, the Act (or the provision) will commence on that day;
- occasionally, a completely open-ended power to proclaim can be justified—for example, to align the commencement with the commencement of associated Commonwealth or State legislation or with the coming into force of an agreement. The reason should be explained in the explanatory memorandum.

55. Further information on commencement of Acts can be found in Part 7.

Definitions

56. In a Principal Act, the definitions and other interpretative provisions that are to apply across the Act are usually located together in one place towards the beginning of the Act.
57. Sometimes a definition is needed only for a limited part of the Act (this could be a section, a Division or a Part). In that case, the definition may be located close to the provisions in which it is needed rather than in the main definition section.
58. Definitions are styled in ***bold italics***.

Transitional provisions

59. An amendment (or a repeal) may create a need to deal with the changeover from the old position to the amended position. This sort of issue is dealt with in provisions known as transitional provisions. The example in the table may help to explain the sorts of issues you need to consider.
60. Resolving transitional issues involves making policy decisions and is part of the instructor's role. The drafters will often help identify the issues and suggest possible solutions to them.

61. The table below sets out an example of transitional issues that may need to be considered when a legislative proposal is being developed.

Example of consideration of transitional issues—

A licensing scheme is replaced by a completely new licensing scheme (but the purpose of the scheme is essentially the same). Transitional issues for the instructor to consider might include—

- Should a licence granted under the old scheme continue to have effect after the new scheme comes into existence? If yes, should it have effect under the old scheme (with the old scheme preserved or "saved" for that purpose), or should it have effect as if it were a licence granted under the new scheme?
- If an application for a licence under the old scheme is still being considered when the new scheme commences, should the consideration of the application go ahead after that commencement, or should the applicant have to make a new application under the new scheme? If consideration of the application should go ahead, should it go ahead under a preserved version of the old scheme, or should it be translated into an equivalent application under the new scheme?
- The old scheme and the new scheme both provide for regulations to specify licence conditions. Should the regulations made for this purpose under the old scheme have effect as if they were regulations made for the same purpose under the new scheme, or will a completely new set of regulations be needed for the new scheme? Usually, it is preferable for new regulations to be made before the new scheme comes into operation.

Self-repeal of amending Acts

62. From 2007, all amending Acts contain a provision that repeals the amending Act. This is usually the last provision of the amending Act. The provision repeals the amending Act on the first anniversary of the day on which the amendments come into operation (or if there is a default commencement day for the amendments, on the first anniversary of the default commencement day).
63. SARC suggested that all amending Acts contain a self-repealing provision, mainly to save the time and expense of having to repeal amending Acts in a statute law revision Bill.
64. The repeal of an amending Act does not in any way affect the operation of the amendments made by that Act to any Principal Act (this is provided for by section 15(1) of the **Interpretation of Legislation Act 1984**).

2.6: Finding the current text of an Act

65. Instructions for amendments of Acts need to be based on the current wording of the Act. An instructor needs to work with an up to date text—a text that incorporates all amendments that have commenced. The instructor should also be aware of amendments of the Act that have been passed but have not commenced, and other amendments of the Act that are currently in Parliament or are proposed to be introduced into Parliament.

Options for finding the text of an Act

66. Victorian Acts are published electronically as authorised versions. Hard copies of authorised versions may also be purchased through the Victorian legislation website.
67. An authorised version is a version of an Act (or a printed copy of that version) that has been authorised for electronic publication by the CPC in accordance with section 62 of the **Interpretation of Legislation Act 1984**.
68. Either the authorised version or a hard copy of the authorised version may be used in court as the official version of an Act. Before 2011, the hard copy of an Act, which was published by authority of the Victorian Government Printer, was the only official version that could be used in court. However the **Interpretation of Legislation Act 1984** now provides that an authorised version is evidence of the Act (see Part V of the **Interpretation of Legislation Act 1984**).

Electronic

69. Acts can be accessed electronically on the Victorian Legislation home page at <http://www.legislation.vic.gov.au>.
70. The home page contains 3 main repositories—
- Legislation in force (contains versions of all consolidated Principal Acts as amended and in force at points in time).
 - Legislation as made (contains an electronic version of each Act as passed or made since 1996).
 - Bills (contains electronic copies of Bills in Parliament, explanatory memoranda and other parliamentary documents, including a link to Hansard).
71. The Victorian Legislation home page also contains links to—

- Legislative information which contains information relating to legislation including commencement details, the value of penalty and fee units, weekly updates and instructional publications.
 - Other help information, which contains information about the role of OCPC and developing legislation with OCPC.
72. Legislation in force authorised versions of consolidated Acts do not incorporate amendments that have been passed but have not come into operation.

Hard copy

Hard copies of Acts as enacted after 1 January 2019 and consolidated authorised versions of Principal Acts are available to be purchased in B5 format through the Victorian legislation website at <http://www.legislation.vic.gov.au>.

Other useful information

73. OCPC publishes various Acts tables from time to time, which are available electronically at <http://www.legislation.vic.gov.au> — select legislative information and then legislative information reports from the menu.

These include—

- a table of Acts passed in the current year;
 - a table of Acts amended or repealed by Acts passed in the current year.
74. Another useful resource is the Commencement Book, which contains up to date information about the commencement of provisions of Victorian Acts. The Commencement Book can be accessed at <http://www.legislation.vic.gov.au>—see Legislative information.

Part 3: Some Acts of general application

3.1: Introduction

75. No Act is completely self-contained. All Acts rely, to greater or lesser degrees, on the general law and on other pieces of background legislation that gives rules for the interpretation of legislation or for other matters of general application to all Acts.
76. Consider the following examples and the questions posed at the end of each:

Example 1

22 Delegations by Minister

The Minister, by instrument, may delegate to any person or class of person employed under Part 3 of the Public Administration Act 2004 in the administration of this Act any power of the Minister under this Act.

- How do you know which Minister is referred to?
- Can the Minister revoke a delegation?
- If the Minister has delegated a power, can the Minister still exercise the power?

The answer to these questions can be found in the **Interpretation of Legislation Act 1984**.

Example 2

29 Compliance with notice

A person must comply with a notice given by the Minister under section 28.

Penalty: Imprisonment for 12 months.

- What do the words at the foot of the provision do?
- Could a fine be imposed instead of a sentence of imprisonment?
- Is the position any different if a body corporate contravenes the provision?

The answer to these questions can be found in the **Sentencing Act 1991**.

77. The main pieces of background legislation that you need to be aware of are—
- the **Interpretation of Legislation Act 1984**;
 - the **Charter of Human Rights and Responsibilities Act 2006**;
 - the **Sentencing Act 1991**;

- the **Constitution Act 1975** (in particular section 85);
- the **Financial Management Act 1994**;
- the **Magistrates' Court Act 1989**;
- the **Infringements Act 2006**;
- the **Fines Reform Act 2014**;
- the **Criminal Procedure Act 2009**.

78. This Part sets out in more detail the matters covered by these Acts.

3.2: Interpretation of Legislation Act 1984 (ILA)

Overview

79. This Act applies to all Victorian Acts except a small number of Acts that are part of national schemes, where the Acts Interpretation Act 1901 of the Commonwealth applies⁷ or those Acts which have their own self-contained interpretation provisions⁸. However, most of the provisions in the ILA are subject to any contrary intention expressed in the Act concerned. The ILA deals with the following matters:

- commencement and repeal of Acts;
- formal matters relating to Acts;
- rules of construction of Acts;
- definitions;
- matters dealing with the exercise of powers and duties;
- matters affecting the operation of statutory bodies;
- special provisions dealing with subordinate legislation (including regulations, rules of court and other statutory rules).

⁷ See section 7 of the **Agricultural and Veterinary Chemicals (Victoria) Act 1994**.

⁸ See Schedule 2 to the National Electricity Law and Schedule 2 to the National Gas Law. These Laws apply as laws of Victoria under the **National Electricity (Victoria) Act 2005** and **National Gas (Victoria) Act 2008**. The Schedules are identical and contain interpretation provisions that apply to the National Electricity Law, National Gas Law and Rules and statutory instruments made under those Laws. They have the effect of displacing the operation of the ILA Act in respect of those Laws.

Discussion of example 1

80. Recall that this example is—

22 Delegations by Minister

The Minister, by instrument, may delegate to any person or class of person employed under Part 3 of the **Public Administration Act 2004** employed in the administration of this Act any power of the Minister under this Act.

- **Minister**—see the definition of "Minister" in section 38 of the ILA—means the Minister administering the provision, or one of the Ministers administering the provision, or a Minister acting on behalf of that Minister. The Ministers who administer particular provisions of Acts are set out in the Administration of Acts General Order made from time to time by the Premier. Victorian Acts generally rely on this definition and do not specify the Minister. This avoids the need to amend the legislation when machinery of government changes result in Ministers altering their titles or administering different Acts.
- **may**—see section 45(1) of the ILA—this makes it clear that a discretion is being given (rather than an obligation being created). This might seem to be stating the obvious, however that has not always been the view taken by courts.
- **by instrument**—see section 41A of the ILA—a power to make, issue or grant an instrument includes the power to revoke or amend the instrument in the same way. Without this provision, or in a case to which it did not apply, the ability to revoke or amend the exercise of a power would have to be dealt with expressly.
- **delegate**—see sections 42 and 42A of the ILA for provisions that apply automatically where an Act confers power to delegate. For example, section 42A(1)(a) makes it clear that the person delegating can also exercise the power himself or herself, despite the delegation.

Outline of provisions of the ILA

Commencement and repeal

81. The following sections of the ILA deal with the commencement and repeal of Acts—

Section 10A	provides for the commencement of provisions of an Act. Contains provisions for commencement by proclamation. If no commencement day is stated in the Act, the Act commences on proclamation or on the first anniversary of Royal Assent, whichever is the earlier;
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Section 11	Acts commence at the beginning of their commencement day;
Section 12	if a provision of an Act expires on a particular day, it expires at the end of that day;
Section 13	exercising powers between passing and commencement of Acts;
Section 14(1)	repeal does not revive previously repealed laws;
Section 14(2)	general savings provision, repeal does not affect things done, rights accrued or liabilities imposed;
Section 15	repeal of amending Act does not affect the amendments made;
Section 16	provides for repeals and re-enactments and provides for the continuation of references and subordinate legislation in some cases.

82. When providing drafting instructions, note in particular sections 10A and 11 (commencement) and section 14 (when dealing with transitional arrangements).

Formal matters

83. These sections of the ILA contain a number of useful provisions that you should be aware of when instructing—

Section 10	citation of Acts (short title before 1985, title after 1985);
Section 17	a reference to an Act or subordinate instrument is a reference to that Act or instrument as in force for the time being;
Section 36	headings (but not section headings before 1 January 2001), Schedules etc. form part of an Act. Punctuation, diagrams, examples and notes at the foot of provisions of an Act (enacted after 1 January 2001) form part of the Act. Footnotes and endnotes are not part of an Act;
Section 37	gender includes all other genders, singular includes plural and vice versa;
Section 38	definitions. Note, in particular, <i>contravention, document, land, Minister, oath, person, prescribed, writing</i> ;
Section 39	defined terms include other parts of speech and grammatical forms;

Section 39A	definitions are taken to be inserted in appropriate alphabetical positions;
Section 39B	consequential renumbering of a section if the section is divided into subsections;
Section 44	calculating periods of time—ignore starting day; periods not to end on non-business days; definitions of month, year, financial year, calendar year; day ends at midnight;
Section 47	reference to an office-holder includes any person occupying or acting in the office;
Section 49	service by post;
Section 50	conferral of jurisdiction on a court or tribunal confers jurisdiction to make rules;
Section 53	substantial compliance with forms is sufficient;
Section 57	Acts apply in certain off-shore areas.

Rules of construction

84. The following sections deal with rules to apply when construing Acts—

Section 6	Acts to be construed (read down) as constitutionally valid;
Section 35(a)	courts to prefer interpretations that promote the purpose or object of an Act;
Section 35(b)	extrinsic aids may be used to resolve ambiguity or confirm ordinary meaning;
Section 36A	examples are not exhaustive. They may extend but do not limit the meaning of the provision of which they are examples.

Exercise of powers and duties

85. The following sections deal with the exercise of statutory powers and duties—

Section 40(1)	powers etc. may be exercised from time to time;
Section 40(2)	powers etc. may be exercised by office holder for the time being;

Section 41	power to appoint includes power to revoke appointment and power to make acting appointment;
Section 41A	power to make instrument includes power to revoke or amend it;
Section 42	delegate exercises delegated power in accordance with delegate's opinion;
Section 42A	general delegation provisions—power to delegate does not include power to subdelegate, person who delegates may still exercise power, delegation may be subject to conditions, office holder or acting office holder may exercise delegated power;
Section 45	<i>may</i> and <i>shall</i> .

3.3: Charter of human rights and responsibilities

86. The Charter is contained in the **Charter of Human Rights and Responsibilities Act 2006**.
87. The Charter sets out a number of human rights and responsibilities that are drawn primarily from the International Covenant on Civil and Political Rights.
88. All Bills introduced into Parliament must be accompanied by a Statement of Compatibility that states whether, in the opinion of the member introducing the Bill, the Bill is compatible with human rights and, if so, how it is compatible. If any parts of the Bill are incompatible with human rights, the statement must state the nature and extent of the incompatibility.
89. All statutory provisions (i.e. Acts, regulations and other subordinate legislation) must be interpreted in a way that is compatible with human rights (so far as it is possible to do so consistently with the purpose of the provision).
90. All public authorities (which include Ministers, government departments, statutory authorities, Victoria Police and local councils) must not act in a way that is incompatible with human rights.
91. The Supreme Court is given certain powers in relation to human rights, including making a declaration of inconsistent interpretation where it cannot interpret a statutory provision in a way that is compatible with human rights. If the Court makes a declaration, the responsible Minister must publicly respond to the declaration in Parliament and in the Government Gazette.

3.4: Sentencing Act 1991

92. The **Sentencing Act 1991** contains a number of provisions dealing with the criminal law and penalties that are of general application to Acts and subordinate legislation.

Discussion of example 2

93. Recall that this example is—

29 Compliance with notice

A person must comply with a notice given by the Minister under section 28.

Penalty: Imprisonment for 12 months.

- ***The provision creates a criminal offence***—see section 111 of the **Sentencing Act 1991**—this provides that if a penalty is set out at the foot of a provision, a contravention of the provision (by act or omission) is an offence punishable by a penalty not exceeding the penalty set out. Note that criminal offences can also be created by express words ("a person who does X is guilty of an offence punishable, on conviction, by Y") although that style is now avoided, if possible.
- ***Term of imprisonment***—see section 109(3) of the **Sentencing Act 1991**—if the stated penalty is a term of imprisonment, an alternative or additional penalty of a fine can be imposed. The formula for working out the maximum fine that can be imposed is number of months in maximum term x 10. This gives the maximum number of penalty units (discussed below) of the fine. In the example, the number of penalty units would be 120.
- ***Penalty unit***—see section 110 of the **Sentencing Act 1991**—Fines are usually expressed in Acts as a number of penalty units. Until 2004, the value of a penalty unit was \$100. From 1 July 2004, the value of a penalty unit is set by the Treasurer each year under section 5(3) of the **Monetary Units Act 2004**⁹.
- ***Bodies corporate (companies etc.)***—see section 113D of the **Sentencing Act 1991**—this provides that if a body corporate commits an offence against the **Crimes Act 1958**, the maximum penalty applicable to the offence is a fine of 5 times the maximum fine that could be imposed on a natural person in respect of the same offence. So, in the example, if the offence is contained in the **Crimes Act 1958** and is committed by a body corporate, the maximum penalty is 600 penalty units. Terms of imprisonment do not apply to bodies

⁹ For the current value of a penalty unit, see <http://www.legislation.vic.gov.au> in the repository "Legislative Information".

corporate. But remember, if the penalty is expressed as a term of imprisonment, it can be converted into a fine (see above) which can then be multiplied by 5 to get the body corporate maximum penalty. For legislation other than the Crimes Act, the maximum penalty for a body corporate may be specified to be different from the maximum penalty for a natural person, either by specifying a different penalty in the offence provision itself or by a general provision covering all offences in the legislation.

94. Other relevant provisions of the **Sentencing Act 1991**—

Section 86	court may make compensation order against offender;
Section 109	establishes penalty levels (for example, level 5 imprisonment, level 3 fine). These can be used in any Act, but so far have been confined to the Crimes Act 1958 and a few other law enforcement Acts ¹⁰ ;
Section 112	offences against Acts (except Crimes Act 1958 or Wrongs Act 1958) are summary, unless specified as indictable (subject to the penalty levels specified in section 109);
Section 113	the maximum term of imprisonment that can be imposed for an indictable offence tried summarily is 2 years;
Section 113A	the maximum term of imprisonment that can be imposed for a summary offence is 2 years;
Section 113B	the maximum cumulative term of imprisonment that can be imposed for summary offences being dealt with at the same time is 5 years.

3.5: Constitution Act 1975

95. This Act provides the legislative authority for all Acts of the Victorian Parliament (see sections 15 and 16¹¹). Much of the Act is taken up with the constitution of the Parliament, the Executive and the Supreme Court and the procedure for the passage of legislation. Significant changes were made to the composition of and electoral system for the Legislative Council that took effect from the 56th Parliament that was elected in November 2006.

¹⁰ For example, the **Drugs, Poisons and Controlled Substances Act 1981**, the **Sex Work Act 1994** and the **Fisheries Act 1995**.

¹¹ Section 15 states that the legislative power of Victoria is vested in the Parliament and section 16 states that the Parliament has power to make laws in and for Victoria in all cases whatsoever.

96. One section that is of importance to all Bills and that should be borne in mind by instructors is section 85.
97. Section 85 vests the judicial power of Victoria in the Supreme Court. It provides that the Supreme Court has jurisdiction in or in relation to Victoria in all cases whatsoever. It further provides that certain procedures must be followed if a Bill purports to repeal, alter or vary the jurisdiction of the Supreme Court.
98. These procedures, in summary, are that—
- the Bill must expressly refer to section 85 and express its intention of altering or varying that section (see section 85(5)(a)); and
 - the member who introduces the Bill must make a statement of the reasons (see section 85(5)(b) and (c)) (this is usually done during the second reading speech); and
 - the Bill must be passed by an absolute majority (see section 18(2A)).
99. Examples of Bills that might alter the jurisdiction of the Supreme Court are Bills that—
- remove jurisdiction from the Supreme Court and confer it on another body;
 - create a new jurisdiction and confer it on a tribunal but not on the Supreme Court;
 - contain an ouster provision (for example, that certain decisions are not reviewable or justiciable in any court) however any such provision will be interpreted in accordance with the High Court decision in *Kirk v Industrial Court (NSW)* [2010] HCA 1; 239 CLR 531.

3.6: Financial Management Act 1994 (FMA)

100. This Act creates the financial framework for the Victorian public sector. It covers accounting, auditing (in combination with the **Audit Act 1994**) and reporting by public sector bodies.
101. Section 54 of the FMA provides that the accounting, auditing and reporting provisions of the FMA (Part 7 of the FMA) prevail over any inconsistent provisions in other Acts.
102. Broadly, public sector bodies to which the FMA applies are—
- government departments;

- public statutory authorities;
- State business corporations and State bodies (see the **State Owned Enterprises Act 1992**);
- declared bodies (presently these include some cemetery trusts, committees of management and superannuation bodies);
- Court Services Victoria.

103. The main accounting and reporting provisions of the FMA are—

Section 8	authorises the Minister for Finance to issue directions in relation to accounting and reporting by departments and public bodies;
Section 44	requires proper accounts to be kept;
Section 44A	requires public bodies to give information to the Minister;
Section 44B	requires a department or public body to maintain a register of assets held or managed by it;
Section 45	preparation of annual report of operations and financial statements;
Section 46	tabling of annual reports in Parliament;
Section 48	form and content of report of operations;
Section 49	form and content of financial statements;
Section 53	composite reports by more than one department or public body;
Section 54	the Part prevails over inconsistent provisions in other Acts.

104. It is not necessary to include accounting, auditing and reporting provisions in legislation that establishes a public sector body, as the FMA will cover these matters. However, an Act could provide that a body must include certain specified information in its report of operations (for example, section 179 of the **Equal Opportunity Act 2010**).

Trust accounts

105. Part 4 of the FMA establishes the Trust Fund, in which public money may be held and applied for particular specified purposes. Instructors need to be aware of these provisions in relation to any proposal to establish trust funds or trust accounts to hold public money.

3.7: Magistrates' Court Act 1989

Search warrants

106. The **Magistrates' Court Act 1989** contains standard provisions relating to search warrants.

Section 75 requires evidence on oath or by affidavit;

Section 76 says to whom a search warrant may be directed;

Section 78 sets out the authority conferred by a search warrant.

107. Provisions in other Acts that allow for the issue of a search warrant for the purposes of those Acts need to be consistent with, and refer to, these provisions.

3.8: Infringements

108. The **Infringements Act 2006** and the **Fines Reform Act 2014** together provide the framework for the issuing and serving of infringement notices for offences and the collection and enforcement of infringement fines (infringement penalties and penalty reminder notice fees) and of court fines (fines under the **Sentencing Act 1991** or imposed by a court).
109. The collection and enforcement of infringement fines and court fines is set out in the **Fines Reform Act 2014**. Most infringement fines that are outstanding may be registered with the Director, Fines Victoria for enforcement unless they relate to a non-registrable infringement offence.
110. Fines Victoria must be consulted about proposed new infringement offences.

3.9: Criminal Procedure Act 2009

111. The **Criminal Procedure Act 2009** consolidates the laws relating to criminal procedure in the Magistrates' Court, the County Court and the Supreme Court.

Burden of proof

- 112. Generally, in criminal matters, the burden of proving an offence lies on the prosecution, but the burden of proving a defence lies on the defendant.
- 113. Section 72 of the **Criminal Procedure Act 2009** provides that the defendant bears the evidential burden of proof in relation to any exception or excuse to an offence created by statute. The prosecution still bears the overall legal or persuasive burden of proof.
- 114. Instructors should bear this in mind when framing instructions for the creation of offences.

Part 4: Authority to draft

4.1: Setting the legislative program

115. Each year Ministers are invited by the Cabinet Secretary to submit proposals for legislation for the next year together with an indication of the likely timeframe within which the Bill can be prepared. The Cabinet Secretary, the CPC and Cabinet Office staff consider the proposals to ensure an orderly flow of legislation. The Cabinet Secretary then writes to the relevant Minister with the allocated dates of Approval in Principle (AIP) and the Bill at Cabinet (BAC) for the Minister's Bill.

4.2: Preliminary steps

Preparatory stages

116. Before being submitted to Cabinet for AIP, a legislative proposal may require consultation with relevant departments.

Necessity for Approval in Principle

117. Unless the Premier otherwise approves, a government legislative proposal must have AIP from Cabinet before a Bill can be prepared.

4.3: Drafting advice on legislative proposals

118. OCPC provides both formal and informal advice on proposals for Bills.

Informal discussion

119. Prior to the AIP stage, instructors may find it useful to arrange an informal meeting with the CPC or other drafters nominated by the CPC to discuss proposals for specific Bills.
120. This may be particularly useful to clarify drafting matters which may impact on policy issues and to work through possible legislative or other means of implementing the proposals. It is also useful as a means of identifying at an early stage issues which may be contentious or complex, and to resolve legal difficulties.

Approval of drafting instructions

121. Submissions seeking Cabinet AIP for a Bill must include drafting instructions.
122. The sponsoring agency is required to submit a draft of the proposed submission and drafting instructions to the CPC, before the submission is lodged, for advice as

to whether the instructions are adequate to enable the first draft of the proposed Bill to be prepared.

Settling proposed drafting instructions for Approval in Principle

123. The CPC, or a drafter allocated the task by the CPC, will check the submission and proposed drafting instructions. The drafter who checks the proposed drafting instructions may not be the drafter who eventually drafts the Bill. At this stage, if the matter is complex or raises a number of issues which require clarification, the drafter may discuss the proposal with the instructing department or arrange a meeting or series of meetings to do so. At the end of this review process the CPC will send written comments to the agency and indicate whether or not the drafting instructions are adequate for the preparation of a first draft of the Bill.
124. It is not the drafter's role to comment on policy except to the extent required to clarify the policy to allow for the drafting of a Bill or to point out inconsistencies or conflicts which need to be addressed before a draft Bill can be prepared. It may be that a different approach can be taken to implement the desired policy. Policy issues should be largely settled before drafting commences.
125. Areas on which the drafter may comment or require further information include—
- the form of the instructions: they should be in a narrative form with sufficient background to aid drafting (see the more detailed list below);
 - whether or not the instructions provide sufficient information and detail for the preparation of a first draft of a Bill;
 - whether the proposals raise issues of law, justice, equity or fairness which may require further consultation, information, consideration or clarification;
 - whether the proposals will engage rights under the **Charter of Human Rights and Responsibilities Act 2006**;
 - how the proposals fit with existing law and what that interrelationship should be (if relevant);
 - whether the proposed scheme could be simplified for greater understanding and compliance;
 - whether other legislation will require amendment to accommodate the new proposal (the amendment may be substantial or consequential);
 - consideration of the commencement scheme, transitional or savings issues and whether or not new regulations will be needed or existing regulations amended (this includes consideration of the scope of regulations that it is

intended to make—so that appropriate and adequate regulation-making powers can be included in the Bill);

- whether or not other relevant departments or bodies have been consulted and whether their approval will be required for the AIP to proceed.

Drafting instructions

126. Drafting instructions **should**—

- be in narrative form and number each paragraph; and
- contain a general statement of the aims of the proposed legislation and the means by which it is suggested they be achieved; and
- give specific instructions as to all matters to be dealt with by the proposed legislation; and
- identify any difficulties of a legal, administrative or other nature that appear to be involved; and
- refer to other similar or existing legislation that may be affected or require modification; and
- identify any relevant legislation from other jurisdictions; and
- be accompanied by any relevant case law, opinions from the Victorian Government Solicitor, the Solicitor-General or from outside counsel, or reports of committees or working parties, that are relevant to the legislation (this background material should be clearly distinguished from matters for which provision is to be made in the proposed legislation); and
- provide express instructions about the commencement, transitional provisions and the extent of regulation-making powers required; and
- provide instructions about consequential amendments that need to be made to other Acts as a result of the Bill; and
- nominate a drafting instructor who is sufficiently authorised to give instructions to drafters on the legislative proposal.

127. Drafting instructions **should not**—

- raise or refer to matters of principle or policy that are not covered in the AIP submission; or

- merely paraphrase the AIP submission recommendations. The submission will normally deal with general principles; the instructions should contain all relevant matters of detail; or
- take the form of a draft Bill: reference to provisions of other legislation or model Bills may be made, but this should not be used as a substitute for detailed narrative instructions explaining the proposals.

4.4: Inter-departmental consultation

128. If a submission and drafting instructions propose amendments to legislation that is not administered by the sponsoring Minister (other than purely technical consequential amendments) or propose legislation that may conflict with existing or proposed legislation that is administered by another Minister, the sponsoring agency should seek the approval of the Minister who administers that other legislation. When considering draft legislative proposals, the drafter will usually check with the sponsoring agency that this approval has been given (the submission should make this clear). The responsibility for ensuring that all appropriate consultations have taken place rests with the instructor.
129. In addition, various matters in Bills should be discussed with the relevant department which has responsibility for the matter. These include—

Attorney-General (Department of Justice and Community Safety)

- jurisdiction of courts and tribunals (including VCAT), review and appeal rights and processes, including provisions limiting the jurisdiction of the Supreme Court (section 85 of the **Constitution Act 1975**);
- imposition of penalties, fines or imprisonment and the use of infringement notices;
- onus of proof;
- evidentiary provisions (including conclusive evidentiary provisions, privilege against self-incrimination, other privileges and protections);
- powers of entry, search and seizure, including powers to obtain information or answers to questions;
- immunity or indemnity clauses;
- compulsory acquisition of land;
- equal opportunity—provisions that would authorise discrimination;

- Charter of Human Rights and Responsibilities and other human rights issues;
- retrospectivity of commencements, offences and other provisions affecting rights;
- choice of laws;
- limitation periods;
- changes affecting the legal profession;
- Corporations Act (Commonwealth).

Treasurer/Minister for Finance (Department of Treasury and Finance)

- annual reporting and auditing;
- establishment of statutory authorities;
- any provisions for the appropriation or application of public money or the establishment of a fund to hold public money;
- immunity and indemnity clauses;
- proposals for government guarantees;
- national competition policy.

Premier (Department of Premier and Cabinet)

- constitutional matters (including entrenchment);
- inter-governmental matters;
- immunity or indemnity clauses;
- establishment of public entities;
- privacy;
- freedom of information.

4.5: Human rights assessment

130. As part of implementing the Charter of Human Rights and Responsibilities, departments are required to identify and assess any impacts that their legislative proposals will have on the human rights contained in the Charter.

- 131. The drafter allocated to review proposed drafting instructions for a Bill will also consider Charter issues when reviewing the instructions.
- 132. OCPC may refer the instructor to the Human Rights Unit in the Department of Justice and Community Safety when reviewing the drafting instructions if the instructions appear to raise Charter issues that have not been addressed.

Approval in Principle

- 133. There are certain requirements for the form and content of Cabinet AIP submissions, and requirements as to timing.
- 134. There are also other documents that form part of the AIP submission, such as the drafting instructions, or that need to accompany the AIP submission (see the Cabinet Handbook on the Department of Premier and Cabinet website).
- 135. Submissions and accompanying documents are lodged with the Cabinet Office in the Department of Premier and Cabinet and are considered at an appropriate Cabinet meeting.
- 136. If Cabinet gives AIP to a legislative proposal (with or without qualifications), the drafting process can begin.

Part 5: The drafting process

5.1: Formal lodging of drafting instructions

137. Once a legislative proposal has been approved in principle, the sponsoring agency lodges the drafting instructions on the Legislative Document Management System (LDMS). The instructions should be the same as those submitted to Cabinet, subject to any qualifications that Cabinet has placed on the AIP.
138. The instructor should also provide any other relevant background material such as legal advice or opinions, relevant case law, reports of committees or law reform commissions, relevant legislation of other jurisdictions and plans or diagrams which may need to be incorporated (unless these have already been provided).
139. The CPC allocates the Bill to a drafter or team of drafters.
140. Cabinet Office (within the Department of Premier and Cabinet), in consultation with the CPC and Cabinet Secretary, allocates the date on which the drafted Bill is to be considered by Cabinet (the **BAC date**).

5.2: First draft of Bill

141. The drafter prepares a first draft of a Bill using OCPC's customised templates, which are designed so that drafts appear in a similar format to the final Bill.
142. Depending on the circumstances and the drafter involved, the drafter may seek a meeting with the instructor before the drafter begins any drafting work, either to clarify the instructions or to receive further information. Again, depending on the circumstances, the drafter may seek a meeting with the instructor after the drafter has started drafting the Bill, but before the first draft has been finalised. In many cases, the drafter will speak to the instructor during the drafting process to seek clarification on particular points, or to seek instructions on minor matters.
143. A first draft will be as complete as possible but may contain draft notes and questions raising issues of concern (which may or may not affect policy) which have arisen in the course of drafting the actual provisions as opposed to analysing and discussing the proposals in the abstract.
144. The drafter is responsible for decisions relating to the format and structure of the Bill and the language used. It is not the instructor's role to dictate to the drafter what words should be used or how the provisions should be written or structured; however, comments from instructors as to readability of the language used and whether the draft effectively implements the desired policy are appropriate. Often

the drafter has chosen to use particular words or phrases because they have been judicially considered or are consistent with an Act being amended or the rest of the statute book.

Statute law revision

145. The first draft of a Bill may contain a clause titled "Statute law revision" (this clause, if included, is usually near the end of the Bill). This clause will contain minor corrections to existing Acts. Appropriate items for the statute law revision clause include the fixing of spelling mistakes, ungrammatical sentences, incorrect numbering and incorrect cross-referencing.
146. OCPC maintains a database of items of a statute law revision nature. If a Bill appears to be an appropriate vehicle to include any of the statute law revision items on the database (which would usually be the case if the items relate to the same Principal Act that the Bill is amending), the drafter will identify this fact and include the items in the Bill.
147. The instructor should check that the statute law revision items identified are appropriate for inclusion. The need for some statute law revision items is not always apparent, so the instructor should have no hesitation in asking the drafter to explain what an item does.
148. Statute law revision items can be included in the Bill without any need for specific Cabinet AIP, as OCPC has standing authority for these types of amendments to be included in Bills.

5.3: Further instructions

149. When the instructor has considered the draft, the instructor will either lodge further written instructions on the LDMS or request a meeting to discuss the Bill. Instructors may invite technical advisers or other staff as appropriate to discuss the draft.
150. Note that the drafter does not usually attend meetings relating to the development of policy. In exceptional circumstances, it may be useful for a drafter to attend meetings with people other than the instructors if there are issues relating to the drafting of the Bill. Any request for a drafter to attend an "outside" meeting needs to be cleared with the CPC and will be considered on a case by case basis.
151. A drafter cannot take instructions directly from an outside source. The instructing officer of the sponsoring agency (in most cases, the relevant government department) is the source of the drafter's instructions, and dealings with people other than the instructor must be through the instructor.

152. Further instructions must be in written and in narrative form. They should not take the form of a marked-up draft or provisions redrafted by the instructor or someone else. The drafter needs to know the nature of the problem to be solved. This is easier to do if an explanation is given rather than the drafter having to interpret words rewritten by someone else when the rewriting may not solve the problem that the instructor wants to address.
153. At a meeting on a draft Bill, instructors will be told that any oral instructions given during the meeting will need to be confirmed in writing. If a meeting results in proposed changes to a draft, it is important that the instructor gives written instructions (except for mere technical amendments such as grammatical errors, spelling mistakes, redrafting for clarity etc.). This is particularly important if the result of the meeting is a shift in policy. Instructors should provide written confirmation of instructions given at a meeting as soon as possible after the oral instructions are given.
154. As drafting progresses and the Bill is close to being finalised, it may be sufficient for instructions or comments to be provided orally if they are related to minor matters. However, any matters of significance need to be at least confirmed in writing.

Supplementary Approval in Principle

155. Further instructions or requests for changes to a draft should not involve matters outside Cabinet's AIP without the appropriate authority.
156. For major changes of policy or additional items, a supplementary AIP may be necessary. If OCPC receives further instructions that significantly depart from the AIP without the appropriate authority, the CPC will raise the matter with the Cabinet Secretary, who will decide what further approval is necessary before drafting can continue.

5.4: Settling section 85 statements

157. If the Bill contains a provision limiting the jurisdiction of the Supreme Court and refers to section 85 of the **Constitution Act 1975**, the instructor must ensure that the second reading speech for the Bill includes a statement giving the reasons for the provision.
158. The drafter will draw the instructor's attention to the provision (in writing) and request a copy of the draft statement of reasons in the second reading speech for settling. In settling the statement, the drafter will not provide the reasons but will check that the statement makes sense and is in the correct form. The statement of reasons must be settled by the drafter before the Bill is submitted to Cabinet.

159. It is important that the statement in the second reading speech sets out the reasons for the provision rather than simply stating what the effect of the provision is. Various examples of statements can be found in Hansard.
160. For a general discussion of section 85 provisions and statements, see *BHP v Dagi* [1996] 2 VR 117.

5.5: Explanatory memorandum

General

161. Each Bill is required to have an explanatory memorandum when it is introduced into Parliament. The explanatory memorandum is prepared by the instructor and settled with the drafter in time for it to be provided with the Bill for consideration by Cabinet.
162. An explanatory memorandum should outline the general scope of the Bill, contain a description of each clause of the Bill and set out the purpose of each clause. It should not merely repeat or paraphrase what is in the Bill.

SARC requirements

163. SARC has made a number of comments on the adequacy of explanatory memoranda. The Committee issued a Practice Note on 26 May 2014 (re-issued with amendments in 2016) which incorporates provisions in Practice Notes 1 to 4 previously issued by the Committee. This Practice Note can be found on the Victorian Parliament's website at <https://www.parliament.vic.gov.au/practicenote>.
164. The following extracts from the Practice Note set out the Committee's concerns regarding explanatory memoranda—

Practices of concern to the Committee include provisions in Bills that inadequately explain and justify:

- i. retrospective commencement on a particular date, and whether any person may be adversely effected by the retrospectivity**
- ii. wide or undefined delegation of administrative powers or functions**
- iii. commencement by proclamation or delayed commencement that is longer than 12 months after introduction, or**
- iv. where the Bill provides insufficient or unhelpful explanatory material particularly in respect to rights or freedoms and other key provisions, such as**
 - Powers of arrest, detention and deprivation of liberty
 - Search and seizure powers without judicial warrant
 - Creation of strict or absolute liability offences

- Reversal of onus of proof in criminal (or civil penalty) offences
- Abridgment of the right to silence or the privilege against self-incrimination
- Freedom of communication, assembly, movement, association, religion or conscience
- Infringement of the right to vote
- Denial of or failure to advise of, judicial or merits review of administrative decisions
- Denial or abridgment of the principle of 'fair trial' or the principles of natural justice
- Acquisition of property without adequate compensation
- Privacy of information and health records
- Is characterised as a 'statute law revision amendment'
- Inappropriately delegates legislative power. Examples: allow regulations to alter the provisions of an Act, or allow regulations to establish a tax (as distinct from a fee for service or penalty).

Where a Bill contains a provision that any of the above mentioned practices the Committee would expect that the Parliament will be provided with an explanation why the provision is desirable or necessary.

The explanation should include the reason why a specific retrospective date is chosen and whether any person may be adversely affected by retrospective application; why a wide or undefined delegation of administrative powers or functions is desirable; and why delayed commencement or commencement by proclamation is necessary or desirable.

Where there is insufficient information provided to the Parliament the Committee may report the matter to the Parliament, or, write to the relevant Minister seeking a further explanation, or both, pursuant to section 17(a) of the **Parliamentary Committees Act 2003**.

Other requirements

165. Other material should be included in an explanatory memorandum to assist a person reading the Bill to understand what the Bill does. Examples of such material include—

- if a clause of a Bill contains a cross-reference to another clause or to a section of an Act, a brief explanation of what that other section or clause does, and, if the reason for the cross-reference is not immediately obvious from that explanation, an explanation of why the cross-reference is necessary;
- examples of how a clause will operate (particularly if the clause includes a formula);
- an explanation of why a particular amendment is being made;
- a brief description of the history of a particular clause (for example, if a clause in a Bill is a re-enactment of an existing section, it is useful to know that fact and the identity of the existing section);

- an explanation of any statute law revision items included in the Bill. As these items are often included at OCPC's initiative, the drafter can assist the instructor in preparing the explanations for them.
166. The following example demonstrates the third dot point. The **Justice Legislation Amendment Act 2015** contains the following section—
- Section 319A definitions**
- In section 319A of the **Crimes Act 1958**—
- (a) the definition of *control* is **repealed**;
 - (b) **insert** the following definition—

"failure to keep under control, in relation to a dangerous dog, menacing dog or restricted breed dog, includes a failure to comply with any of the requirements under sections 26(1), 28, 29, 38, 39, 40, 41, 41E, 41F(1)(a), 41G, 41H, 41HA and 41I of the **Domestic Animals Act 1994**;"
167. The explanatory memorandum contains the following note in relation to section 23—
- Clause 23 amends section 319A of the **Crimes Act 1958** to omit the definition of *control* which when used in conjunction with sections 319B(1)(a) and (2)(a)(ii) and 319C creates a "double negative" and makes the offences in those sections ineffective. This clause inserts a definition of *failure to keep under control* to rectify this situation.

Guide to Preparing an Explanatory Memorandum and Template

168. At <https://www.vic.gov.au/developing-legislation-chief-parliamentary-counsel>, there is a "Guide to Preparing an Explanatory Memorandum and Template". The guide has been designed to assist the preparation of the explanatory memorandum for a Bill.
169. The guide describes the process for preparing and finalising an explanatory memorandum and the purpose of an explanatory memorandum. It also sets out examples, information and tips about how to write clause notes, including information about how much detail is required and the expectations of SARC. The guide contains a template that instructors should use to prepare an explanatory memorandum in the correct format and style.

Settling an explanatory memorandum

170. When a drafter receives a draft explanatory memorandum from the instructor, the drafter marks any necessary changes to the explanatory memorandum (substantive changes will be discussed with the instructor), and if there is sufficient time, the drafter sends it back to the instructor to be revised by the instructor.

5.6: Statement of Compatibility

171. All Bills introduced into Parliament require a statement of their compatibility with human rights to be laid before each House before the second reading speech (see section 28 of the **Charter of Human Rights and Responsibilities Act 2006** (the Charter)).
172. The statement is made by the Minister introducing the Bill and is prepared by the sponsoring agency. The instructor will be referred to the Human Rights Unit of the Department of Justice and Community Safety, which has the responsibility for overseeing statements of compatibility.
173. SARC has the responsibility of reviewing statements of compatibility for Bills. SARC issued a Practice Note on 26 May 2014 (re-issued with amendments in 2016) which includes its functions under the Charter and certain Charter matters that arise in Bills. The Practice Note can be found on the Victorian Parliament's website at <https://www.parliament.vic.gov.au/practicenote>.
174. The following extracts from the Practice Note set out the Committee's expectations in relation to a Statement of Compatibility—

The Committee has determined that it will characterise a Statement of Compatibility, made under the Charter s. 28, as a form of explanatory memoranda equivalent in status to an explanatory memorandum accompanying a Bill.

The Committee considers that, where house amendments are proposed for a Bill that are unrelated to the Bill's purpose as introduced, supplementary information should be provided to Parliament as to the compatibility of those amendments with the Charter's rights.

Where there is insufficient information regarding the Statement of Compatibility is inadequate or unhelpful in describing the purpose or effect of provisions in a Bill that may engage or infringe a Charter right or affect an operative provision of the Charter the Committee may report the matter to the Parliament, or, write to the relevant Minister seeking a further explanation, or do both, pursuant to section 17(a) of the **Parliamentary Committees Act 2003**.

175. SARC makes comments in the Practice Note about how a Statement of Compatibility (or other explanatory material) should address the following types of provisions—
- penalties, fines and other burdens (sections 21(5) and 22-27 of the Charter);
 - self-incrimination provisions (sections 24(1) and 25(2)(k) of the Charter);
 - reverse onus provisions (section 25(1) of the Charter);
 - compliance notices for suspected criminals (section 25(1) of the Charter);

- national uniform legislation schemes (sections 28, 30, 32, 36 and 38 of the Charter).

5.7: Finalising a Bill for Bill at Cabinet

176. Once a Bill has been settled between the drafter and the instructor, the drafter will arrange for various in-house legal checks and readings to be done. These checks involve reading through for clarity and sense and checking that the insertion of amendments work and that the Bill is consistent with current printing and publishing styles. The sponsoring agency should also check the Bill for any last minute typographical or other errors. At this stage, it is a good idea if a person in the sponsoring agency other than the instructor reads the Bill.
177. As soon as the draft Bill has been settled, the sponsoring agency submits it to the Minister for approval. Procedures for submission of Bills to Ministers will vary between agencies. The Minister provides the authority to advise the drafter that the Bill is satisfactory and that the CPC can order a Cabinet Draft of the Bill.
178. Once the sponsoring agency has advised in writing that the Bill has been cleared by the Minister and the submission has been lodged with the Cabinet Office, the drafter will arrange for the Cabinet Draft to be ordered. Note that once the Cabinet Draft has been ordered, the drafter cannot alter the content of the Bill, except for minor technical amendments or typographical errors, unless Cabinet authorises the alteration. If the instructor finds any technical or typographical errors, the instructor should notify the drafter who will advise if they can be fixed.
179. The CPC orders a Cabinet Draft and arranges for it to be sent electronically to the Cabinet Office.

5.8: Exposure draft (release for public comment)

180. Occasionally, a Minister may wish to release a Bill for public comment before it is introduced into Parliament. In that case, the Bill takes the form of an exposure draft. Cabinet authority is required for public release of an exposure draft. The Cabinet submission is similar to a BAC submission. An explanatory memorandum may be provided, but is not necessary. The sponsoring agency will normally prepare explanatory material to accompany the exposure draft when released. A draft Statement of Compatibility may accompany the exposure draft.
181. Very occasionally, an agency may wish to release a further exposure draft of a Bill that has already previously been released as an exposure draft. This was done in

the case of the Whistleblowers Protection Bill, which was released a second time as Revised Proposals for Whistleblowers Protection Legislation.

182. If the Minister wishes to proceed with the Bill following public consultation on the exposure draft or revised proposals, a BAC submission is prepared and submitted to Cabinet. The BAC submission would explain any variations to the Bill as a result of the consultation process.

5.9: Bill at Cabinet submission

183. It is the instructor's responsibility to prepare the BAC submission. The BAC submission is lodged with the Cabinet Office. There are a number of requirements as to the format and content of BAC submissions, and as to the timing of lodgement.
184. If Cabinet approves a BAC submission, the next step is for the Bill to be introduced into Parliament.

Part 6: Passage through Parliament

6.1: Introduction into Parliament—preparatory steps

Notification of Cabinet approval

185. The instructor should notify the drafter when Cabinet has approved the BAC submission. If Cabinet requires alterations to the Bill, the drafter will consult with the instructor to determine the nature of the alterations and the process by which those alterations are to be incorporated into the Bill consistently with the decision of Cabinet.

Confidentiality

186. Bills remain confidential after they have been considered by Cabinet until the second reading has been moved. The exceptions are for government party clearance, briefing non-government members in exceptional circumstances and Bills approved by Cabinet to be released for public comment as exposure drafts.

Government party clearance

187. Each successive government has its own internal arrangements for reporting Bills to its members of Parliament before the Bills are introduced. The CPC is advised by the Cabinet Secretary when Bills are to be introduced and the House of introduction of each Bill.

Briefing non-government members

188. Draft Bills are not usually made available to the non-government parties or independent members before their introduction into Parliament. The period between the second reading speech for a Bill and the resumption of debate enables consideration of the Bill by the non-government parties and independents.
189. Occasionally, particularly in the case of urgent Bills where a shortening of the adjournment before debate is required, a Minister may wish to provide details of the Bill to the non-government parties (normally the party spokespeople for the matter and the manager of party business) and any independents¹².

Timing of introduction

190. The government determines the timing of introduction of a Bill. Generally speaking, a Bill is most likely to be introduced in the week in which it receives approval at

¹² An example of this consultation occurred in 2001 with the House Contracts Guarantee (HH) Bill (see Legislative Assembly Hansard, 5 June 2001).

Cabinet, unless Parliament is not sitting or there is a delay because of the need for further drafting or consultation.

Introduction print

191. When a Bill has been cleared for introduction, the CPC arranges for an introduction print of the Bill to be prepared.
192. The printer delivers copies of the introduction print directly to the appropriate House and extra copies to OCPC. On request by the department, the drafter may provide a copy of the introduction print to the instructor in electronic form by lodging the print on the LDMS. It is important to note that the Bill still remains confidential until the second reading has been moved.
193. An introduction print can be identified by the footer on the front page of the explanatory memorandum and on each page of the Bill, which will say "BILL LA (or LC) INTRODUCTION dd/mm/yyyy".
194. The instructor at this time may also start to prepare the Minister's book on the Bill for use by the Minister in the parliamentary debate on the Bill.

House of introduction

195. In deciding the House of first introduction, consideration is given to—
 - the management of parliamentary business;
 - whether introduction in the Council is prohibited under the Constitution;
 - whether introduction in the Council may raise a question of breach of the financial privileges of the Assembly.

Parliamentary business

196. All things being equal, it would be expected that a Bill would be initiated in the House of which the sponsoring Minister is a member. However, the choice of House may also be influenced by the amount of business before each House and the sitting patterns of each House.
197. In recent years the number of Bills initiated in the Council has been small.

Constitutional requirements

198. Section 62(1) of the **Constitution Act 1975** is as follows—

62 Appropriation Bills

- (1) A Bill for appropriating any part of the Consolidated Fund¹³ or for imposing any duty, rate, tax, rent, return or impost must originate in the Assembly.

199. The Assembly has adopted the following interpretation of appropriations¹⁴—

An appropriation is interpreted as any expenditure from the consolidated fund but not a reduction in revenue flowing to the fund.

200. Section 62(1) covers a direct appropriation of the Consolidated Fund (that is, the annual appropriation Bills and Bills the main purpose of which is an appropriation) and Bills imposing taxes. Note that section 64 of the Constitution Act provides that Bills containing certain provisions (for example, pecuniary penalties, licence fees or fees for services) are taken not to be Bills appropriating the Consolidated Fund or imposing taxes.

Financial privileges of the Assembly

201. Section 19(1) of the **Constitution Act 1975** provides that the privileges of the 2 houses are the same as those enjoyed and exercised by the House of Commons in 1855 as long as they are not inconsistent with any Act of the Parliament of Victoria. These privileges are in part the basis of the principle that the financial initiative of the Crown rests with the Assembly and that Bills involving public expenditure (whether appropriation Bills or Bills forcing an appropriation) are introduced into the Assembly.

202. The Assembly is entitled to exercise its financial privileges if a Bill that is initiated in the Council appears to the Assembly to be in breach of those privileges. The Assembly may decline to entertain a Bill that has been initiated in the Council in breach of the Assembly's privileges.

203. Erskine May (3rd Edition, 1855) is the authority for the scope of these privileges. The standing orders and practices of the Assembly over the years illustrate how the Assembly applies them.

204. In 1985, issues of the financial privileges of the Assembly were raised in connection with a Coroners Bill that was initiated in the Council. The Bill contained a provision that was an appropriation provision and a number of other provisions for which the Assembly would "pursuant to its longstanding rulings and practices, seek to obtain

¹³ The Consolidated Fund is where the bulk of the State's money is held. This money cannot be used unless Parliament authorises it to be used. This authorisation is called an "appropriation".

¹⁴ See Legislative Assembly Hansard, 4 March 2004, p. 286.

a message recommending an appropriation in a particular instance"¹⁵. The President of the Council had 2 options—

- to rule, "having regard to past practices", "that the Bill is incompetent to proceed in this House as many of its clauses could be regarded as forcing appropriations"; or
- to admit the Bill (subject to the omission of the clause for the appropriation), in the realisation that "the Bill may be in jeopardy unless the Assembly ultimately takes a favourable view of that course".

205. After obtaining legal opinions and hearing from the Attorney-General and the leaders of the non-government parties, the President chose the second option. The Attorney-General then moved to withdraw the Bill and subsequently introduced a new Bill with the offending clause omitted.
206. In some cases, it may be possible to structure a Bill (or use 2 Bills) to enable the Bill (or the primary Bill) to be introduced into the Council without putting the Bill in jeopardy. Where it is likely that a Bill will be sought to be introduced into the Council, the issue needs to be addressed at an earlier stage rather than at the time of giving notice.

6.2: Introduction into Parliament—parliamentary procedure

Standing and sessional orders

207. The general procedures for the introduction and passage of Bills in Parliament are contained in the standing orders of each house, as modified by sessional orders that may be passed at the commencement of each parliamentary session.
208. The standing and sessional orders do not just deal with Bills but deal with parliamentary procedures in general.
209. Attachment 3 summarises the stages that a Bill goes through in each house.

Government business program

210. The standing orders of the Assembly provide that a government business program may be set for a sitting week¹⁶. Under this program, the Assembly agrees on the first sitting day of the week to deal with specified Bills during the week. Rules are set out for the time by which the relevant stages of the Bills must be completed and also provide for the timely circulation of any proposed house amendments. At

¹⁵ See Legislative Council Hansard, Session 1985, Vol. 379, p. 471.

¹⁶ This is contained in Chapter 11 of the Assembly standing orders.

the conclusion of the time set for consideration of programmed Bills, any remaining stages are immediately completed (that is, the questions are put without further debate).

Notice

211. Traditionally, the first step for the introduction of a Bill is a notice of motion for leave to bring in the Bill. Under the current standing orders of each house, it is now not necessary to give notice. However, the drafter still prepares a written notice for the Bill after the party clearance has been received and the CPC sends the notices to the relevant officers of the Assembly or the Council. They may be used by the Ministers when introducing their Bills.

Introduction procedure

212. The introduction procedure for a government Bill in either House is—

Day 1 or 2 (Tues. or Wed.)	A Minister moves a motion for leave to introduce a Bill. If this is carried, the question is put that the Bill be read a first time (first reading). However, only the long title of the Bill is read out and the Bill is not yet publicly available.
Day 2 or 3 (Tues. or Wed.)	Second reading: The Minister moves that the Bill be read a second time and gives the second reading speech, outlining the scope of the Bill. Copies of the introduction print and second reading speech are distributed to each member ¹⁷ . The Minister also tables the Statement of Compatibility at this time.

213. If the second House is the Legislative Council, the second reading happens straight after the first reading.
214. Although the Bill is not made available at the first reading stage, in the Assembly any member may ask the Minister for a brief explanation of the Bill when the Minister moves the first reading¹⁸. It is important that Ministers are briefed adequately so that they can respond to such a request. This is especially the case when the Bill is introduced into the Assembly on behalf of a Minister who is a member of the Council, as the representing Minister may not have as much familiarity with the Bill as the responsible Minister.

¹⁷ Under Council Standing Orders 14.06 and 14.07, a Minister may, instead of reading the second reading speech, move that it be incorporated into Hansard without being read. This is now the normal practice in the Council for Bills that originated in the Assembly, although if a Bill has been amended in the Assembly, the Minister will give an oral explanation of the amendments (see Standing Order 14.07).

¹⁸ See Assembly Standing Order 61(1).

215. The Bill is released to the public after the Minister moves the second reading. The introduction print and explanatory memorandum are placed on the Internet soon after the second reading¹⁹.

Adjournment of debate

216. After the second reading of the Bill is moved and the second reading speech given, debate on the Bill is usually adjourned, unless the Bill is urgent. The normal period for an adjournment in the Assembly is 14 days, although the House may agree to a shorter or longer adjournment. The period of an adjournment in the Council varies, but the period is usually less than in the Assembly, especially for Bills that originated in the Assembly.
217. During the adjournment in the House of first introduction, the Bill is considered by SARC. Members also consult with their constituencies and interest groups on the Bill.
218. Occasionally debate on a Bill is not adjourned, usually because the Bill needs to be considered as a matter of urgency. Examples of this are the House Contracts Guarantee (HH) Bill in June 2001, the Constitution (Supreme Court) Bill in October 2003 and the Serious Sex Offenders Monitoring (Amendment) Bill in 2006.

Departmental briefings

219. During the adjournment of a Bill, the government may offer a departmental briefing on the Bill to non-government members of Parliament. These briefings are organised through the relevant Minister's office and are generally conducted at Parliament House. The Minister or a ministerial adviser will attend, as well as the instructor or another departmental representative and relevant non-government MPs. Separate briefings may be organised for the separate non-government parties and independent members.
220. Briefings may also be organised for government members or committees.

¹⁹ See <http://www.legislation.vic.gov.au> (Parliamentary Documents).

6.3: Governor's messages

221. A Governor's message to the Assembly may be required before Bills involving expenditure of public money can be passed by the Assembly.

222. Section 63 of the **Constitution Act 1975** provides—

63 Appropriation to be in pursuance of message

The Assembly may not pass any vote resolution or Bill for appropriating any part of the Consolidated Fund or of any duty rate tax rent return or impost for any purpose which has not been first recommended by a message of the Governor to the Assembly during the session in which such vote resolution or Bill is passed.²⁰

223. There are 2 types of Governor's messages. An **introductory message** is used to introduce the annual appropriation Bills and any other Bills the main purpose of which is an appropriation of the Consolidated Fund. An **incidental message** is used in respect of any other Bill that may have the effect of forcing an appropriation of the Consolidated Fund. An incidental message is also required if proposed house amendments to a Bill will have the effect of forcing an appropriation.

224. The ultimate decision as to which provisions force an appropriation is one for the Speaker in the Assembly. Parliamentary practices and precedents over the years have established categories of matters that have been interpreted as forcing an appropriation and thus requiring a Governor's message. These categories include—

- provisions specifically appropriating the Consolidated Fund;
- provisions that create or increase a liability or contingent liability of the State;
- the establishment of a public body (where establishment costs will need to be met by the State, or administrative assistance is to be provided by the State for the body to perform its functions);
- provisions for the appointment of public officers or members of bodies who will be entitled to remuneration, allowances or fees or reimbursement of expenses;
- provisions that substantially increase the functions of an existing public body, such that additional funds would be required for those functions to be performed;
- the redirection of public money through the Consolidated Fund to other funds;

²⁰ Section 64(1) of the **Constitution Act 1975** contains exceptions to the rule in section 63 for Bills that appropriate fines, licence fees and fees for services.

- requirements for public money (for example, taxes, fees or fines) to be paid into a fund other than the Consolidated Fund;
 - provisions for infringement notices to be issued for offences (including adding offences to existing infringement notice provisions)—this is because the **Infringements Act 2006** contains a power to withdraw infringement notices and refund the infringement penalty paid;
 - the provision of government guarantees;
 - continuing expired Acts that originally required a Governor's message;
 - varying an existing appropriation if an additional appropriation results from the variation.
225. If a message is required, it is prepared by the drafter and submitted to the Governor with a recommendation from the Attorney-General. An introductory message is presented to the Assembly immediately before the Bill to which it relates is introduced. An incidental message must be presented to the Assembly before the consideration in detail of the relevant clause of the Bill (or before the third reading of the Bill if the consideration in detail is dispensed with). Generally, an incidental message is prepared and signed during the adjournment period for the relevant Bill, and presented to the Assembly on the next sitting day after it is received from the Governor.
226. A Governor's message is also required if house amendments to a Bill have any of the effects outlined above. Sometimes, a Bill will have 2 Governor's messages—the first relating to the Bill as introduced and a further message recommending an appropriation as a result of house amendments to be moved. This also has implications for house amendments by non-government members.

6.4: The Scrutiny of Acts and Regulations Committee

General introduction

227. The Scrutiny of Acts and Regulations Committee (commonly referred to as "SARC") is a joint committee of the Victorian Parliament (meaning that it has members from both the Legislative Assembly and the Legislative Council). As with all parliamentary committees, its members come from across the political spectrum, and it has the assistance of a permanent staff. At least one member of this staff is usually a lawyer who provides legal advice to the Committee.
228. The Committee was established under its current name in late 1992. Before that time, its predecessors were primarily concerned with the scrutiny of subordinate

legislation. The current Committee still has significant functions with respect to subordinate legislation, but these materials deal only with SARC's functions regarding Bills. The Committee's current functions are found in the **Parliamentary Committees Act 2003**.

Functions

229. Despite its name, the Committee primarily concerns itself with the scrutiny of Bills, rather than Acts. The functions of the Committee with respect to primary legislation are set out in section 17 of the **Parliamentary Committees Act 2003** as follows—

- to consider any Bill introduced into the Council or the Assembly and to report to the Parliament as to whether the Bill directly or indirectly—
 - trespasses unduly upon rights or freedoms;
 - makes rights, freedoms or obligations dependent upon insufficiently defined administrative powers;
 - makes rights, freedoms or obligations dependent upon non-reviewable administrative decisions;
 - unduly requires or authorises acts or practices that may have an adverse effect on personal privacy within the meaning of the **Privacy and Data Protection Act 2014**;
 - unduly requires or authorises acts or practices that may have an adverse effect on the privacy of health information within the meaning of the **Health Records Act 2001**;
 - inappropriately delegates legislative power;
 - insufficiently subjects the exercise of legislative power to parliamentary scrutiny;
 - is incompatible with the human rights set out in the Charter of Human Rights and Responsibilities²¹;
- to consider any Bill introduced into the Council or the Assembly and to report to the Parliament—

²¹ See also section 30 of the **Charter of Human Rights and Responsibilities Act 2006**.

- as to whether the Bill directly or indirectly repeals, alters or varies section 85 of the **Constitution Act 1975**, or raises an issue as to the jurisdiction of the Supreme Court;
- if a Bill repeals, alters or varies section 85 of the **Constitution Act 1975**, whether this is in all the circumstances appropriate and desirable;
- if a Bill does not repeal, alter or vary section 85 of the **Constitution Act 1975**, but an issue is raised as to the jurisdiction of the Supreme Court, as to the full implications of that issue;
- to review any Act in accordance with the terms of reference under which the Act is referred to the Committee under this Act²².

How the Committee operates

230. Once the second reading of a Bill is moved in the House of introduction, copies of the Bill are made available to the Committee.
231. The Bill is then scrutinised by the Committee's staff, who prepare a draft report on the Bill for the Committee. On occasion, interest groups or members of the public make written submissions to the Committee on a Bill. At times, the Committee will also hold public hearings on a Bill it is examining, and will invite interested groups or people to give evidence or to make an oral submission. Submissions received on a Bill are taken into account in the preparation of the Committee's report on the Bill.
232. In the course of scrutinising a Bill, it is not unusual for the Committee to write to the Minister responsible for the Bill to query certain provisions of the Bill (usually to seek clarification on the purpose or meaning of a provision). If a response to a letter sent by the Committee is received in time, the material parts of the response are usually quoted in full in the Committee's report on the Bill.
233. Once the Committee agrees on its report on a Bill, the report is published in the Committee's next *Alert Digest*. The Committee attempts to publish its report on a Bill before the second reading debate on the Bill resumes. This is not always possible. In cases where it is not possible, the Committee will still publish a report on the Bill at the first available opportunity.
234. If a reply to a letter sent to a Minister by the Committee seeking information about a Bill is received after the report on the Bill is published, the material parts of the

²² Section 33 of the **Parliamentary Committees Act 2003** provides for referrals to joint investigatory committees.

letter are usually published in the next *Alert Digest* with a short summary explaining the background to the letter. The Committee monitors the letters it sends and will publicly note the absence of a reply after a reasonable time has elapsed.

235. The *Alert Digests* are public documents. Adverse comments in an *Alert Digest* by the Committee have the potential to cause embarrassment to the Minister responsible for the Bill and to the government. In a situation where the government does not control a House of Parliament, an adverse report by the Committee on a Bill could be used by the non-government parties and members as a ground for blocking the Bill. At the very least, a letter from the Committee to the Minister will require the Minister to sight the letter and to sign the reply. The writing of the reply itself can, at times, require considerable time and effort.

The Committee and the instructor

236. In view of the possible consequences of adverse Committee comments on a Bill, instructors are well advised to take precautions to attempt to forestall such comments. This generally involves 2 processes—
- identifying Bill provisions that might attract an adverse comment;
 - taking steps to minimise the chances of an adverse comment in relation to such provisions.

Identifying possible problems

237. The first thing to note is that not all adverse comments by the Committee are avoidable. To give effect to a particular government policy it may well be necessary, for example, for a Bill to deliberately do something that trespasses unduly on the rights of a segment of the community. The Committee recognises that, and in those situations, after noting that a provision unduly trespasses on a right or freedom, the Committee refers the matter to Parliament for debate. In making this referral, the Committee may suggest that the provision seems justified. It is also possible for the Committee to decide that a trespass on a right or freedom is not undue.
238. Although there is no certain way of determining what will attract the Committee's attention, a listing of the matters that have attracted its attention in the past is a useful guide. The following is a brief summary listed in accordance with the Committee's statutory functions—
- Unduly trespassing on rights or freedoms
 - Powers of search and entry

Powers to enter vehicles, premises or land, or to search suspects, vehicles or premises without a warrant are scrutinised closely. Problems can be minimised if these powers are expressed as narrowly as possible and if they are accompanied by safeguards (such as limiting them to circumstances where the searcher holds a relevant reasonable belief and requiring the searcher to produce identification).

- Retrospective provisions

A retrospective provision is a provision that brings the provision of a Bill into operation on a date before the Bill receives Royal Assent. Such a provision has the potential to make something that has been done illegal even though it was legal at the time it was done. Given the potential effects these provisions can have, the Committee scrutinises them closely. Provided no-one's rights are adversely affected (for example, where a provision fixes a minor typographical error), the Committee will usually find that these provisions are not an undue trespass.

- Restricting established freedoms and privileges

Possible freedoms that may be restricted include freedom of speech, freedom of the press, freedom of movement, freedom of peaceful assembly and freedom of choice. The most common matter of concern to the Committee here in practice is provisions that restrict, or that may restrict, the privilege against self-incrimination.

- Overturning established legal precepts

The most common example of a legal precept being overturned is the reversal of the onus of proof. The Committee only accepts an alteration to the onus of proof if there is a significant justification for it, such as a need to protect the security of others, or if the defendant is in exclusive possession of relevant information which would be difficult or impossible for the prosecution to prove but which would be relatively easy for the defendant to prove.

Other areas of concern are altering the standard of proof and the removal of any defences, the right to legal representation, the right to trial by jury, the right to appeal and the right to contest a decision through an impartial body.

- Removing an existing statutory or common law right

The Committee is concerned when legislation removes a right to legal redress that a previous Act had allowed for. The Committee also disapproves when a Bill prohibits legal redress under the common law.

- Establishing strict liability offences

The Committee requires that there be detailed reasoning for the inclusion of offences that do not require proof of the offender's state of mind at the time the offence was committed, such as strict liability offences. The Committee may be satisfied with the inclusion of a strict liability offence if it is used in conjunction with adequate exceptions or defences.

- Making rights, freedoms or obligations dependent upon insufficiently defined administrative powers

The most common provisions that arise under this area are delegation provisions where either the powers that are delegated or the class of people to whom they can be delegated are too broadly defined. The Committee strongly prefers that delegation powers be limited to holders of nominated offices, people holding certain qualifications or members of a professional body governed by legislation.

- Making rights, freedoms or obligations dependent upon non-reviewable administrative decisions

Bills will raise concern under this area by, for example, giving any government authority (be it a Secretary, a Minister or the Governor in Council) the discretion to make orders, grant exemptions or grant licences that cannot be appealed or reviewed.

- Inappropriate delegation of legislative power

- Commencement by proclamation

The Committee strongly disapproves of open-ended commencement clauses. These are clauses that provide for a Bill, or a provision of a Bill, to come into operation on a day to be proclaimed without specifying a limit on when the proclamation must occur. They are considered to be a problem because they can be used to subvert the will of Parliament. Once Parliament passes a Bill intending it to become law, an open-ended commencement clause enables the government to stop the

enacted Bill from becoming law simply by refraining from bringing it into operation.

Therefore, unless there is a very good reason (such as a co-ordination problem in relation to a Bill that is part of a national scheme) every commencement clause should have a provision forcing all the provisions in a Bill to be brought into operation by a specified date. (Incidentally, this date must not be unreasonable—for example, the Committee would comment adversely on a date that is 5 years after the date of introduction unless it was given a very good reason for it.)

- Legislative decisions

At the heart of this area are provisions which allow for legislative decisions to be made by someone other than Parliament, most commonly a Minister (for example allowing a Minister to set fees or flesh out definitions in Acts or otherwise extend the scope of an Act).

- Insufficiently subjecting the exercise of legislative power to parliamentary scrutiny

Examples in this area include—

- allowing the Governor in Council or a statutory body to set fees for services other than by regulation;
- granting a broad discretion to an officer to "make any order that the officer considers appropriate", or "on the grounds the officer sees fit";
- giving a Minister a power to exempt someone from an obligation under an Act;
- permitting the use of guidelines, which are not subject to scrutiny;
- inserting a Henry VIII clause (this is a clause enabling an Act to be expressly or impliedly amended by subordinate legislation or executive action);
- authorising the making of directions that have a legislative character, but that are placed beyond parliamentary scrutiny.

Minimising possible problems

239. A number of possible problems can be avoided by ensuring that offending provisions do not appear in a Bill. For example, knowing that the Committee does not like open-ended commencement provisions, an instructor wishing to avoid an adverse comment would ensure that all the commencement provisions in the Bill had definite commencement dates. Of course, this solution is not always an option.
240. In a case where it is necessary to insert a provision that the Committee may not like, it may be possible to minimise or avoid adverse comments by inserting conditions on the use of a power (for example, requiring those exercising the power to identify themselves before exercising the power or imposing express limits on how the power is to be used) or by otherwise providing other safeguards (for example, requiring the tabling before Parliament of executive decisions having legislative effect).
241. In a situation where it is necessary to insert a provision that the Committee may not like, the single most effective thing that can be done to avoid problems is to explain what the Bill is doing and why the particular provision is necessary. The only places such explanations can be made are in the second reading speech and in the Bill's explanatory memorandum. (While it may be possible to provide explanations by means of other media, the Committee is likely to consider such action discourteous.)
242. In fact, not only does an explanation help to ensure that the risks of an adverse comment are minimised, but the Committee will criticise those responsible for a Bill if explanations of certain things are not provided. In particular, the Committee has specifically asked in the past that explanations be provided for retrospective provisions, strict liability offences, open-ended commencement clauses, any abrogation of the privilege against self-incrimination and broad delegation powers.
243. Providing an adequate explanation of a provision may forestall criticism of both the provision itself and the fact that no explanation was provided, and may prevent the need for the Committee to correspond with the relevant Minister.

Finding *Alert Digests*

244. Copies of *Alert Digests* and other information about the Committee are available on the Parliament's website at <https://www.parliament.vic.gov.au/alertdigests>.

6.5: Consideration of Bill by Parliament

Second reading debate

245. Bills are listed on the notice paper of the relevant House for the resumption of the second reading debate on the day to which they have been adjourned. When the Bill is reached (which may be on a subsequent day depending on when the House is sitting and the other business before the house), the second reading debate resumes. This is a general debate on the principles behind the legislation, rather than a clause by clause analysis of the Bill, although references are frequently made to specific clauses. Standing orders impose time limits on speakers²³.
246. Members who intend on moving house amendments to the Bill may foreshadow them in the second reading debate²⁴. In addition, a member may move a reasoned amendment to the Bill.

Consideration in detail/committee stage

247. If the Bill passes its second reading, the Bill is then considered in detail, clause by clause²⁵. In the Assembly, this is called ***consideration in detail***. In the Council, it is called ***consideration in committee of the whole***. This stage gives members the opportunity to debate particular clauses or to seek an explanation from the sponsor of the Bill as to the effect of particular clauses, and to move house amendments. There are time limits on debate, and limits on the number of times a member can speak on any particular clause.

Cognate Bills—concurrent debate

248. If there are 2 or more Bills before the House which deal with similar subject matter or form part of a legislative package, the House may resolve that the Bills be debated together. This may occur, for example, where the Bills consist of a Bill for a new Principal Act and a Bill containing consequential amendments and transitional provisions because of the new Principal Act.
249. The second reading of each Bill is moved separately, and separate second reading speeches are given, but at some time before the resumption of debate on the second reading, the responsible Minister in the Assembly would move a motion in the following form—

²³ See Assembly Standing Order 131; Council Standing Order 5.03.

²⁴ See Assembly Standing Order 64; Council Standing Order 14.10 (traditionally, proposed amendments were circulated at the commencement of the consideration in detail/committee stage).

²⁵ This stage can be dispensed with by leave of the house. It is common to dispense with it for straightforward Bills or where no house amendments are to be proposed.

That this House authorises and requires Mr Speaker to permit the second reading and subsequent stages of the Business Licensing Authority Bill, the Victorian Civil and Administrative Tribunal Bill and the Tribunals and Licensing Authorities (Miscellaneous Amendments) Bill to be moved and debated concurrently.²⁶

250. The Council form of the motion is slightly different —

That this House authorises and requires the Honourable the President to permit the second reading debate on the Business Licensing Authority Bill, the Victorian Civil and Administrative Tribunal Bill and the Tribunals and Licensing Authorities (Miscellaneous Amendments) Bill to be taken concurrently.²⁷

6.6: House Amendments

Introduction

251. Although any member may move house amendments to a Bill, in practice government amendments are moved by the Minister, and non-government amendments are moved by the relevant non-government party spokesperson or independent member.
252. Amendments may be made to a Bill in each house; however, the Council may not amend an annual appropriation Bill (section 62 of the **Constitution Act 1975**), nor should it propose amendments that would require a Governor's message or otherwise breach the privileges of the Assembly. However, the Council may suggest amendments that it does not have the power to make (section 64(2) of the **Constitution Act 1975**). In practice, this means that amendments of a financial nature (appropriations and taxation) are moved only in the Assembly.
253. Sometimes a member may want to move amendments to amendments that have been circulated. It is also possible that a member who has already circulated amendments may wish to move further amendments, which have to be circulated as well.
254. If the House in which a Bill is first introduced makes amendments to it, the Bill is reprinted as amended before its introduction into the second House. This is known as the "amended print"²⁸. However, if the second House amends a Bill and then passes it, that House transmits the amendments to the first House by means of a written message. The Minister (or other person) responsible for the Bill in the first House moves a motion as to how the amendments are to be dealt with. This may

²⁶ See Legislative Assembly Hansard, 19 April 1998, p. 1361. Note that "Mr Speaker" would now be referred to as "Speaker".

²⁷ See Legislative Council Hansard, 19 May 1998, p. 1141.

²⁸ An amended print can be identified by the footer on the front page of the explanatory memorandum and on each page of the Bill, which will say "BILL LA (or LC) AMENDED dd/mm/yyyy".

include agreeing to the amendments, disagreeing with them, or suggesting further amendments that are relevant to the amendments made by the other house. The process continues until both houses agree or the Bill is defeated, deferred or laid aside.

Relevance of amendments

255. To be in order, amendments moved to a Bill must be within the scope of the Bill. That is, they must be relevant to matters that are dealt with by the Bill and not introduce unrelated matters. If it is desired that matters outside the scope of the Bill be introduced by house amendments, they can be dealt with only if the House passes a motion to widen the scope of the Bill. This motion will be in order only if the proposed amendments are reasonably relevant to matters that are already in the Bill. If they are not relevant at all, or are only remotely relevant, the only way they can be dealt with is by suspending standing orders.

256. The way this is done is by the member who wishes to move the amendments (the Minister in relation to government amendments or the relevant non-government party spokesperson or independent member in relation to non-government amendments) moving an appropriate motion. In the Assembly, this would be a motion under Standing Order 67(1). In the Council, this would be a motion under Standing Order 14.14(1), for example—

That upon the Livestock Disease Control (Amendment) Bill being committed, that it be an instruction to the Committee that they have power to consider a New Clause to provide for the application of capital and interest in the Sheep and Goat Compensation Fund towards the control or eradication of disease of sheep or goats.

257. Notice of this motion needs to be given unless the House gives leave for it to be moved without notice.

258. The relevant parliamentary officer generally consults the drafter on the appropriate wording of the motion to ensure that the motion identifies the correct scope of the amendments.

259. A similar rule as to relevance applies when the House in which a Bill was first introduced is considering amendments made by the other house. The first House may only propose further amendments that are relevant to the amendments made by the second House. It may not introduce amendments dealing with other matters.

Drafting government house amendments²⁹

- 260. Assuming a Bill passes its second reading, amendments may be moved by any member when the Bill is considered in detail. In practice, government amendments are proposed by the Minister and non-government amendments are proposed by the relevant non-government party spokesperson or independent member.
- 261. House amendments for the government are drafted by OCPC on instructions from the sponsoring agency. Instructions should be in writing and in narrative form. If the amendments involve matters of policy or substance (other than technical amendments to correct errors), they are required to be approved (after they are drafted) by Cabinet. The sponsoring agency prepares a Cabinet submission and attaches the house amendments to the submission when they have been settled.
- 262. If there is insufficient time for government amendments to be considered by Cabinet (for example, if amendments are required urgently during a sitting week), they may be authorised by an executive group of Ministers.
- 263. When government amendments have been approved, the drafter sends a copy to the relevant parliamentary officers for them to check that the amendments are in the correct form and will operate. The parliamentary officers will also check whether a further Governor's message or a motion to extend the scope of the Bill will be required.
- 264. When advice has been received from the relevant parliamentary officers and any technical changes have been made, the drafter sends the final version of the house amendments to the sponsoring agency.

Other house amendment matters

Amending explanatory memoranda and second reading speech

- 265. If a Bill is amended in the first house, it may be necessary to amend the explanatory memorandum for the Bill before it is introduced into the second house. This is primarily the responsibility of the instructor, who should review the explanatory memorandum in the light of any house amendments and send any required revisions to the drafter. Ideally, this should be done before the house amendments are moved in Parliament, as the timelines for printing the amended Bill for the second House are often very tight.

²⁹ Drafting for non-government members is discussed at 6.8.2.

266. It may also be necessary to alter the second reading speech and the Statement of Compatibility for the second house, which is also the responsibility of the instructor.

House amendments limiting the Supreme Court's jurisdiction and section 85 statements

267. If house amendments are proposed that will limit the jurisdiction of the Supreme Court, a section 85 provision and statement are required in order for the provisions to be valid.

Proposed house amendments to a Bill that does not already contain a section 85 provision

268. In this case, the house amendments need to insert a section 85 provision in the Bill (if the Bill is an amending Bill, the section 85 provision will need to be inserted in the Principal Act or, if the Principal Act already contains a section 85 provision, that provision will need to be amended). The insertion will usually be done as a new clause. A section 85 provision should be inserted at the end of an Act, immediately before the regulation-making power if the Act contains one.

Proposed house amendments to a Bill that contains a section 85 provision

269. The section 85 provision in the Bill will need to be amended if the provision is not sufficiently wide enough to cover the limitation sought to be introduced by the house amendments.
270. If house amendments contain a section 85 provision (or an amendment to a section 85 provision already in the Bill), a section 85 statement needs to be made in relation to them. This statement is made by the member who introduced the Bill, before the amendments are moved. It may be made at any time by leave, or with 24 hours notice (see section 85(5)(c) of the **Constitution Act 1975**). An example of this notice is—

I desire to give notice that I will make a statement pursuant to section 85 of the **Constitution Act 1975** of the reasons for altering or varying that section by clause ... of the ... Bill (as amended by amendments that I intend to propose in Committee).

271. If government amendments are to be moved in the second house that contain a section 85 provision and the amendments have been settled before the Bill is introduced into the second house, the section 85 statement can be included in the Minister's second reading speech for the second House (an example of this occurred in 1996 with the Legal Practice Bill—see Legislative Council Hansard, 8 October 1996, p. 27). This would be an exceptional situation.

Reasoned amendments

272. Any member may move a ***reasoned amendment*** to a Bill. This is an amendment to the second reading motion that attempts to have the Bill withdrawn or delayed for reasons set out in the amendment.
273. A reasoned amendment may be moved in order to³⁰—
- declare a principle adverse to, or differing from, the principles, policy or provisions of the Bill; or
 - express an opinion as to any circumstances connected with the introduction or prosecution of the Bill, or otherwise opposed to its progress.
274. There are a number of rules governing the admissibility of reasoned amendments³¹—
- the amendment must strictly relate to the Bill under consideration and must not include in its scope other Bills that may be considered by the house;
 - the amendment must not be concerned in detail with the provisions of the Bill, nor anticipate amendments to the Bill that may be moved when the Bill is considered in detail;
 - the amendment must not simply add words to the question that the Bill be moved a second time, so as to attach conditions to the second reading;
 - the amendment must not simply amount to a direct negation of the principle of the Bill.
275. The presiding officer rules on the admissibility of proposed reasoned amendments.
276. An example of an acceptable reasoned amendment is in respect of the Legal Practice Bill in 1996—
- That all the words after "That" be omitted with the view of inserting in place thereof "this Bill be withdrawn and redrafted to ensure the independence of the legal profession and its freedom from unnecessary interference by government and to ensure there is no increase in the cost of justice as a result of the proposed reforms".
277. Requests for reasoned amendments are handled by the Procedure Office in the Assembly and the Papers Office in the Council.

³⁰ See Erskine May 22nd Ed., pp. 504–505

³¹ See Erskine May 22nd Ed., pp. 504–505

278. Further information on the admissibility of reasoned amendments can be found in the ruling of the President of the Council on 8 March 1995 (Legislative Council Hansard, pp. 69–70) and in Fact Sheet 3 prepared by the Assembly.

6.7: Remaining stages

Third reading

279. The third reading stage differs somewhat in each house.
280. After the consideration in detail stage in the Assembly is complete, the question is put to the House that the Bill be read a third time. There is no debate on this question.
281. In the Council, after the Committee stage is complete, the Bill is reported back to the House either with or without amendments. The Committee's report is considered (usually immediately) and the Minister (or sponsoring member) moves that the Bill be read a third time. In theory, this motion can be debated and further amendments made to the Bill, but in practice the third reading is a formal step, and generally does not involve any debate (although the Minister often makes a few brief remarks commenting on matters raised about the Bill or thanking members for their contributions to the second reading debate or consideration in committee stage).
282. If the third reading is carried in either house, the following occurs—
- in the House of first introduction—the Bill is transmitted to the other House with a message requesting its agreement to, or concurrence with, the Bill;
 - in the second house—
 - if the Bill is amended by the second house—a message is sent to the first House requesting its agreement to, or concurrence with, the amendment;
 - if the Bill is not amended by the second house—a message is sent to the first House that the second House has agreed to the Bill, and the Bill is prepared for Royal Assent.

Passage through second house

283. When a Bill passes the House in which it was first introduced, it is then introduced into the second House with a message from the first House seeking the second House's concurrence with the Bill. The question is then put that the Bill be read a first time. A Bill brought from the Council usually has its second reading in the

Assembly on a subsequent day to its first reading, but a Bill brought from the Assembly often has its second reading in the Council on the same day it is brought from the Assembly.

Governor's amendments

284. Section 14 of the **Constitution Act 1975** provides—

14 Governor's amendments

The Governor may transmit by message to the Council or the Assembly for its consideration any amendment which he desires to be made in any Bill presented to him for Her Majesty's assent and all such amendments shall be taken into consideration in such convenient manner as the standing rules and orders of the Council and the Assembly provide.

285. Governor's amendments are used to correct errors or oversights in a Bill that are not picked up before the Bill passes both houses. They are very rare. They are not to be used for any amendments that involve matters of substance.
286. The procedure for preparing a Governor's amendment is for OCPC to submit a draft Governor's message to the Governor via the Attorney-General.
287. In the Assembly, Governor's amendments are dealt with in the same way as Council amendments (Standing Order 79). See also Joint Standing Order 12. The procedure is similar in the Council (Standing Orders 14.30–14.32).

Clerks' amendments

288. The Clerk in each House is authorised by the standing orders to make clerical or typographical corrections to a Bill after it has passed the relevant house³².
289. Clerks' amendments have been used to correct errors in primary numbering, that is, the numbering of sections, subsections and paragraphs. They have also been used for correcting numbering errors in inserted sections, subsections and paragraphs³³. However, they are not usually used to correct cross-referencing errors. Such errors usually require a house amendment.
290. The Clerk of the Parliaments is authorised to make typographical corrections only, but may report any clerical errors to the House in which a Bill that has been passed originated, and that House may deal with the errors as with other amendments³⁴.

³² See Assembly Standing Order 81; Council Standing Order 14.34. The corrections must be reported to the house.

³³ See Legislative Assembly Hansard, 30 November 1999, where the Speaker reported a clerk's amendment in the Audit (Amendment) Bill to renumber a paragraph in a new section being inserted into the Audit Act by the amendment Bill.

³⁴ See Joint Standing Order 6(2).

6.8: Non-government matters

Private members' Bills

291. Any member may introduce a Bill, except for Bills appropriating the Consolidated Fund (as a member who is not a Minister would not be able to secure a Governor's message).
292. The Premier has advised that all requests by private members for the drafting of private members' Bills are to be made through the Clerk of the House of which the private member is a member.
293. If a private member's Bill is drafted outside OCPC, the Bill is generally forwarded to the CPC before it is introduced for advice as to its form.
294. When a drafter is drafting a Bill for a private member, instructions come from the member or the member's office, and the instructions and Bill will not be discussed with any government agency or representative without the permission of the private member. The instructions and process of drafting are confidential between the drafter and the member.
295. The same parliamentary procedure applies for a private member's Bill as for a government Bill. However, private members' Bills are dealt with in the parliamentary time set aside for general business. Private members' Bills stand little chance of success unless they are supported by the government. The first private member's Bill to pass both Houses in many years was the **Petroleum Products (Terminal Gate Pricing) Act 2000**, which was sponsored by the independent member for Mildura.

Drafting non-government house amendments

296. Instructions for non-government house amendments will come from the member who wishes to move the amendments (usually the relevant party spokesperson). If an independent member wishes to move amendments, the drafter will draft them on the member's instructions.
297. In this instance, the drafter is acting for that member or party in relation to the amendments, and the drafter is not at liberty to disclose the proposed amendments to, or discuss them with, the Bill's sponsoring agency. The work is done on a confidential basis for the member/party concerned and the drafter must have their permission to release the amendments to the relevant house office.
298. In some cases, the member may request that consultation be undertaken with the sponsoring agency, especially if the amendments are complex.

299. When advice has been received from the relevant house office and the amendments have been approved by the member for circulation, the drafter arranges for their delivery to the relevant house office.
300. A non-government member cannot move a textual amendment that would require a Governor's message³⁵. However, a reasoned amendment could be moved instead (see above). If a drafter receives instructions to draft amendments that may require a message, the drafter will discuss this with the member. If there is doubt whether a message is required, the advice of the Clerk of the Assembly will generally be sought.
301. Although a non-government member cannot move amendments that would require a message, a member in the Council may move that the Council suggest to the Assembly that amendments be made. Suggested amendments do not require a Governor's message (although a Governor's message would be required in the Assembly for the Assembly to agree to make the suggested amendments).
302. At any time, a drafter may be preparing house amendments for both the government and for non-government members. The drafter will not disclose to any of the parties the existence or content of the amendments of another party without the permission of the relevant party.
303. The rules as to relevance (discussed above) also apply to non-government amendments.

6.9: Miscellaneous parliamentary matters

Private Bills

304. A private Bill (as used in each house's standing orders) is a Bill for the particular benefit or interest of a person or group or a public corporation or local authority. Private Bills should be distinguished from Bills which have operation in a particular locality but nevertheless affect the public in general, and are public Bills.
305. The procedure for the passage of private Bills is different from that for the passage of public Bills³⁶. The presiding officer of the House in which a Bill is introduced has the power to rule that it is a private Bill. It is sometimes difficult to say with

³⁵ Amendments that were sought to be moved by the shadow Attorney-General were ruled out of order by the acting Chairman of Committees in the Assembly on 7 December 1999 for this reason. The amendments were intended to reduce fees payable for applications to VCAT in freedom of information matters and to reduce charges payable for copies of documents accessed through freedom of information. See Legislative Assembly Hansard, 7 December 1999, p. 60. However, see also Legislative Assembly Hansard, 5 June 2003, pp. 2172–7). The Assembly has since revised its interpretation of the circumstances in which a message is required.

³⁶ See Assembly Standing Orders 83–86; Council Standing Orders 14.37–42.

certainty whether a Bill is or is not a private Bill before the presiding officer rules on the matter. It is important to be aware of the possibility that a Bill may be a private Bill if the Bill appears to be for a particular benefit of a person.

306. If the Bill is ruled a private Bill, the House may pass a motion that it be dealt with as a public Bill, and also a motion that fees otherwise payable be waived. If these motions are passed, the Bill is treated in the same way as a public Bill.
307. If the Bill is not to be treated as a public Bill, notice of its purposes must be published in a newspaper circulating generally in Victoria and, if applicable, in the locality affected by the Bill. Objections may be lodged, and the presiding officer must appoint a panel of examiners to report to the House on the objections and to recommend whether a select committee should be appointed. If appointed, that committee considers the Bill in the light of its preamble and reports to the House on whether it should proceed.
308. Unless the House agrees that fees be waived, the promoter must pay a deposit towards the expenses of the Bill's passage. The promoter must also pay for the cost of drafting, printing and circulating the Bill, and the expenses of any select committee that is appointed.
309. A private Bill must contain a preamble. Matter which is properly for a private Bill should not be included in a public Bill.
310. The drafter will advise as to whether it appears to the drafter that the proposed Bill is a private Bill. However, the final decision is made by the presiding officer. If matter to be included in a Bill appears to be of a private nature, the drafter will advise the sponsoring agency to refer the matter to the clerk of the relevant House for advice.
311. An example of a provision in the nature of that of a private Bill is section 9 of the **Land (Amendment and Miscellaneous Matters) Act 1986** (now repealed), which provides for the grant of Crown land to the Glastonbury Child and Family Services. The private nature of this provision was pointed out during the passage of the Bill, but the Bill was nevertheless allowed to proceed.
312. An example of a private Bill is the **Land (Goonawarra Golf Course) Act 1988**.

Same question rule

313. This parliamentary rule is designed to prevent a question that has already been decided by a House of Parliament being raised again in that house within a certain

period. The rule is an ancient one, dating back to the House of Lords in 1606, but it finds its modern expression in the standing orders³⁷.

314. The rule most often arises in relation to Bills that have been rejected in whole or part by one house, and when an attempt is made to re-introduce the rejected matter during the same session.
315. There is a qualification to the rule, which may apply if one House amends a Bill by omitting provisions from it. If the other House passes the Bill without those provisions (or agrees to the amendment), a new Bill containing the omitted provisions may be introduced. The President of the Council has ruled that this will only apply if there has been some change in circumstances since the first omission of the provision³⁸.

Broadcast and publication of parliamentary proceedings

316. Sections 73 and 74AA of the **Constitution Act 1975** provide protection from prosecution or civil action for people who broadcast or publish reports or extracts of the proceedings in either House of Parliament or in a parliamentary committee, if the broadcast or publication is authorised by the House or committee. Authorisation is given by way of motion in the relevant House or committee³⁹.

Bills lying over at end of year—correction of year reference

317. If a Bill lies over in Parliament from one calendar year to the next, it will have the wrong year in its title. To avoid having to amend every Bill lying over to change the year, the following motion is usually moved by the Leader of the Government in each House at the commencement of sittings in a year if there are any Bills lying over—

I move:

That where a Bill has passed through both Houses and the citation of the Bill includes a reference to a calendar year earlier than that in which the passage of the Bill was completed, the Clerk of the Parliaments be empowered to alter the calendar reference in the citation of the Bill and any corresponding reference within the Bill itself to the year in which the passage of the Bill is so completed.

³⁷ Assembly Standing Order 152(1) provides that a motion cannot be moved if it is substantially the same as one resolved in the same session. Council Standing Order 7.06 provides that a question cannot be proposed if it is the same in substance as a question resolved in the previous 6 months in the same session. A "session" begins with the opening of Parliament after an election or prorogation and ends when that Parliament is prorogued or expires. It may extend for up to 4 years.

³⁸ See the President's ruling on the Land (Prince Henry's Hospital) Bill and Aboriginal Land (Transfer) Bill, Legislative Council Hansard, 19 November 1991, pp. 1334–6. There is no similar precedent in the Assembly.

³⁹ See Legislative Assembly Hansard, 26 February 2003, pp. 49–50.

318. If this motion is passed, the year of the Bill and internal references in the Bill to the year of the Bill will be changed, but if other Bills refer to the Bill, House amendments would need to be made to correct the reference.

Consequential renumbering

319. Standing orders⁴⁰ authorise the clerk of each House to carry out any consequential renumbering required in a Bill as a result of house amendments. This does not, however, permit the clerk to renumber text that is being inserted into a Principal Act by an amending Bill.

Note-taking in public gallery

320. The taking of notes of parliamentary proceedings by members of the public in the public gallery was once not permitted. Apparently, the prohibition stemmed from rules adopted by the British House of Commons to ensure that parliamentary debates were kept secret from the monarch (quite possibly Charles I).
321. On 24 October 2000, the Speaker announced that the prohibition against note taking was to be lifted for the Legislative Assembly⁴¹, so note-taking in the public gallery of the Assembly is now allowed.

⁴⁰ See Assembly Standing Order 75; Council Standing Order 14.33.

⁴¹ See Legislative Assembly Hansard, 24 October 2000, p. 969.

Part 7: After Parliament

7.1: Royal Assent

322. To become an Act, every Bill that has passed both houses⁴² must receive Royal Assent. Royal Assent is given by the Governor on behalf of the King. As a matter of practice, Royal Assent is usually given at Executive Council meetings (which are normally held on Tuesday mornings).
323. After a Bill has passed both houses, assent copies are printed and certified by the Clerk of the Parliaments. The Attorney-General also gives a certificate that there is no legal objection to the Bill passing into law.
324. Following Royal Assent, the Act is numbered and sent for publication.

7.2: Commencement

325. Section 10A(4) of the **Interpretation of Legislation Act 1984** provides that an Act that has no commencement date specified in it comes into operation on proclamation or on the first anniversary of its Royal Assent, whichever is earlier.
326. However, it is the current practice in Victoria always to include commencement provisions in Acts.
327. Formerly, a common commencement provision was that the Act would come into operation on the day on which it receives Royal Assent. Because of section 11(1)(a) of the **Interpretation of Legislation Act 1984**, this had a retrospective effect (from midnight until the time of the giving of Royal Assent). To avoid this effect, if it is intended that the Act operate as soon as practicable, the usual practice is to provide for the Act to come into operation on the day after the day on which it receives Royal Assent.

7.3: Proclamations

Introduction

328. It is usual for Victorian Acts to be brought into operation, either all at once or in stages, by proclamation. The usual formula for this is to state that "This Act comes into operation on a day or days to be proclaimed".

⁴² As a matter of terminology, a Bill that has passed both Houses but is yet to receive Royal Assent is known as a "proposed law".

329. It is also usual for an Act to state a default commencement date, being a date on which any unproclaimed provisions of the Act will come into operation.

Settling proclamations of commencement and other instruments

330. Departments must send draft proclamations of commencement to OCPC for settling prior to the making of the proclamation. A Parliamentary Counsel, who is a member of the proclamation team, will settle the proclamation, taking into consideration such matters as sections which must be proclaimed together to be effective and appointments or subordinate instruments which need to be made to make sections effective on commencement.
331. Proclamations should follow the relevant form required by the Executive Council. The Parliamentary Counsel, when settling the proposed proclamation, will check that the format is consistent.
332. On request, the Parliamentary Counsel will check other documentation made under Acts for a department and advise as to power and settle the format.

Proclamations once made cannot be revoked

333. The proclamation of commencement of an Act or provision of an Act cannot be revoked. A power to proclaim an Act or provision can be exercised only once and, once exercised, is a spent power.
334. It is clear that once a commencement date has passed, the commencement cannot be undone, except by statutory provision. However, OCPC are occasionally asked why it is not possible to revoke a proclamation before the proposed commencement date. If it were possible, it would be necessary, in order to prove that a commencement did occur, to prove both the proclamation and the absence of any revocation.
335. Bray CJ in *Palais Parking Station Pty Ltd v Shea* (1977) 16 SASR 350 at page 358 said—

Section 39 of the Acts Interpretation Act 1915, as amended, which provides that power to make regulations and other instruments shall be deemed to include a power to revoke or vary them and to substitute others, does not include proclamations amongst the instruments specified. It may be that, *prima facie* and apart from statutory authority, a power to make proclamations is one of those powers which can only be exercised once and the exercise of which cannot be revoked or altered, except if at all, as specifically authorised in the instrument exercising the power. Halsbury, *Laws of England*, Third Edition, Vol. 30, para 507, page 267, para 543, page 287; Fawell on Powers, Third Edition (1916), page 306. Some proclamations are obviously in this class, e.g. a proclamation of the day on which an Act of Parliament shall come into force. The power to proclaim the Act is obviously exhausted by the proclamation - and I should doubt whether even a power reserved in the proclamation to substitute another date by another proclamation would be effective.

Proclamations not to be retrospective

336. In the rare circumstance that provisions of an Act need to operate retrospectively, specific provision will need to be made for this in the Act itself. Proclamations of commencement of an Act or provisions of an Act should ideally allow time for the public to become aware of the operation of the Act. To aid in this, proclamations are required to be published in the Government Gazette.

Proclamations to be published in the Government Gazette

337. Section 10A of the **Interpretation of Legislation Act 1984** provides that when an Act provides for the Act or provisions of the Act to come into operation on a day or days to be proclaimed, the Governor in Council is empowered to fix the day or days of commencement by a proclamation published in the Government Gazette.
338. If the commencement section of the Act uses the formulation "day or days to be proclaimed", the proclamation may provide for different provisions to come into operation on different days (section 10A(2) of the **Interpretation of Legislation Act 1984**).
339. Section 11(2) of the **Interpretation of Legislation Act 1984** provides that the publication of the proclamation in the Government Gazette is a condition precedent to the coming into operation of the Act or provisions of the Act. A proclamation does not fail completely if not published on the day it is made, but the Act or provisions will not come into operation until that publication. (See also *Flinn v James McEwan and Co. Pty Ltd* [1991] 2 VR 434.)
340. Commencement proclamations are usually made by the Governor at an Executive Council meeting, which is usually held on a Tuesday.
341. The Executive Council arranges for all commencement proclamations to be published on the same day that they are made in a Special Gazette.

Part 8: Glossary

The Parliament	consists of the King (represented by the Governor), the Legislative Council and the Legislative Assembly. The latter 2 are the <i>Houses of Parliament</i> .
A Parliament	begins with its opening by the Governor after a general election and continues until the expiry or dissolution of the Legislative Assembly. Under section 38 of the Constitution Act 1975 , the Assembly expires in late October or early November every 4 years (unless dissolved earlier). The term of the Legislative Council ends at the same time as the Assembly (see section 28(2) of the Constitution Act 1975).
Dissolution	<p>is the dissolving of the Legislative Assembly by proclamation of the Governor, which is followed by a general election for the Assembly and the Council. The Governor may dissolve the Assembly—</p> <ul style="list-style-type: none">• after a motion of no confidence has been passed by the Assembly (see section 8A of the Constitution Act 1975); or• on the Premier's advice if a Bill has become deadlocked between the Houses (see section 65E(2) of the Constitution Act 1975). <p>A dissolution terminates the business of Parliament, so any Bills and other business before either House lapse.</p>
Session	begins with the opening of a new Parliament or the first meeting of an existing Parliament after its prorogation. It ends with the prorogation of the Parliament or the expiry or dissolution of the Legislative Assembly. There may be one or more sessions in each Parliament (for example, 53rd Parliament, first session; 53rd Parliament, second session). Recent Parliaments have had only one session.
Prorogation	is the bringing to the end of a session of Parliament without the dissolution of the Assembly. A prorogation terminates the business of Parliament, so any Bills and other business before either House lapse, but an election is not necessary before Parliament meets again.
Sitting period	is the time that Parliament is in session each year. In the past, there was an autumn sitting and a spring sitting. These were often, erroneously, referred to as the autumn session and the spring session. These sittings were

separated by a recess when each House of Parliament stood adjourned to a fixed date or a date to be fixed by the relevant presiding officer (as advised by the government). In recent years, the sitting period for each year has been set at the beginning of the year (or towards the end of the previous year) and so there has not been separate autumn or spring sittings. Parliament does not actually sit on every day or during every week of a sitting period (there are no sittings on Mondays and only rarely on Fridays).

An adjournment at the end of a sitting period does not terminate the business of either House (but the business may be terminated by a subsequent prorogation, expiry or dissolution).

A list of the parliamentary sitting days is available on Parliament's website.

Sitting day

is a day on which a House actually sits (see its definition in section 38 of the **Interpretation of Legislation Act 1984**). A normal sitting day begins with prayers and ends with an adjournment. It may be suspended during the day, for example, for a meal break.

Adjournment

includes various types of adjournments of a sitting of a House of Parliament. The first is an adjournment at the end of a sitting day. A Minister may move this adjournment at any time. Also, at a set time on each sitting day⁴³, the presiding officer interrupts the business of the House. A Minister may move that the House continue sitting. If not, the **adjournment debate** commences. This is a period for members to raise matters with Ministers, often on behalf of constituents⁴⁴. There is a period for Ministers to respond, following which the House adjourns.

In the Council, there is a procedure under the standing orders for a member to move that a definite matter of urgent public importance be brought before the Council for discussion (Standing Order 6.09). The member requires the support of 6 members to move this motion. Only one such motion can be moved on any sitting day (and such motions are rare).

⁴³ The adjournment time in the Assembly is 10 p.m. (Standing Order 32) (but see any relevant sessional orders). The adjournment times in the Council are 10 p.m. (Tuesday and Thursday), 4 p.m. (Friday) and either 7 p.m. or 5.30 p.m. (Wednesday) (5.30 p.m. if a joint sitting has been scheduled for 6.15 p.m. on that day) (Standing Order 4.07). However, the usual practice in both houses is to adjourn early on Thursdays, and sittings on Fridays are rare.

⁴⁴ Standing orders set time or speaker limits for the adjournment debate (Assembly Standing Order 33; Council Standing Order 4.11).

A House may adjourn for a few hours as a mark of respect to a former member or members who have died. A motion for such an adjournment is usually moved by the Premier in the Assembly or the Leader of the Government in the Council.

A House may also be adjourned for lack of a quorum or if there is grave disorder.

Standing Orders form the set of standard procedures for the dispatch of business in each house. There is also a set of joint standing orders that deal with communications between the houses and joint committees. A member may move that standing orders be suspended so that the procedure for dealing with a particular matter can be changed.

Sessional Orders are any orders that may be passed by either House at the commencement of a session. They supplement the standing orders and often deal with things such as the hours of sitting, the division of time between government and general business, and the broadcasting and publication of proceedings. The current standing orders of each House incorporate most of the previous sessional orders.

Leader of the House is the Minister in the Assembly responsible for co-ordinating the business of the Assembly on behalf of the government.

Royal Assent is what must be given by the Governor for a Bill to become law, after the Bill has been passed in identical form by both houses. In practice, Bills are usually given Royal Assent at Executive Council meetings (although legally it is the Governor alone who gives Royal Assent).

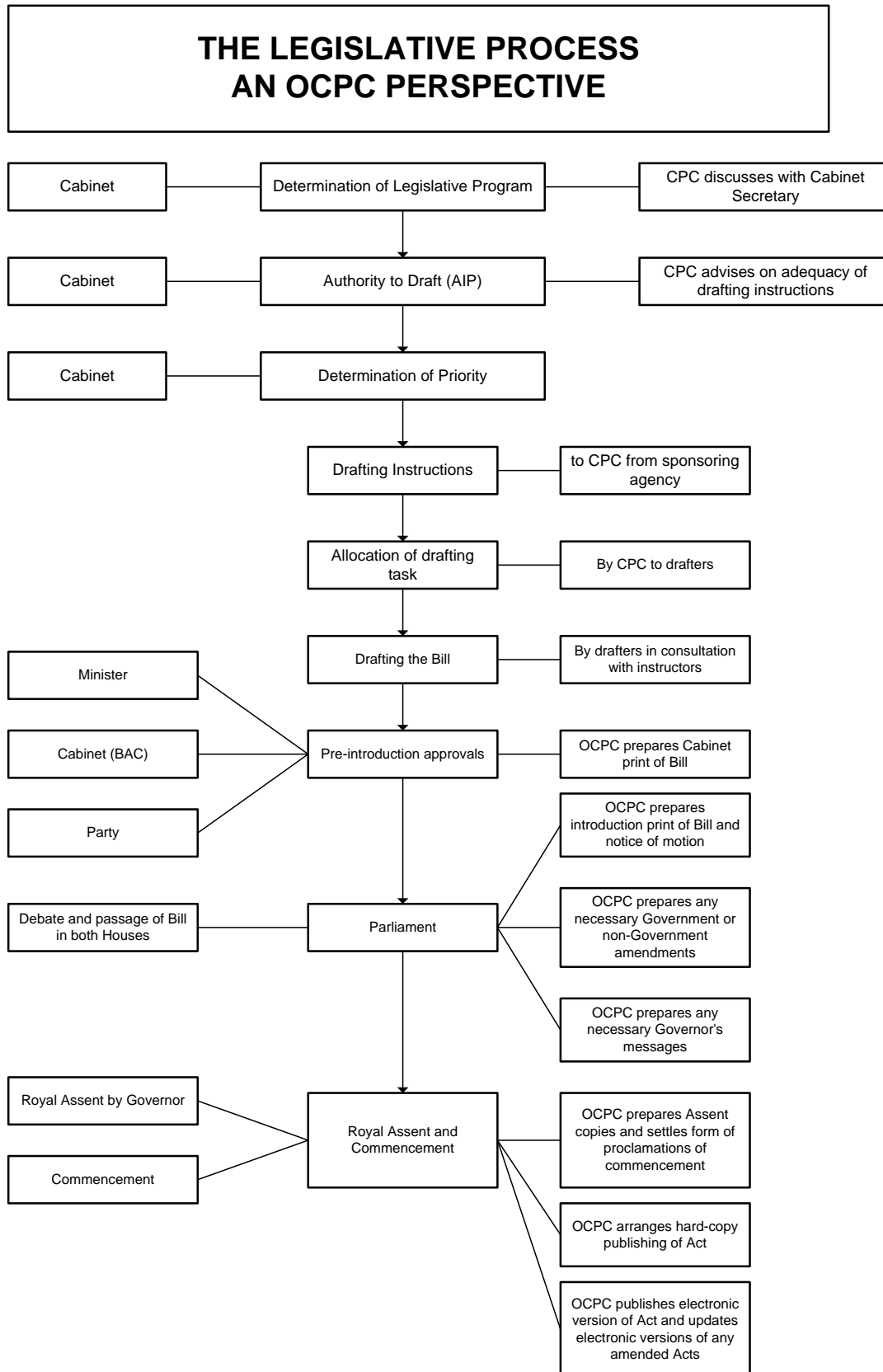
Proclamations are made by the Governor, for the purpose of convening a new Parliament or new session of Parliament, or by the Governor in Council, for the purpose of bringing provisions of Acts into operation. There are also provisions for proclamations to be made under various Acts (for example, section 4 of the **Essential Services Act 1958**). Proclamations are published in the Government Gazette.

Governor in Council is the Governor acting with the advice of the **Executive Council**, which consists of the Ministers of State. The quorum of the Executive Council is 2 Ministers (section 87C(3) of the **Constitution Act 1975**).

Order in Council

is an order made by the Governor in Council. It is generally published in the Government Gazette. Orders in Council are generally required for statutory appointments and for the making of some types of subordinate legislation.

Part 9: Attachment 1



Part 10: Attachment 2

10.1: THE DRAFTING PROCESS

1. Drafter advises on legislative proposals

- drafter available for informal preliminary discussions on Bill proposals
- drafter advises whether proposed drafting instructions accompanying AIP for submission to Cabinet are sufficient for preparation of first draft of Bill
- drafter does not comment on policy except to clarify matters for drafting of Bill
- drafter advises on legal and technical issues relating to drafting of Bill and effective legislative implementation of policy through Bill

2. Drafting Bills

Process

- formal receipt of instructions
- first draft of Bill
- further instructions and drafts
- statute law revision
- drafter settles explanatory memoranda prepared by instructor
- drafter settles section 85 statements prepared by instructor
- finalising Bill for Cabinet or LC approval
- Bill at Cabinet submission
- introduction into Parliament

Role of drafter

- prepares Bills under instruction from department for government
- prepares Bills for private members where approval for that preparation has been given by Premier
- responsible for format, structure and wording of Bill

Role of instructor

- prepares drafting instructions and provides further instructions as drafting of Bill progresses
- prepares Cabinet submissions
- prepares explanatory memoranda for settling by drafter
- prepares section 85 statements (if required) for settling by drafter
- prepares Statement of Compatibility

3. Drafting House Amendments

- drafter prepares government house amendments on instruction from department
- drafter prepares non-government house amendments for non-government parties or independent members on instruction from member on confidential basis
- drafter liaises with relevant house office and provides copies of proposed amendments to relevant house office

4. Other

- a Parliamentary Counsel settles proclamations of commencement for departments and provides advice to Executive Council regarding form and content