

Auditor-General of Queensland

Report to Parliament No. 6 for 2009

Providing the information required to make good regulation

A Performance Management Systems Audit



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QUEENSLAND

Prepared under Part 3 Division 3 of the
Auditor-General Act 2009

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Auditor-General of Queensland

August 2009

The Honourable J Mickel MP
Speaker of the Legislative Assembly
Parliament House
BRISBANE QLD 4000

Dear Mr Speaker

This report is prepared under Part 3 Division 3 of the *Auditor-General Act 2009*, and is on systems that provide the information required to make good regulation. It is the sixth in the series of Auditor-General's Reports to Parliament for 2009.

In accordance with s.67 of the Act, would you please arrange for the report to be tabled in the Legislative Assembly.

Yours sincerely



Glenn Poole
Auditor-General



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Executive summary

1.1 Audit overview

Parliament makes regulations by passing primary and subordinate legislation primarily to protect the community and the environment from adverse events. To make good regulations, the government and Parliament need information that the proposed regulation is the best way to solve the problem and that the appropriate analysis and consultation has occurred. This information is generated in the development process and is provided with the regulation as explanatory materials to allow the Parliament to assess the appropriateness of the proposed regulatory solution.

Business and the community are regularly raising concerns over what they perceive as excessive 'red tape' or unnecessary bureaucracy, which can prove to be a barrier to industry and business growth. In its 2007 report *A Scorecard of State Red Tape Reform*¹, the Business Council of Australia (BCA) assessed that Queensland had an adequate approach to regulation but there was clear room for improvement.

My report presents the results of a performance management systems audit conducted under the authority of the *Auditor-General Act 2009* into the systems to provide the information required to make good regulation in Queensland.

It is pleasing to note that all audit recommendations have been accepted by all of the agencies audited.

1.2 Audit opinion

Each of the four line agencies and the two central agencies audited demonstrated particular strengths in their approach to providing information to make good regulation. The audit highlighted that while many of the staff involved in developing regulations are highly skilled and had gained significant expertise, opportunities for improvement of systems exist across all of the agencies audited. I found that:

- There is room for improvement in the completeness of the information in some Explanatory Notes (EN) and Regulatory Impact Statements (RIS) tabled when regulations are introduced to the Legislative Assembly. Information on the need for the regulation and its impacts could be more fully explained. This is occurring partly because the agencies' systems to assess options and the need for and impact of proposed regulatory solutions, are not always well documented nor being applied consistently. Critical information such as the cost of new and amended regulations and the full impact on business and the community is, in many cases, not included in sufficient detail.

¹ Business Council of Australia, *A Scorecard of State Red Tape Reform*, 2007.

- The guidance material available to support public sector agencies in the development of good regulations has been revised at different times but there has not been a systemic review to assess the effectiveness of the suite of materials. The *Regulatory Impact Statement Guidelines* which apply to a small proportion of subordinate legislation were revised in 2009 to reflect the principles of best practice. There is however, no overarching set of guidelines for all regulations that clearly outline the principles of best practice and how to apply them in implementing government policy. There is very little training available for agency officers on how to develop effective and efficient regulations, and none on how to implement best practice principles.
- Treasury Department has undertaken a leadership role in the national and state regulatory reform agenda across Queensland. There are a range of initiatives planned as part of the *Smart Regulation Reform Agenda* and plans are in place to continue to reform the regulatory development process.
- A 'gatekeeper' responsible for coordinating the regulatory reform process for both primary and subordinate legislation in Queensland was not in place. A gatekeeper for the regulatory process would contribute significantly to ensuring that the checks and balances are working effectively and that good regulations (both primary and subordinate) are being developed that minimise any unnecessary burden on business and the community.

I recognise that governments frequently need to quickly implement policy in response to community and business concerns about safety, health and environmental issues. This often puts pressure on agencies to deliver regulatory solutions within short timeframes. At times this can lead to agencies having to adapt normal regulatory development processes to meet these timeframes. If staff developing regulations had access to enhanced tools and training to support them to provide the required information for the consideration of Parliament, they would be better able to meet the legislative requirements while still meeting the timeframes of government. When regulations are prepared in haste, the analysis and consultation used to prepare the information provided to Parliament is often lessened. The risk is that inefficient regulations will be created, adding to the burden on business and the community.

1.3 Key findings

While the decision to undertake this audit was informed by a number of assessments including but not limited to those undertaken by the Productivity Commission and the BCA, the audit opinion is based solely on the evidence collected and analysed during the desk audit and fieldwork. The detailed audit conclusions are outlined in Sections 3 and 4 of the report.

The audit conclusions are based on audit criteria that were developed from an analysis of the Queensland legislative requirements, the Council of Australian Governments' (COAG) principles of best practice and were informed by expectations set by the Queensland Scrutiny of Legislation Committee. The audit has been conducted under the Auditor-General of Queensland Auditing Standards.

Developing regulation

The lack of detail in some of the information in the explanatory materials, together with the absence of well documented systems to assess options and the need for and impact of proposed regulation, means that information provided for Parliament's consideration is in some cases incomplete and lacking in adequate consultation and vital analysis.

The systems of the agencies audited are not resulting in explanatory materials that provide full and comprehensive information against the legislative requirements. The key areas for improvement are in the provision of information in the following areas:

- costing information
- analysis of consistency with fundamental legislative principles
- providing clear and useful objectives.

None of the four line agencies audited had comprehensive documentation of their policies and procedures in place to guide the making of regulation, the development of explanatory materials or to ensure compliance with the legislative requirements. The risk to these agencies is that there is no clear direction or process to guide officers to ensure a consistent and compliant approach is taken on each piece of regulation developed.

Instead of documented policies and procedures for developing regulation, audit found the *Queensland Cabinet Handbook* was used as the primary source of guidance for the development of regulation by most agencies. Although the Cabinet Handbook does not purport to be a policy handbook, audit found that most agencies use it as one. The handbook encompasses the entire Cabinet process through preparation, lodgement and consideration of Cabinet business, as well as ongoing administrative aspects of the maintenance of Cabinet records. Policy officers who only refer to the Cabinet Handbook risk missing vital stages in the policy development cycle and not providing the required information for Parliament's consideration.

The agencies audited generally have experienced officers who undertake the regulation making process. The reliance on officers' expertise is heightened without documented processes. The risk to agencies is that there may be a loss of expertise when officers leave the agency or move to other roles, resulting in process inefficiencies. The lack of formal systems and documented policies also leads to individual policy officers adopting inconsistent approaches to the development of regulations.

During this audit, I noted that the non-compliance issues were similar to those in my *Report No. 1 for 2008 Enhancing Accountability through Annual Reporting*. The information reported to Parliament through agencies' annual reports did not fully comply with legislation, was incomplete and ambiguous in the portrayal of agencies' accountability and performance.

The similarity between the findings from my audits highlights the continuing risk of agencies relying on guidelines and handbooks that are not well designed for the purpose agencies ultimately use them. For Report No. 1 for 2008 I found that the 2007 *Annual Report Guidelines for Queensland Government Agencies*, prepared by the Department of the Premier and Cabinet, did not provide adequate guidance to ensure compliance with legislative requirements or transparency and accountability. For this audit I found that the guidance provided to develop regulations is not effective in ensuring that explanatory materials to be tabled in Parliament are fully compliant and clearly explain why the regulations are needed and what will be the likely impact. The risk identified in both audits, is that incomplete information has been provided to Parliament, due to inadequate guidance.

Another area of concern is one that I have reported before – and that is a lack of systems in government to generate and report reliable costing data. In various reports to Parliament since 2005, I have highlighted the absence of systems in place for agencies to provide costs relating to:

- departmental fees and charges²
- costing details to support key performance indicators.³

The lack of effective costing systems is highlighted again in this audit where none of the agencies audited could provide adequate evidence of how they identify costs to government, business and the community. As a consequence, agencies have problems reporting these costs to Parliament.

Supporting quality regulation

Guidance and support is available to policy officers developing regulations from a range of sources and experts. Audit found that although the guidance materials provided by central agencies have been updated and benchmarked, they do not reference the COAG's principles of best practice regulation or provide specific guidance in how policy officers should incorporate the principles in the development of regulations. The lack of coordinated and cohesive guidance from central agencies has resulted in a siloed and ad hoc approach to regulation making. Agencies are relying on the expertise of their policy staff without providing on-going training or clearly documented appropriate policy frameworks in which to operate. Other states have already provided comprehensive guidance on how to apply the COAG principles of best practice regulation.

The absence of centrally coordinated or agency based training means that the skills necessary for the efficient drafting of regulations that align with best practice can not be assessed or systematically developed. Given the heavy reliance of agencies on the skills and expertise of their staff, greater support for policy officers would seem to be a prudent investment.

² Queensland Audit Office, Report to Parliament No 8 for 2006, *Results of Performance Management Systems Audit of the Management of Departmental Fees and Charges*.

³ Queensland Audit Office, Report to Parliament No 5 for 2005, *Results of Performance Management Systems Audits of Output Performance Reporting – Phase 2*.

1.4 Summary of recommendations

It is recommended that:

Line agencies

- agencies develop and implement policies and procedures to enable them to fully address the requirements of the *Legislative Standard Act 1992* and *Statutory Instruments Act 1992 (SIA)* when developing EN and RIS for proposed regulation
- agencies incorporate into their policies and procedures, the 2007 COAG's Principles of Best Practice to fully inform Parliament and aid in its decision making processes when considering regulatory solutions.

Central agencies

- central agencies review their guidance materials to align them with the principles of best practice regulation
- Department of the Premier and Cabinet work with Treasury Department to facilitate the development of a training framework for policy officers developing regulations
- central agencies collaborate to identify and develop the role of a regulatory gatekeeper to ensure a smooth and consistent governmental approach to developing quality regulation (both primary and subordinate).

1.5 Responses to the report

1.5.1 Department of Premier and Cabinet

The Director-General stated in his response dated 28 July 2009:

'Regulation influences almost every aspect of society, and has a crucial role to play in delivering benefits for the economic, social, environmental, and legal wellbeing of the community. However, it is important to find an appropriate balance between the benefits and costs of regulation to deliver the best possible outcomes for the community, business and government.

The Queensland Government has, and maintains, a longstanding commitment to improve Queensland's regulatory environment. Through the Queensland Smart Regulation Reform Agenda and the National Partnership Agreement to Deliver a Seamless National Economy, Queensland is implementing regulatory and competition reforms to improve the efficiency and inter-jurisdictional harmonisation of the regulatory environment.

While I support the thrust of the recommendations in your report, I consider that some of the supporting commentary in the report does not necessarily follow from the analysis undertaken.

I note that in the section on Regulatory Reform (Section 2.1), the draft report states:

Queensland's performance does not compare well to the progress achieved by other States.

Section 2 then provides evidence from the Business Council of Australia's (2007) A Scorecard of State Red Tape Reform (BCA scorecard) and the 2008 Productivity Commission Report, Performance Benchmarking of Australian Business Regulation: Quantity and Quality (PC Report) to support this conclusion.

I draw your attention to the results of the same BCA scorecard publication as it indicates that only two other states (South Australia and Victoria) received better overall assessments than Queensland. All other states and territories assessed received equal or lower overall assessments than Queensland.

In relation to the Volume of Regulation measure included in the PC Report, the essential point remains that pages of legislation is a poor proxy for regulatory burden, a point that the PC Report itself notes. In this context the prominence afforded to the pages of regulation measure of regulatory burden in the draft report is difficult to understand, as is drawing any conclusions on this measure.

I note that comparative assessments of regulatory burden are difficult to make. However, I do not support the conclusion that Queensland's performance does not compare well to the progress achieved by other states and territories based upon QAO's interpretation of the results of the BCA Scorecard and the PC Report.

I acknowledge that you consider as one of your key findings in Section 1.2 that there is 'room for improvement in the completeness of the information in some explanatory notes and regulatory impact statements'.

It is of course important to continue to improve the quality of explanatory notes and regulatory impact statements.

In Section 5.4, the draft report provides a summary of the assessment of the information provided to Parliament in the explanatory notes. I note that out of the nine areas of the Legislative Standards Act (LSA) assessed across the 14 explanatory notes audited by the QAO, 16 out of the 126 audited areas were found in the opinion of the QAO to require 'room for improvement in the completeness of information'. The assessment of whether or not more information should have been provided is necessarily subjective.

Nevertheless, I note the recommendations that you have raised within the draft report and agree that improvements could be implemented to ensure better guidance and support by central agencies in the development of regulation by line agencies.

Recommendation 1:

Line agencies develop and implement policies and procedures to enable them to fully address the requirements of the Legislative Standard Act 1992 and Statutory Instruments Act 1992 when developing Explanatory Notes and Regulatory Impact Statements for proposed regulation.

I note the above recommendation and acknowledge that more work can be done to improve the quality of Explanatory Notes and Regulatory Impact Statements. However, to ensure the consistency of compliance with legislative standards across the Queensland Government, it is more appropriate for central agencies to develop whole-of-Government policies and procedures, to be supported by each line agency implementing their own internal procedures to ensure compliance. My view is that adopting a whole-of-Government approach to policies and procedures is essential to ensuring that a standards and quality control measures are applied across government.

With respect to requirements of the Legislative Standards Act 1992, the Department of the Premier and Cabinet will develop guidelines and templates for explanatory notes for inclusion in the guidance material currently provided to ensure that the requirements of the Legislative Standards Act 1992 are met.

With respect to the Statutory Instruments Act 1992 (SIA), the Queensland Office for Regulatory Efficiency will update existing policies and procedures, including explicit incorporation of the 2007 COAG Principles of Best Practice Regulation, to support agencies in fully addressing the requirements of the SIA. Both the Department of the Premier and Cabinet and the Queensland Office for Regulatory Efficiency will establish systems which require agencies to demonstrate proper consideration of regulatory best practice principles in developing the proposed regulation and that the requirements of the LSA or SIA have been addressed.

Recommendation 2:

Line agencies incorporate into their policies and procedures, the 2007 Council of Australian Governments' (COAG) Principles of Best Practice to fully inform Parliament and aid in its decision making processes when considering regulatory solutions.

The Department of the Premier and Cabinet supports this recommendation.

Existing Queensland Government guidance materials are substantially consistent with the COAG Principles of Best Practice.

In implementing the enhanced Queensland regulatory development system as part of the Smart Regulation Reform Agenda, the Department of the Premier and Cabinet and the Queensland Office for Regulatory Efficiency will update existing whole-of-Government policies and procedures to explicitly incorporate the COAG Principles of Best Practice and establish whole-of-Government systems which require agencies to demonstrate proper consideration of regulatory best practice principles when developing legislation or regulation.

The Department of the Premier and Cabinet agrees that each agency must put in place its own internal procedures to ensure compliance with the whole-of-Government policies.

Recommendation 3:

Central agencies review their guidance materials to align them with the principles of best practice regulation.

The Department of the Premier and Cabinet supports this recommendation and will review its guidance material and, where applicable, ensure alignment with the principles for best practice regulation.

In implementing an enhanced Queensland regulatory development system as part of the Smart Regulation Reform Agenda, the Department of the Premier and Cabinet and Queensland Office for Regulatory Efficiency will ensure that guidance materials fully align with the COAG Principles of Best Practice Regulation.

Recommendation 4:

The Department of the Premier and Cabinet work with Treasury Department to facilitate the development of a training framework for policy officers developing regulations.

The Department of the Premier and Cabinet supports this recommendation. In implementing the enhanced Queensland regulatory development system, the Queensland Office for Regulatory Efficiency and the Department of the Premier and Cabinet will ensure that there is an appropriate training framework for policy officers. This training framework will build on the existing frameworks in place offered by Queensland Treasury and the Department of Premier and Cabinet.

Recommendation 5:

Central agencies collaborate to identify and develop the role of regulatory process gatekeeper to ensure a smooth and consistent Governmental approach to developing quality regulation.

The Department of the Premier and Cabinet supports this recommendation.

The Department of the Premier and Cabinet and the Queensland Office for Regulatory Efficiency will undertake to further promulgate regulatory best practice across the Queensland Government through appropriate guidance materials and advisory support. However, agencies will continue to be responsible for complying with whole-of-Government policies and procedures. Full implementation of the enhanced system will occur as early as possible in 2010.'

1.5.2 Treasury Department

The Under Treasurer stated in his response dated 22 July 2009:

'The Report is the outcome of your recent Performance Management Systems Audit of the systems and frameworks that support the development of regulations.

This letter responds to specific issues and the recommendations of your Report. These issues have been discussed between our respective officers and I would like to acknowledge the extent to which Queensland Treasury's comments and additional analysis have been taken on board in the development of the Report.

Before addressing the specific issues and recommendations of your Report, I would first like to outline the significant body of work that has been undertaken and will continue to be advanced by Queensland Treasury in relation to regulatory reform.

The Queensland Government has a long standing commitment to improve Queensland's regulatory environment. The Government is now strengthening this regulatory reform agenda by taking action on two main fronts to put in place a regulatory environment that delivers better economic, social and environmental outcomes.

In December 2008, the Queensland Government, along with other Australian jurisdictions, committed to a National Partnership Agreement to Deliver a Seamless National Economy. Under this agreement, Queensland is implementing regulatory and competition reforms in 36 key areas to improve the efficiency and inter-jurisdictional harmonisation of the regulatory environment. Harmonisation of these regulations across Australian jurisdictions will contribute to reducing costs incurred by business in complying with differing and inconsistent regulation across jurisdictions. These reforms are being progressively implemented over the period 2008-13.

This is arguably the largest suite of regulatory reforms undertaken since the national competition reforms of the early 1990s. The reform areas have been selected to drive maximum benefit for the national economy.

In addition to this national reform agenda, Queensland Treasury, through the Queensland Office for Regulatory Efficiency, is implementing the Government-endorsed Smart Regulation Reform Agenda, including an innovative five-point action plan. The plan aims to reduce and prevent unnecessary regulatory burden on business, community and government.

This plan builds on previous reform work by tackling the quantity of existing regulatory stock and the quality of future regulation simultaneously. Key to this is eliminating unnecessary and excessive regulatory requirements and streamlining remaining areas of legislation where possible, while preserving and strengthening community safeguards and protections with best practice regulation.

These key actions are being progressed through the following initiatives under the Smart Regulation Reform Agenda:

- 1. Queensland Regulatory Simplification Plan 2009-13. This initiative is focused at reducing unnecessary regulatory burden through a phased program of reviews by all agencies of their stock of existing regulation. The plan targets an initial reduction of \$150 million per annum in the compliance burden to business and the administrative burden to government by the end of 2012-2013.*
- 2. An enhanced regulatory development system. This initiative is focused at preventing unnecessary regulatory burden through the introduction of a streamlined, more rigorous and harmonised regulatory development and review system that improves the quality of future legislation and regulation. This system is being progressively implemented through significant reform of existing arrangements, policies and processes, and will be fully implemented as early as possible in 2010.*

These Queensland Government initiatives are based on regulatory best practice principles, address COAG regulatory reform commitments, and support the making of 'good' regulations.

Attachment 1 sets out comments with respect to specific issues raised in your Report.

I support your recommendations and agree that improvements can be made to the regulatory development and review arrangements, policies and processes across the Queensland Government to improve the quality of future legislation and regulation. Attachment 2 details Queensland Treasury's response to each of the recommendations in your draft Report.

Queensland Treasury commitments in response to your recommendations will be incorporated into the Queensland Office for Regulatory Efficiency's significant work program to be delivered in collaboration with the Department of the Premier and Cabinet.

This work to strengthen the current regulatory environment in Queensland through the progressive implementation of the enhanced regulatory development system will address the need for: (i) line agencies to put in place policies and procedures to ensure compliance with whole-of-government policies and procedures relating to development of regulations; and (ii) central agencies to better support line agencies in their compliance with best practice regulation.

The progressive implementation of this system including commitments to your recommendations will be fully operational across the Queensland Government as early as possible in 2010.

Attachment 1

QUEENSLAND TREASURY COMMENTS ON REPORT OBSERVATIONS

Volume of regulation (section 2.1)

The use of a page count of regulation is not an accurate indicator of regulatory burden. The Productivity Commission Report itself notes that "this information only provide a general indication of the volume of regulation in each jurisdiction. It does not indicate the regulatory burden on business from that regulation".

Queensland's comparative performance in the Productivity Commission benchmarking study reflects the range and size of sectors and activities undertaken in the Queensland economy. It is also attributable to Queensland's preferred inclusions (eg. tables of provisions, end notes, annotations, transitional provisions and covers) and distinctive plain English style (eg. generous use of white space, footnotes and separation of provisions) to support improved interpretation, understanding, transparency and readability. Having adopted this approach since 1991, most of Queensland's statute book is in plain English. These practices promote greater transparency and easy reference by users.

Regulatory making process (section 2.3)

Queensland Treasury acknowledges the importance of the benchmarks against which the Business Council of Australia (BCA) has rated state performance. However, Queensland Treasury considers that the BCA assessment against these benchmarks is limited in scope and does not necessarily provide a full account of the regulatory processes adopted in Queensland.

For example, against the principles for good regulation making, the BCA did not report on Queensland's Public Benefit Test process which applies to both primary and subordinate legislation for restrictions on competition and requires consideration of alternative options and a cost-benefit analysis. Consideration of Queensland's Public Benefit Test process would have been necessary to assess consistency with the COAG principles used in the BCA assessment.

"Ad hoc" processes (chapter 3)

Queensland Treasury believes the audit conclusion that agencies have a series of ad hoc and inconsistent processes for the development of regulation may not recognise the need for flexibility in the process to accommodate the diverse range of legislation and regulation agencies deal with. Queensland Treasury believes its use of highly experienced officers to prepare primary legislation, and its compliance with the Government processes set down in the Queensland Cabinet Handbook and Queensland Legislation Handbook more than adequately addresses this concern. In addition, greater consideration needs to be taken of the relatively extensive templates and other material provided by the Queensland Treasury website, and particularly, the guidance provided by the Cabinet Legislation and Liaison Office and by one-on-one consultation and advice.

Compliance of Explanatory Notes with the Legislative Standards Act 1992 (section 3.2 and appendix 5.4)

Comments in the Report reflect the view of the Auditor-General that there is not full compliance with the Legislative Standards Act 1992 of the Explanatory Notes relating to the Revenue and Other Legislation Amendment Bill 2008, the Future Growth Fund Bill 2006 and the Queensland Competition Authority Amendment Bill 2008.

While it is valid to indicate areas of improvement in the level of detail provided in fulfilling the requirements of section 23 of the Legislative Standards Act 1992 (as indicated in the notes to Appendix 5.4), Queensland Treasury believes this should not be taken as an indication of a lack of full compliance with that legislation.

In particular, the Report indicates further detail could be provided about the extent the sampled Explanatory Notes meet the requirement of an assessment of consistency with fundamental legislative principles. Queensland Treasury's view is that, of the Explanatory Notes sampled, the Explanatory Note for the Future Growth Fund Bill 2006 was fully compliant with the requirements of the Legislative Standards Act 1992.

This is supported by the Scrutiny of Legislation Committee which has stated that "Explanatory Notes should not simply assert that a bill is consistent with fundamental legislative principles in all but the clearest cases" (Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System, page 11, paragraph 1, Scrutiny of Legislation Committee (2001)). Queensland Treasury's view is that the Future Growth Fund Bill 2006 falls squarely within the category of being a "clear case" and thus a simple assertion as to consistency with the principles is sufficient. This was also confirmed by the fact that the Scrutiny of Legislation Committee indicated in Alert Digest No 6 of 2006 in respect of the Bill that "the committee considers that this bill raises no issues within the committee's terms of reference".

With respect to the other bills audited, Queensland Treasury notes that the Scrutiny of Legislation Committee was satisfied with the further information provided by the Treasurer in response to their requests.

Support and advice by the Queensland Office for Regulatory Efficiency (section 3.3)

The Queensland Office for Regulatory Efficiency actively supports agencies through the regulatory development process including determination of appreciable costs by providing prompt and comprehensive advice, guidelines on the preparation of regulatory impact statements, training on the regulatory impact statement process where sought, and information seminars on the regulatory reform agenda.

The role and activities of the Queensland Office for Regulatory Efficiency is aligned with its delegated responsibility for administering Section 5 of Statutory Instruments Act 1992 as noted later in the Report.

COAG Best Practice Principles (sections 4.2 and 4.6)

Collectively, Queensland's legislative requirements and regulatory guidance materials (including the Public Benefit Test Guidelines and Regulatory Impact Statement Guidelines) are substantially consistent with the COAG Best Practice Principles and reflect the intent of these principles.

All guidance material will explicitly refer to the COAG principles when updated for the full implementation of the enhanced Queensland regulatory development system.

COAG Regulatory Reform Plan commitments (section 4.5)

These commitments are now included in the National Partnership Agreement to Deliver a Seamless National Economy and are required to be implemented by 30 June 2009.

Queensland has made significant progress with meeting its commitments under the COAG Regulatory Reform Plan including the Treasurer's role in leading and directing the national and State reform agendas across the Queensland Government, improvements to the Regulatory Impact Statement processes, and the current development of the enhanced Queensland regulatory development system.

Central 'gatekeeper' (section 4.6 and 4.7)

Whilst the Queensland Office for Regulatory Efficiency is not a central 'gatekeeper', it plays an active role in supporting the Treasurer in his role in leading and directing the development and implementation of the Queensland regulatory reform agenda at a whole-of-government level. It is also supported by the Senior Officers Network for Regulatory Reform, who champion regulatory best practice within each State Government department and assists with driving a culture change across the Queensland Government.

QUEENSLAND TREASURY RESPONSE TO RECOMMENDATIONS

Recommendation 1: Agencies develop and implement policies and procedures to enable them to fully address the requirements of the Legislative Standards Act 1992 and the Statutory Instruments Act 1992 when developing Explanatory Notes and Regulatory Impact Statements for proposed regulation.

Queensland Treasury supports this recommendation.

However, a whole-of-Government approach to the development of the appropriate policies and procedures is necessary to ensure a consistent and efficient standard of legislative and regulatory development practices across government. Within this whole-of-Government approach, each agency must continue to take ownership and responsibility for ensuring that it has satisfactorily complied with whole-of-government policies and procedures.

Queensland Treasury notes that the Department of the Premier and Cabinet has primary administrative responsibility for the Legislative Standards Act 1992 (LSA) and the Statutory Instruments Act 1992 (SIA). The Queensland Office for Regulatory Efficiency within Queensland Treasury has delegated responsibility for Part 5 of the SIA.

The Queensland Office for Regulatory Efficiency with the Department of the Premier and Cabinet will, as part of implementing the enhanced Queensland regulatory development system:

- 1. update existing policies and procedures, including explicit incorporation of the 2007 COAG Principles of Best Practice Regulation, to support agencies in fully addressing the requirements of the LSA and the SIA when developing Explanatory Notes and Regulatory Impact Statements for proposed regulation; and*
- 2. establish whole-of-government systems which require agencies to demonstrate proper consideration of regulatory best practice principles in developing a proposed legislation or regulation, and that the requirements of the LSA or SIA have been addressed.*

Queensland Treasury agrees that each agency must put in place its own internal policies and procedures to ensure compliance with the whole-of-government policies and procedures.

Recommendation 2: Agencies incorporate into their policies and procedures, the 2007 Council of Australian Governments' (COAG) Principles of Best Practice to fully inform Parliament and aid in its decision making processes when considering regulatory solutions.

Queensland Treasury supports this recommendation.

Existing Queensland Government guidance materials are substantially consistent with the COAG Principles of Best Practice.

In implementing the enhanced Queensland regulatory development system, the Queensland Office for Regulatory Efficiency and the Department of the Premier and Cabinet will update existing whole-of-government policies and procedures to explicitly incorporate the COAG Principles of Best Practice and establish whole-of-government systems which require agencies to demonstrate proper consideration of regulatory best practice principles when developing legislation or regulation.

Queensland Treasury agrees that each agency must put in place its own internal policies and procedures to ensure compliance with the whole-of-government policies and procedures.

Recommendation 3: Central agencies review their guidance materials to align them with the principles of best practice regulation.

Queensland Treasury supports this recommendation.

The Queensland Office for Regulatory Efficiency released in June 2009 a revised version of the Regulatory Impact Statement Procedures and Requirements Guide. The revised guide provides more comprehensive information on the processes and procedures policy officers need to follow to ensure regulatory proposals meets statutory requirements and regulatory best practice.

In implementing the enhanced Queensland regulatory development system, the Queensland Office for Regulatory Efficiency and the Department of the Premier and Cabinet will ensure that guidance materials fully align with the COAG Principles of Best Practice Regulation.

Recommendation 4: Department of the Premier and Cabinet work with Queensland Treasury Department to facilitate the development of a training framework for policy officers developing regulations.

Queensland Treasury supports this recommendation.

In implementing the enhanced Queensland regulatory development system, the Queensland Office for Regulatory Efficiency and the Department of the Premier and Cabinet will ensure that there is an appropriate training framework for policy officers. This training framework will build on the existing frameworks in place offered by Queensland Treasury and the Department of the Premier and Cabinet.

Recommendation 5: Central agencies collaborate to identify and develop the role of a regulatory process gatekeeper to ensure a smooth and consistent Governmental approach to developing quality regulation.

Queensland Treasury supports this recommendation.

Queensland Treasury is currently responsible for providing advice to agencies on policies and procedures to support Public Benefit Tests and Regulatory Impact Statements.

The Queensland Office for Regulatory Efficiency was transferred to Queensland Treasury from the former Department of State Development in early 2008 to support the Treasurer in his role of leading and directing the national and State regulatory reform agenda across the Queensland Government and ensure regulatory reform is centrally driven.

In implementing an enhanced Queensland regulatory development system, the Queensland Office for Regulatory Efficiency and the Department of the Premier and Cabinet will undertake to further promulgate regulatory best practice across the Queensland Government through appropriate guidance materials and advisory support. However, agencies will continue to be responsible for complying with whole-of-government policies and procedures. Full implementation of the enhanced system will occur as early as possible in 2010.'

1.5.3 Department of Justice and Attorney-General

The Director-General stated in her response dated 20 July 2009:

'Recommendation 1

Line agencies develop and implement policies and procedures to enable them to fully address the requirements of the Legislative Standard Act 1992 and Statutory Instruments Act 1992 when developing Explanatory Notes and Regulatory Impact Statements for proposed regulation.

I note the above recommendation and acknowledge that more work can be done to improve the quality of Explanatory Notes and Regulatory Impact Statements. However, to ensure the consistency of compliance with legislative standards across the Queensland Government, it is more appropriate for central agencies to develop whole-of-Government policies and procedures, to be supported by each line agency implementing their own internal procedures to ensure compliance.

My view is that adopting a whole-of-Government approach to policies and procedures is essential to ensuring that standards and quality control measures are applied across government. My Department will ensure that procedures are implemented to comply with the whole-of-Government standards.

With respect to requirements of the Legislative Standards Act 1992 the Department of the Premier and Cabinet will develop guidelines for explanatory notes for inclusion in the guidance material to ensure that the requirements of the Legislative Standards Act 1992 are met.

With respect to the Statutory Instruments Act 1992 (SIA), the Queensland Office of Regulatory Efficiency will update existing policies and procedures, including explicit incorporation of the 2007 COAG Principles of Best Practice Regulation, to support agencies in fully addressing the requirements of the SIA.

Both the Department of the Premier and Cabinet and the Queensland Office of Regulatory Efficiency will establish systems which require agencies to demonstrate proper consideration of regulatory best practice principles in developing the proposed regulation and that the requirements of the LSA or SIA have been addressed.

Recommendation 2

Line agencies incorporate into their policies and procedures, the 2007 Council of Australian Governments' (COAG) Principles of Best Practice to fully inform Parliament and aid in its decision making processes when considering regulatory solutions.

While the existing Queensland Government Regulatory Impact Statement Procedures and Requirements are broadly consistent with the COAG Principles of Best Practice Regulation, the proposed actions for the previous recommendation will also address this recommendation by ensuring full alignment of Queensland Government guidance materials with these COAG principles.'

1.5.4 Department of Environment and Resource Management

The Acting Director-General stated in his response dated 22 July 2009:

'I note the issues raised in your draft Report regarding explanatory notes and Regulatory Impact Statements (RIS) and I acknowledge that it is important to continue to improve the quality of explanatory notes and RIS.

However, to ensure the consistency of compliance with legislative standards across the Queensland Government, it is more appropriate for central agencies to develop whole-of-Government policies and procedures, to be supported by each line agency implementing their own internal procedures to ensure compliance. My view is that adopting a whole-of-Government approach to policies and procedures is essential to ensuring that standards and quality control measures are applied across government.

With respect to requirements of the Legislative Standards Act 1992, the Department of the Premier and Cabinet will develop guidelines and templates for explanatory notes for inclusion in the guidance material currently provided to ensure that the requirements of the Legislative Standards Act 1992 are met.

With respect to the Statutory Instruments Act 1992 (SIA), the Queensland Office for Regulatory Efficiency will update existing policies and procedures, including explicit incorporation of the 2007 COAG Principles of Best Practice Regulation, to support agencies in fully addressing the requirements of the SIA. Both the Department of the Premier and Cabinet and the Queensland Office for Regulatory Efficiency will establish systems which require agencies to demonstrate proper consideration of regulatory best practice principles in developing the proposed regulation and that the requirements of the LSA or SIA have been addressed.

I will ensure that this department will implement policies and procedures to ensure compliance with the whole-of-Government frameworks.

I support your recommendations that central agencies review their guidance materials and develop a training framework. Officers from the department will work closely with central agencies to ensure that the whole-of-Government frameworks are implemented in a way that will result in enhancements to the processes of the department.

The department is also in the process of establishing a Policy and Legislation Strategy Group which will, amongst other things, perform the role of the former Department of Natural Resources and Water's Legislative Oversight Committee referred to on page 17 (now page 33) of your draft report. That Group will be tasked with developing the 'more complete set of policy documents' that your report suggests will ensure that clear and documented processes are in place to meet the agencies' legislative responsibilities.'

1.5.5 Department of Employment, Economic Development and Innovation

The Director-General stated in his response dated 20 July 2009:

'Responses to the report findings and recommendations on behalf of the OLGR are being coordinated by the Queensland Office for Regulatory Efficiency (QORE) within the Queensland Treasury Department and will be submitted through the Under-Treasurer as the OLGR was previously part of the Treasury Department, prior to the Machinery of Government changes.

I will provide some brief comments in relation to the OFT which is now within the DEEDI portfolio. The OFT takes seriously the obligations imposed by the principles of best practice regulation and the obligations imposed under the Legislative Standards Act 1992 and the Statutory Instruments Act 1992. It is pleasing to see that the four pieces of legislation (two bills and two regulations) administered by the OFT and examined during the audit were found to be fully compliant with the explanatory note requirements imposed by the Legislative Standards Act 1992 and the regulatory impact statement (RIS) requirements imposed by the Statutory Instruments Act 1992.

The commentary in your draft report notes the importance of appropriate training of policy officers responsible for developing regulation. I agree that such training is an important way to supplement experience and expertise (gained both within and outside the public service) and mentoring processes used to develop staff. The OFT regularly utilises training programs designed to develop appropriate skills required of policy officers. Examples include Institute of Public Administration Australia courses such as 'Practical Skills for Policy Officers' and 'Turning Policy into Legislation' which contains guidance on compliance with obligations imposed by the Legislative Standards Act 1992 – including fundamental legislative principles - and requirements imposed by the Statutory Instruments Act 1992.

The OFT recognised the importance of the Council of Australian Government's guidelines on best practice regulation some time ago when the Office arranged for two regulatory impact assessment experts from the Commonwealth Office of Regulatory Review to travel to Queensland to present a workshop on compliance with regulatory impact assessment processes. In addition to that, most fair trading policy officers have completed the RIS training offered by the QORE. Other training arranged by the Office has included a presentation at the Queensland Parliament by the Scrutiny of Legislation Committee's research officer on the work of the Committee.

I understand the Director-General of the Department of the Premier and Cabinet is also responding to you with detailed comments on all the recommendations in your draft report. This department will comply with the strategies put in place by central agencies to address the concerns raised in your draft report.

I would like to take this opportunity to confirm DEEDI's continued commitment to establishing integrated and high quality internal performance management systems in line with the whole-of-government and national initiatives outlined above. To this end, I have tasked the newly formed Strategic Policy Coordination Unit to develop and lead a strategy to establish integrated planning, performance management and reporting systems across DEEDI. My expectation is to drive an increased level of maturity in DEEDI's performance management systems over the next two to three years.

In addition, the recent Machinery of Government changes and the bringing together of sub-organisational units with related regulatory responsibilities from a number of previous departments, has led to the establishment of a new Office of Regulatory Policy within DEEDI. This unit will consolidate staff with like functions, responsibilities and competencies to provide the most optimal approach for business and marketplace regulation. The establishment of this unit will maximise the opportunities for coordination and harmonisation of regulatory processes.'

2 Audit objective and approach

2.1 Regulatory reform

The impetus for regulatory reform in Australia since the 1990s has been the reduction of 'red tape' and its associated compliance burden on business and the community. Through the Council of Australian Governments (COAG), jurisdictions are cooperating to reform regulation making practices and progressing cross-jurisdictional uniformity under the National Reform Agenda and 'Regulatory Hot Spots' initiatives. Separate reform initiatives were launched at state level, which were intended to build upon the collaborative commitment being delivered through COAG. The newly formed COAG Reform Council has been charged by the States to monitor the progress of these reforms.

The World Economic Forum's Global Competitiveness Index rates the economies of 134 countries, in part, by evaluating government capacity to control against excessive bureaucracy, red tape and overregulation.⁴ In this report, Australia ranked 18th overall in the 2007-2008 GCI. Regulatory and legislative reform initiatives, such as those focusing on red tape reduction and alternatives to regulation, have been implemented in most Australian States and Territories, including Queensland. Despite these efforts, however, concerns about 'red tape' continue and Queensland's performance does not compare well to the progress achieved by other states. The Commonwealth Government's comprehensive review of regulation red tape led by the Chair of the Productivity Commission, provided a comparative measure of the total stock of regulation, including primary acts, subordinate regulations and other legislative instruments at 30 June 2007.

Governments around the world struggle to measure the degree of regulatory burden on their economies, and none have yet resulted in a reliable means for doing so. The Productivity Commission indexed the volume of legislation by number of pages, a measure the Productivity Commission itself, admits is only a rough means for comparison. By this measure, however, Queensland's volume of regulation exceeded all other states and territories, with over 70,748 pages of regulation,⁵ which Queensland accounted to its distinctive plain English drafting style which features a higher allocation of 'white space' per page, and the inclusion of supplemental information, including graphs, appendices and endnotes, to the page count.⁶ Both the Productivity Commission and Queensland agree that '*what ultimately matters to business is the number of regulatory obligations that they must comply with, and the concomitant compliance burden, not just the number of regulatory instruments*'.⁷

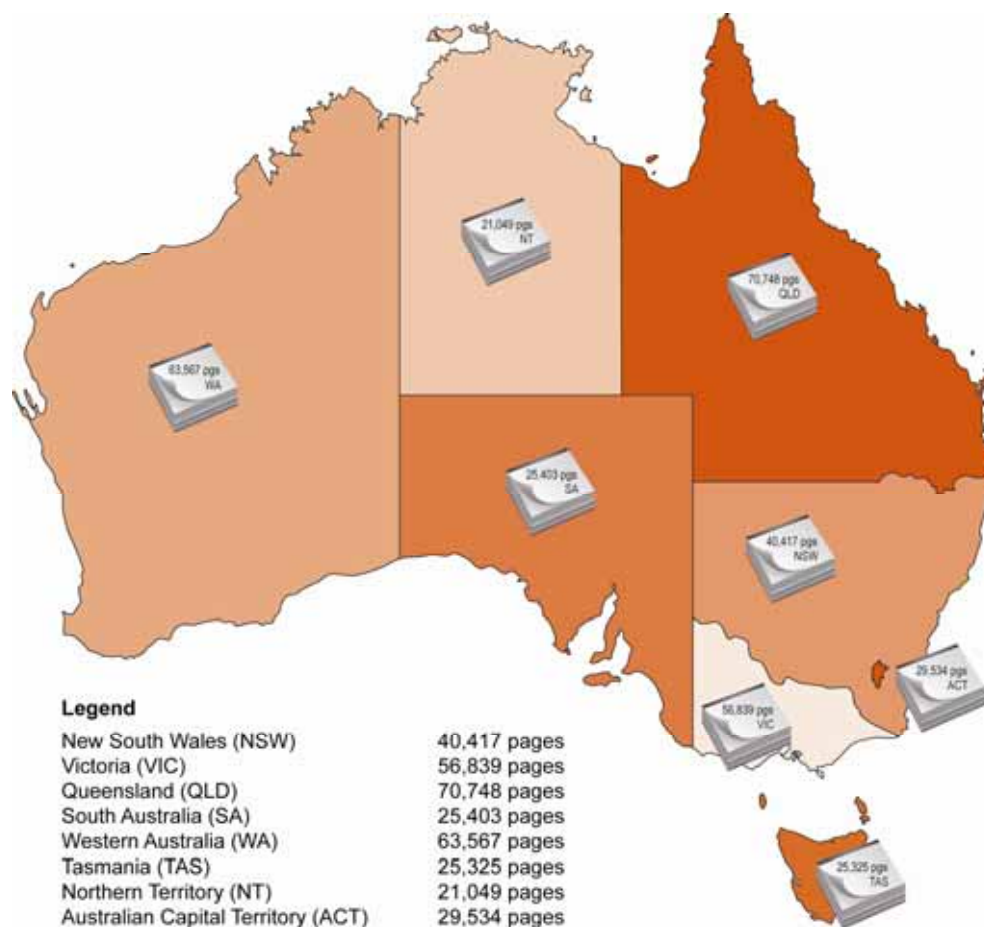
⁴ World Economic Forum, *The Global Competitiveness Report 2008-2009*.

⁵ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Quantity and Quality*, Research Report, 2007.

⁶ *Ibid.*

⁷ *Ibid.*

Figure 2A : Volume of regulation in Australia 2007, by state.



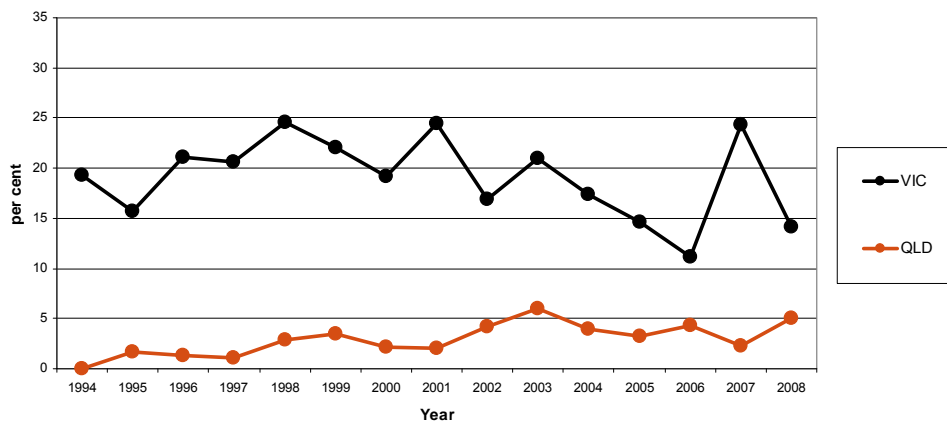
Source: Productivity Commission

Queensland legislators in the 1990s determined that there was benefit in providing full information to decision makers on how the proposed regulation would work and impact on business and the community. The requirement to prepare a Regulatory Impact Statement (RIS) was introduced in Queensland in 1994. The purpose of a RIS is to provide an assurance on subordinate legislation to Parliament that:

- the problem has been understood and options to resolve it are explained. The costs, benefits and risks are identified and addressed
- there is a balance between the public good and the rights of the individual which is demonstrated by an understanding of the impact of the regulation on fundamental legislative principles
- consultation has been conducted to inform and achieve a balanced outcome, as well as assisting the level of compliance with the regulation once it is imposed.

The Productivity Commission in its report, *Performance Benchmarking of Australian Business Regulation: Quantity and Quality*⁸ reported on the important role of regulatory impact assessments in enhancing the quality of regulation decision making. In Victoria, regulatory impact assessments are undertaken more frequently than in Queensland. Figure 2B shows the percentage of subordinate legislation tabled in Queensland that had a formal regulatory assessment or RIS completed, in comparison to Victoria. Current data for other states and territories was not available at the time of audit.

Figure 2B : Percentage of subordinate legislation with a RIS tabled in Queensland compared to Victoria



According to Victoria's experience, 'the steps that went into making a regulatory impact statement are steps that departments and agencies should go through to develop a policy at any event. Accordingly, the practical burden on departments and the running of the government should be a net zero cost. If not, proper, inherent mechanisms may not have been in place at an earlier time.'⁹

In my view, there are risks to Parliament where a significant proportion of subordinate legislation has not benefited from the in-depth analysis and consultation that can be realised through the use of the regulatory impact assessment process. Clearly, in order to realise the benefits afforded by this 'policy decision tool', the obligation to undertake a RIS should apply to a greater proportion of Queensland's regulation.

In spite of all the difficulties in measuring red tape and the acknowledged shortcomings of the available data, the analysis indicates that this area would benefit from a performance management systems audit.

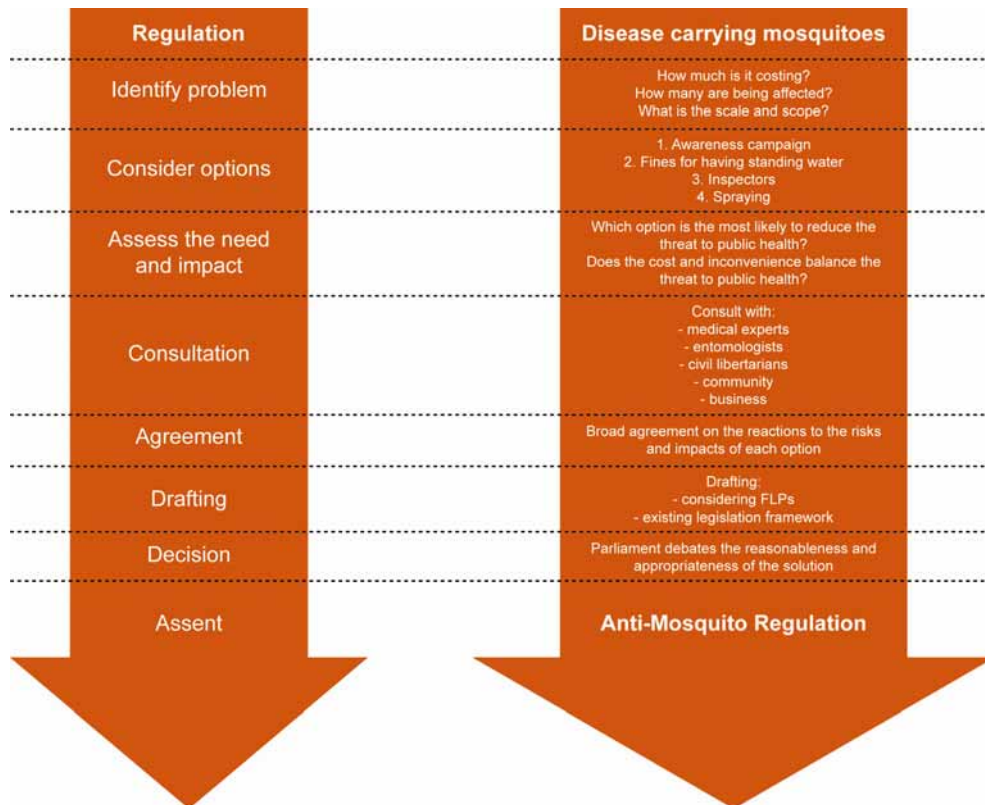
⁸ Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Quantity and Quality*, Research Report, 2007.
⁹ Queensland Scrutiny of Legislation Committee, *Report of Study Tour – Melbourne*, 4 and 5 March 2008.

2.2 How are regulations made?

'Regulation refers to the broad range of legally enforceable instruments which impose mandatory requirements upon business and the community, as well as to those government voluntary codes and advisory instruments for which there is a reasonable expectation of widespread compliance.'¹⁰

The figure below outlines the steps agencies can undertake to develop regulation.

Figure 2C : The main steps to make good regulation



Agencies developing these regulations have access to support from a range of expertise from within their own agency and each of the following central agencies.

Department of the Premier and Cabinet: Policy Coordination Officers provide support in the development of the content of Cabinet submissions.

Queensland Office for Regulatory Efficiency: Policy Officers provide advice on assessing the need for a RIS and provide assessments of the adequacy of RIS.

Office of the Queensland Parliamentary Counsel: Drafting Officers provide technical advice and draft government Bills, amendments to Bills and subordinate legislation.

Agency Cabinet Legislation and Liaison Officers: A network of officers across agencies who assist in the effective functioning and operations of Cabinet (including Cabinet related functions such as Cabinet Committees and Community Cabinet), Executive Council, legislative and parliamentary systems.

¹⁰ Council of Australian Governments (COAG), *Best Practice Regulation Guide For Ministerial Councils and National Standard Setting Bodies*, 2007.

The Scrutiny of Legislation Committee, a parliamentary committee, has a number of responsibilities as outlined below:

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

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

(b) the lawfulness of particular subordinate legislation; by examining all Bills and subordinate legislation.

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

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

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

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

- *section 9 (Meaning of subordinate legislation)*
- *part 5 (Guidelines for regulatory impact statements)*
- *part 6 (Procedures after making of subordinate legislation)*
- *part 7 (Staged automatic expiry of subordinate legislation)*
- *part 8 (Forms)*
- *part 10 (Transitional).'¹¹*

2.3 Reasons for the audit

The business sector has long argued, and Parliament has recognised, that too much regulation reduces competition and adds to the cost of doing business. The cost of complying with regulations may outweigh any benefit that it brings to the community or business.

Another major outcome of Australia's regulatory reforms during the 1998-2006 period was the development and implementation of a set of regulatory performance indicators, in order to manage the growing regulatory burden more effectively. These were adopted to assist the national benchmarking strategy by the Productivity Commission. Around the same time period (2007) the Business Council of Australia (BCA), in its report *A Scorecard of State Red Tape Reform*,¹² sought to apply a similar strategy to the review the performance of state and territory governments using an abbreviated subset of these indicators. Though the BCA study was not as extensive as the Productivity Commission substantial contribution, it was the first to attempt to benchmark state performance from the business industry's point of view.

¹¹ *Parliament of Queensland Act 2001*, s.103.

¹² Business Council of Australia, *A Scorecard of State Red Tape Reform*, 2007.

The BCA's overall assessment of Queensland's performance in reducing red tape was 'adequate but with clear room for improvement'. The BCA listed among the sample of state-based regulatory reform initiatives, the 2004-2005 Red Tape Reduction Stocktake, assessing that 'regulatory reform had reduced compliance costs in Queensland by \$14 million', as well as undertaking a number of public reviews focused on regulatory 'hot spots' and other specific industries. However, in regard to the four benchmarking measures applied by the BCA, Queensland's performance was assessed as 'good' only in its review processes. Queensland's performance in using the principles of regulation making, as well as in regard to its level of accountability, were both assessed as 'adequate, but with clear room for improvement'. In terms of its level of transparency, Queensland was assessed as 'poor'.

Figure 2D: The Business Council of Australia - Overall assessment of states and territories red tape reduction

EXHIBIT 1 - Overall assessment of regulation making	
State/Territory	Overall assessment
Australian Capital Territory	Adequate – but with clear room for improvement
New South Wales	Unable to assess at this stage*
Northern Territory	Adequate – but with clear room for improvement
Queensland	Adequate – but with clear room for improvement
South Australia	Adequate/good
Tasmania	Adequate – but with clear room for improvement
Victoria	Good
Western Australia	Poor

* Note: The BCA considers that it would be misleading to undertake an assessment of current regulatory processes in New South Wales. While there is clear and broad agreement that these processes have been poor to date, the New South Wales Government has recently committed to some significant reforms resulting from a review of red tape conducted by the Independent Pricing and Regulatory Tribunal (IPART). Those reforms are currently being implemented and cannot be assessed for their operational effectiveness. The BCA welcomes the efforts of the New South Wales Government to comprehensively review its regulatory regime and to improve its processes, and will be monitoring developments in the implementation stage of regulatory reforms in New South Wales.

The BCA highlighted the fact that no state or territory received an excellent assessment, and that only Victoria received consistently good results in all four benchmark measures. The BCA found it 'disappointing that most jurisdictions have yet to establish an independent agency to assess the adequacy of regulatory compliance'¹³, and that the agreement to the COAG's principles of best practice regulation had not been followed up by a greater 'emphasis on accountability and consultation mechanisms', at the jurisdictional level.

2.4 Audit objective

The objective of the audit was to determine whether agencies have appropriate systems in place to assess options or alternatives to regulation, and the need for, and impact of, proposed regulations and amendments to existing regulations.

In addition, the audit assessed the level of compliance of explanatory materials of a sample of primary and subordinate regulations with the *Legislative Standards Act 1992* (LSA) and the *Statutory Instruments Act 1992* (SIA).

¹³ Business Council of Australia, *A Scorecard of State Red Tape Reform*, 2007.

2.5 Audit scope

Four line agencies were selected based on the significance of their regulatory roles and responsibilities, materiality of revenue, and their coverage of critical areas of public health and safety and the environment. Significant machinery-of-government changes effective 26 March 2009, were made across the public sector during the fieldwork conducted between February and April 2009. Agencies selected for this audit, in the new machinery-of-government format, are outlined below:

- Treasury Department
- Department of Environment and Resource Management
 - Former Environmental Protection Agency
 - Former Department of Natural Resources and Water
- Department of Justice and the Attorney-General
- Department of Employment, Economic Development and Innovation
 - The Office of Liquor, Gaming and Racing (formerly with the Treasury Department)
 - The Office of Fair Trading (formerly with Department of Justice and the Attorney-General).

During the conduct of the audit, several key agencies were identified as playing a major role in providing guidance on the regulatory process. Officers from the following agencies were interviewed as part of the audit process to determine whether appropriate guidance, tools and training is provided to Queensland government agencies:

- Office of the Queensland Parliamentary Counsel (OQPC)
- Department of the Premier and Cabinet
- Queensland Office for Regulatory Efficiency (QORE) within Treasury Department.

The audit scope did not extend to an the examination of quasi-regulation, bylaws, or local authority regulations. The audit was also restricted to the frameworks and systems used by line agencies to comply with legislative requirements, guidance and advice from central agencies and the COAG's *Principles of Best Practice Regulation*. The audit was limited to the Explanatory Notes (EN) and RIS tabled at the time the regulation was introduced to the Legislative Assembly. It did not cover the systems and frameworks regulators use to ensure compliance, handle complaints and ensure quality services.

Audit applied the Scrutiny of Legislation Committee advice to assess the information provided to meet the legislative requirements of the sample of explanatory materials selected for the desk review. Further detail is provided in Sections 5.4 and 5.5.

2.6 Audit procedures

The audit was undertaken using a mixture of desk audit analysis, interviews conducted at agencies and review of the evidence gathered. The audit sought to determine the maturity of systems in place to comply with current legislation and, where possible, how well equipped agencies were to apply principles of best practice to their processes.

A sample of primary and subordinate legislation passed or amended since 2005 was selected from the four government agencies. An assessment of the associated EN and RIS prepared as part of the regulatory process was undertaken to determine the level of compliance with the LSA and the SIA. The results of this analysis are presented in Section 5.

3

Developing regulation

Summary

Background

*'Regulation is an essential part of running a well-functioning economy and society, but must be carefully designed so as not to have unintended or distortionary effects or imposing unnecessary or onerous costs on those affected by the regulations.'*¹⁴

Government agencies need good systems to develop options and assess the need for, and impact of, proposed regulation. Agencies also need to provide quality information to decision makers (Cabinet and Parliament) so they can be confident that proposed regulatory options have been carefully considered, and are a reasonable and appropriate response to the problem.

Key findings

- There are areas where the level of detail provided in the Explanatory Notes (EN) and Regulatory Impact Statements (RIS) could be improved to ensure full compliance with the relevant legislation. Although the audit identified that, in many cases, the appropriate consideration had been undertaken by the agencies to satisfy the legislative requirements, it was not always provided for the consideration of Parliament. A lack of documentary evidence in the ENs and RISs on these issues (refer Sections 3.2 and 3.3) reduces the quality of information provided to Parliament for its decision making.
- Agencies have ad hoc systems in place to assess options and alternatives to regulation, and the need and impact of proposed regulation, for each stage of the regulation making process. The principles of best practice regulation were not in place. The risk is that inconsistently collated information is provided to Parliament as the basis for its decision making.
- Agencies are relying heavily on the Cabinet Handbook to develop regulations. This handbook was designed to outline the procedures used to submit a range of documents for Cabinet's consideration rather than fulfilling the information requirements of Parliament regarding developing good regulation. The result is that agencies are focused on Cabinet processes rather than providing key information for Parliament's needs in line with the legislative requirements.

¹⁴ The Office of Best Practice Regulation, *Users Guide to Best Practice Regulation Handbook*, Australian Government, August 2007.

3.1 Informing decision makers

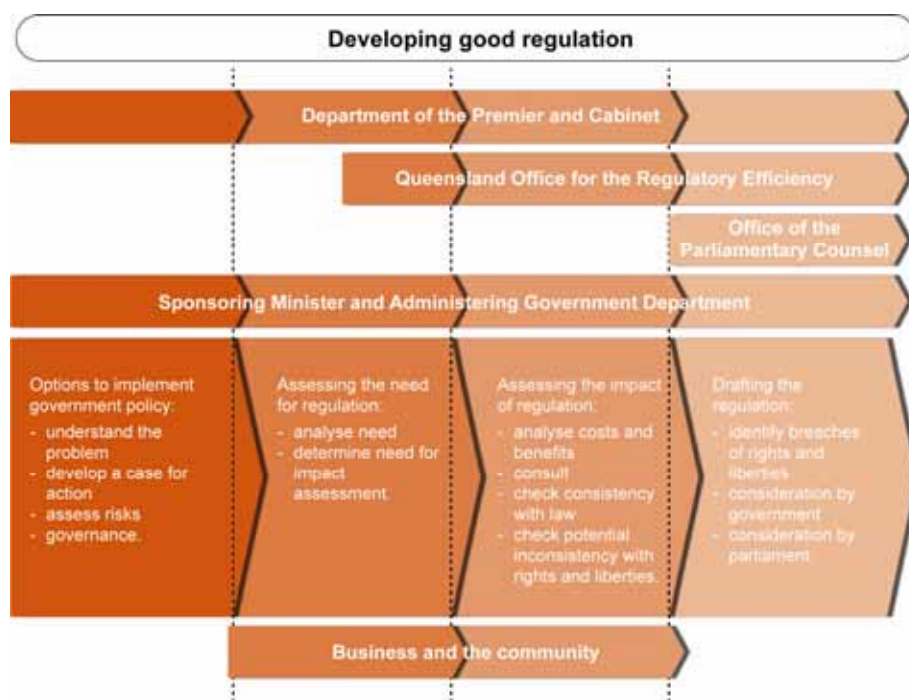
Parliament has set the standard of information it expects to receive during the regulation making process. The information requirements are outlined in the *Legislative Standard Act 1992 (LSA)* for primary legislation and the *Statutory Instruments Act 1992 (SIA)* for subordinate, or secondary, legislation. The Scrutiny of Legislation Committee is a standing parliamentary committee that reviews all introduced Bills and comments on their compliance with fundamental legislative principles.¹⁵ A key part of the process is an assessment of potential breaches of fundamental legislative principles. The principles protect the civil liberties of individuals and the institution of parliament. This is part of a system of controls to ensure regulation is produced in line with democratic principles, and is representative, balanced and accountable. Extracts of the LSA and SIA are provided in Sections 5.1 and 5.2 of this report.

These Acts provide the minimum information requirements when drafting regulations. If agencies fully comply with these requirements, Parliament can be assured that they have been provided information that has been developed through a process of consultation and analysis.

If the development of policy goes beyond mere compliance and incorporates the principles of best practice, Parliament can be assured that the following has been undertaken and applied to the policy issue:

- appropriate and reasonable options have been developed for their consideration
- the costs and benefits including the cost to government have been analysed
- full consultation has been undertaken with all stakeholders on the needs and impact of proposed regulation.

Figure 3A : Areas involved in developing regulations



¹⁵ Queensland Government, *The Queensland Legislation Handbook*, 2004.

To produce effective information that supports good regulations and meets Parliament's needs, agencies need systems that provide the critical information to the process. The systems audited and their contribution are discussed in Sections 3.2 and 3.3 below.

3.2 Meeting legislative requirements

Audit undertook an assessment of the explanatory materials on a sample of regulations produced by four agencies over the past three years to ascertain their level of compliance with the requirements of the *Legislative Standard Act 1992* (LSA) and *Statutory Instrument Act 1992* (SIA). (See Sections 5.1 and 5.2 for a listing of the requirements of the two pieces of legislation.)

The EN for 14 Bills were assessed against the LSA. Of the 14 EN, only five provided adequate detail against the requirements of the LSA – nine EN across all agencies audited had areas where they could be improved as they were deficient in some respect. The detailed assessments can be found in Section 5.4 of this report.

Eight RIS were assessed against the SIA. Of the eight, only three provided adequate detail against the requirements of the SIA. The detailed assessments can be found in Section 5.5 of this report.

Collectively, the key areas of legislative requirements not fully addressed are outlined in Figure 3B below.

Figure 3B : Key aspects of Acts not addressed

Act	Key areas not addressed	The implication for Parliament
LSA s23(1)(c) SIA s44(c)	Brief statement of the way the policy objectives will be achieved, and why this way of achieving them is reasonable and appropriate.	Without a statement of reasonable and appropriate achievement of policy objectives by the preparers of the regulation, Parliament can, if time permits, request further information or draw its conclusion based on the information provided which may be incomplete or deficient.
LSA s23(1)(e) SIA s44(g)	Brief assessment of the administrative cost to government of implementing the bill or regulation.	Full costing information may be hidden within existing budgets and skew the real economic implications for the State and stakeholders.
LSA s23(1)(f) SIA s44(h)	A brief assessment of the consistency of the bill or regulation with fundamental legislative principles (FLPs).	If full information on the impact of FLPs is not present, it is not clear to Parliament that all implications have been addressed.

Specific advice on the individual requirements has been provided by the Scrutiny of Legislation Committee in its August 2001 *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*¹⁶ (see Section 5.6 for a summary) and periodically in its Alert Digests and later Annual Reports.

Audit found that there were distinct patterns in the areas of information not being provided in the EN and RIS, as outlined in Figure 3B. There were many examples of EN that reported that there were no additional cost to government of administering the Bill because it would be absorbed within existing budgets. This fails to meet the requirements of the LSA and the specific guidance provided by the Scrutiny of Legislation Committee.

¹⁶ Queensland Scrutiny of Legislation Committee, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*, August 2001.

*'In the committee's view, the use of the word "assessment" indicates that some appraisal of the relevant issues is required. An appropriately prepared Explanatory Note will clearly show that departmental officers have given the matter serious consideration, and will contain information which is useful to the reader. A simple assertion in the Notes that there are "no costs" will tend to suggest that the issue has received scant attention, or that some information is being withheld.'*¹⁷

Examples of the unreported costs to government found by the audit were:

- training of staff to implement new regulations
- lost revenue from the disposal of assets
- advertising of changes in land use as a result of regulation changes
- inspection and compliance costs
- maintenance and depreciation costs of acquired/transferred assets.

The risk of absorbing these costs into existing budgets is that already budgeted programs and services may need to be reduced to accommodate the new costs of the regulation. If Parliament is not provided with useful information on the costs to government, it may not be able to fully judge whether the benefits of the regulatory solution being proposed outweigh the costs.

Whilst the LSA and SIA state that the requirements are intended as guidance only in the development of EN and RIS, these Acts also indicate that it is Parliament's intention that the guidelines be complied with. The exclusions of the assessments in Figure 3B for both EN and RIS do not facilitate the making of good regulation by Parliament because key information is omitted or inadequately reported.

Audit found that while agencies had often considered the issues required under the LSA and the SIA as part of the development of the regulation, they did not always convey this information to Parliament through the EN or RIS. A number of officers informed audit that at times the non-inclusion of information resulted from their perception that having considered the issues and, concluding that the issues were insignificant, they believed that the requirement to provide the information was not relevant or necessary.

Audit found that most agencies cited the use of the *Queensland Cabinet Handbook* as the 'policy' in use to guide the making of regulatory policy. However, the authors of the handbook state that was not its intended purpose. The use of the handbook substituted or replaced agency policy. Coordination and communication occurs predominantly through the direction of the Department of Premier and Cabinet (DPC), the Office of the Queensland Parliamentary Counsel and the Cabinet Legislative and Liaison Officer network. This process is effective for controlling scheduling for the items to be considered by Cabinet, however, it does not replace the need for agency level systems to coordinate, support and oversee the engagement of staff and resources, as well as the process and the delivery of quality outcomes. Given the Business Council of Australia's (BCA) performance assessment of Queensland's regulatory process as 'poor' with regard to transparency¹⁸ (see Section 2), this is one area where the development of explicit systems within agencies is needed.

¹⁷ Queensland Scrutiny of Legislation Committee, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*, August 2001.

¹⁸ Business Council of Australia, *A Scorecard of State Red Tape Reform*, 2007.

3.3 Systems for analysis and consultation

Agencies need systems to ensure that good regulation is developed so that Cabinet and Parliament have the information they need. Audit looked for systems to identify options for decision makers (Cabinet and Parliament) to consider the possible ways to address the policy problem. Audit then assessed the systems agencies used to determine the need for the regulation and the impact on business and the community.

Audit acknowledges the comments made by agencies that each piece of legislation is different and requires a tailored approach to its development. However, there is a standard process used in the development of all legislation and the provision of decision making information to Parliament.

Audit also noted that on occasions, there is pressure on agencies to develop regulatory solutions quickly. This may mean that the processes or systems are not fully considered or implemented due to short timeframes.

Considering options

The first stage of developing regulation is to determine the alternatives available for consideration. At times, the pressure of the problem presented may reduce or exclude the consideration of the key processes also noted in Figure 3C. Even when a legislative approach appears to be the best alternative, consideration of all possible options can yield an effective, and potentially, less costly remedy.

Figure 3C : Options



Scale and scope

When considering options, understanding the size and complexity of the problem and how deeply it affects the community, will impact on the proposed remedy to be applied.

It is imperative that all parties in the process have a comprehensive understanding of the issue and its potential implications. Without such knowledge the problem could be inadequately addressed.

Audit found that the audited agencies have ad hoc systems in place to assess options and alternatives to regulation. The systems for assessing the scale and scope of the policy problem were not clearly documented at any of the agencies audited.

Although some agencies could adequately assess scale and scope of the policy problem with an ad hoc approach, the risk is that inconsistency can lead to mistakes and omissions in the analysis and consultation. Agencies may not be able to identify synergies from one process to another because there is not a documented, standardised system or tools and templates to aid in the process.

Case for action

Parliament receives advice from agencies on socially, economically or environmentally feasible options to address the problem. A well rounded case for action aids in determining which approach is the most beneficial overall for the community.

At times, assessing scale and scope and developing a case for action may be subject to constraints imposed by government's decisions, such as a pre-determined path to developing legislation. Usually, there are issues of public safety or other significant matters that require a legislative approach being taken. While there are instances where this occurs, it is still beneficial for the agency to undertake the analysis of alternatives for presentation to the Parliament for their consideration.

Failure to fully explore all feasible alternatives may lead to unnecessary development of regulation which can be costly to develop and maintain, and may still not achieve the policy objectives.

Risk

The risks associated with specific options cannot always be determined at the initial stages. Agencies are best positioned to refer the implications of known risk to Parliament to aid in determining the most appropriate action.

Systems supporting the risk analysis varied across, and within, agencies. The risk analysis process often relies on the expertise of long-standing and experienced agency officers whose knowledge and on the job training often replaced documented systems and procedures. The risk is that reliance on individuals can lead to independent and varied implementation of policy. Dependence on officers' expertise was particularly prevalent in the areas of defining the scale, scope and risks associated with the problem.

Governance

Robust governance systems ensure that the process fulfils the requirements of making good regulation in a consistent and methodical manner. Parliament can be assured that all stakeholders and decision makers have been consulted at key points of the process.

Notably, audit found that governance processes at each of the agencies followed the hierarchy of the agency without formally documented roles and responsibilities. In the absence of a formal statement of senior executives' expectations, such as in a policy, the question arises as to how the executive can be assured that the process as outlined in the LSA and SIA has been given due regard. The risk is that if the agency does not set the standards, then individual officers set their own standards based on their personal experience and judgement. The process may then be short-cut without key points for authorisation and consideration by agency executives.

Audit found an exception at one agency which had in place a Legislative Oversight Committee. The committee outlined some brief expectations in documents to policy officers developing legislative proposals. A more complete set of policy documents would allow a committee like this to assure the executive group that clear and documented processes are in place to meet the agencies' legislative responsibilities.

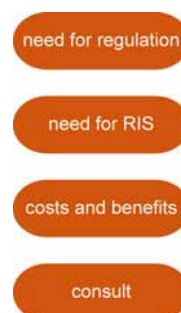
Assessing need and impact of proposed regulation

Key processes underpin the gathering of information to fully inform and shape the policy outcome. Understanding the need for the regulation and its consequences in terms of impact is a critical component of developing the regulation.

Key information is sought from a range of stakeholders, predominantly the community, business and government. While there is a balance between costs and benefits to all parties, often the consultation assists in achieving a mutually agreeable outcome.

Audit found that the agencies' systems in place to assess the need for, and impact of, proposed regulation were mainly ad hoc. Some examples of operational systems were noted in agencies, with practices aligned to best practice noted for several agencies in isolated procedures.

Figure 3D : Need and impact



Need for regulation (options)

Once suitable options are determined as possible responses to the problem, a more thorough examination of these options is undertaken, including the need to develop regulation. At this point, it is critical to extend consultation already undertaken to the broader community and ascertain the issues key to these stakeholders.

The selection of alternatives, together with costs, benefits and associated risks, provides a range of researched options for Parliament to consider in addressing the identified problem.

Need for RIS (appreciable cost)

The determination of appreciable cost triggers the need for an agency to produce a RIS. In its *Guide to Completing the RIS Assessment Form*, Queensland Office for Regulatory Efficiency (QORE) states that:

'Without limiting its scope, the term "appreciable cost" generally applies where proposals are likely to have a substantial negative impact, either directly or indirectly, on:

- *individuals within the community*
- *business and/or industry sustainability and/or*
- *the community as a whole*

from a social, economic and/or environmental perspective, taking into account the particular circumstances of stakeholder(s) concerned, and any negative public perceptions and sensitivities likely to be associated with a proposal.'

The Guide asks a series of questions that prompt an agency in determining whether appreciable cost applies.

Therefore, the RIS seeks to inform stakeholders of critical aspects of the regulation-making process and the likely impact of the regulation.

Audit found that none of the agencies had adequate systems in place to determine appreciable costs. Guidance, on determining appreciable cost, offered by QORE is minimal and does not provide sufficient information to agencies to be able to adequately assess the cost to business and the community. In addition, audit noted that QORE offers one-on-one advice in relation to RIS enquiries, however, its role is advisory and agencies remain responsible for ensuring the requirements of the SIA are met. The risk is that agencies opt not to undertake the RIS and consultation process without a rigorous determination of whether an appreciable cost exists. Avoiding the RIS process largely excludes community interaction and can create acceptance issues after the regulation has been passed in Parliament. It also reduces the amount of information flowing to Parliament in assisting the decision making process.

Audit noted that at one agency it was common practice to undertake the RIS process, regardless of the appreciable costs. The main factor influencing its decision was the nature of the regulation administered. The outcome for this agency was better community consultation and interaction in the implementation of the desired outcome.

Costs and benefits, consultation and fundamental legislative principles consideration

There are three key points to consider in assessing the need and impact of proposed regulation on stakeholders:

- the costs and benefits of all options allows Parliament to consider the impact of the option on the community, business and government
- the level of community and governmental consultation undertaken and agreement reached by agencies guides Parliament in understanding the views of stakeholders and allows for informed decision making. Parliament can also gain an important understanding of how the proposed regulation impacts on stakeholders' rights and liberties
- an assessment against the fundamental legislative principles (as set out in Section 4 of the LSA) is aimed at protecting the rights and liberties of individuals and the institution of parliament.

Audit noted that when a RIS is undertaken, a more robust analysis of these key factors occurs.

The RIS and EN provide vital information to Parliament on the analysis and options available to resolve the policy issue. The risk of incomplete information being provided to Parliament could have unintended or an adverse impact on the effectiveness of its decisions.

3.4 The COAG Principles of Best Practice

In 2007, the Council of Australian Governments' (COAG) Principles of Best Practice Regulation were introduced to improve regulatory outcomes. These principles were agreed through COAG by each Australian State and Territory (see Section 5.3). These principles specify the application of evidence, analysis and consultation processes as 'controls', against the risk of resulting policy that is neither balanced nor efficient. The legislative requirements of the LSA set the minimum standard while the principles of best practice regulation take it further, to how regulation can be developed to ensure better outcomes for business and the community.

Audit found some examples aligned to best practice, however, these examples were not supported by documented frameworks and systems that would ensure consistent practice. For example, the extent to which analysis and consultation was carried out was largely dependant on the amount of time allotted to the agency to complete the regulation, rather than following documented and approved policies and procedures.

3.5 Conclusion

There are times when government needs to introduce regulation within a short timeframe to respond to public health, safety or environmental issues. Poorly documented systems contribute to inefficiencies in developing the proposed regulation when this occurs. When shortcuts are taken, full analysis and consultation of options, needs and impact of proposed regulatory solutions are not always considered.

EN and RIS that are not fully compliant with the guidance requirements of LSA and SIA are causing incomplete and poor quality information to be provided to Parliament for their consideration. In addition, audit found that agencies rely on the Cabinet Handbook to drive the development of legislation within their organisations. The network of Cabinet and Legislation Liaison Officers and the Cabinet information system ensure Cabinet's information needs are met on time.

Parliament set out its information needs in 1992 in the LSA and the SIA. One agency audited had previously maintained policies and procedures on their legislation development processes, but in recent years, has changed to using the Cabinet Handbook. Audit found no evidence of any systems or resources dedicated to ensuring the information provided for consideration by Parliament are met.

None of the four agencies audited had fully documented policies and procedures in place to guide the development of regulation, rather a series of ad hoc and inconsistent processes were used. The risk to these agencies in using ad hoc systems is that there is no clear direction or process to guide officers to ensure a consistent and compliant approach is taken on each piece of regulation developed. The subsequent lack of consistency does not allow for improvement to processes nor does it allow for officers to gain a consistent knowledge base.

Audit found that the COAG's principles of best practice regulation were not incorporated into agency policies and procedures, even though the State has committed to do so. The handbooks and documentation of the audited agencies, used to support officers developing regulations are aligned with the Cabinet Handbook and not the principles of best practice regulation or the requirements of the LSA and SIA. Audit found examples where this resulted in Queensland regulations being developed without the required levels of analysis and consultation being provided for Parliament's consideration. Parliament and government are not assured of receiving the level of information required by legislation or recommended by best practice when considering regulations.

The agencies audited have experienced officers who undertake the regulation making process. Without documented process, the reliance on officers' expertise is heightened. The risk to agencies is that there may be a loss of expertise when officers leave the agency, resulting in process inefficiencies and uncertainty of expectations.

3.6 Recommendations

It is recommended that:

- agencies develop and implement policies and procedures to enable them to fully address the requirements of the *Legislative Standard Act 1992* and *Statutory Instruments Act 1992* when developing Explanatory Notes and Regulatory Impact Statements for proposed regulation
- agencies incorporate into their policies and procedures, the 2007 Council of Australian Governments' Principles of Best Practice to fully inform Parliament and aid in its decision making processes when considering regulatory solutions.

4 Supporting quality regulation

Summary

Background

*'Accountable officers are required to establish and maintain appropriate systems of internal control and risk management.'*¹⁹ Clear standards and expectations ensure that an organisation's affairs are being managed effectively, efficiently, economically and with due regard for the rule of law. Through guidance, support and training, standards are set, expectations clarified and outcomes supported by adequate process.

This section presents the findings, conclusions and recommendations for guidance, support and coordination of the development of regulation in government.

Key findings

- Guidance and support is available for policy officers from the Queensland Office for Regulatory Efficiency (QORE), the Department of the Premier and Cabinet and the Office of the Queensland Parliamentary Counsel (OQPC).
- There are no overarching guidelines for disseminating best practice principles for developing regulations. While the 2009 Regulatory Impact Statement Procedures and Requirements address some of the elements of the Council of Australian Governments' (COAG) principles of best practice, they only apply to subordinate legislation that requires a Regulatory Impact Statement (RIS) (approximately five per cent). This encourages a siloed and inconsistent approach to the development of regulation.
- The lack of centrally coordinated training means there is no assessment or systematic development of the skills necessary for the efficient drafting of regulations that align with best practice.
- Queensland Treasury is now leading and directing the national and state regulatory reform agenda across Queensland Government.
- A gatekeeper with broader authority and accountability would ensure greater consistency and the uptake of best practice for all primary and subordinate legislation.

¹⁹ *Financial Accountability Act 2009*, s.61.

4.1 The role of central agencies

Guidance and support for policy officers developing regulation is provided by:

- Department of the Premier and Cabinet (DPC)
- Queensland Office for Regulatory Efficiency (QORE)
- Office of the Queensland Parliamentary Counsel (OQPC).

DPC is the administering agency for the *Legislative Standards Act 1992* (LSA) and the *Statutory Instruments Act 1992* (SIA). DPC delegates responsibility to the QORE for Section 44 of the SIA which provides guidance on the content of RIS.

QORE offers guidance and support for policy officers developing subordinate legislation. If requested, it provides advice to agencies on whether or not the completion of a RIS is recommended. QORE is also available to provide support in developing RIS and in assessing the statement's compliance with the SIA.

OQPC is responsible for ensuring that Queensland legislation is of the highest standard. This is achieved by providing an effective and efficient legislative drafting service for Queensland legislation. The office also ensures that Queensland legislation, and information related to Queensland legislation, is readily available in both printed and electronic form.²⁰

4.2 Promoting best practice

Queensland policy officers developing regulation have access to a number of sources of guidance from the central agencies. The sources referenced by agency staff were:

- the Legislation Handbook – OQPC
- the Queensland Cabinet Handbook – DPC
- Regulatory Impact Statement Procedures & Requirements – QORE.

Audit found that although the above guides had been reviewed or benchmarked against other jurisdictions, they had not been updated to ensure that all regulatory processes in Queensland are consistent with the COAG's principles of best practice regulation. In Queensland there is no overarching better practice guide that clearly outlines the eight COAG principles of best practice (see Section 5.3). New South Wales and Victoria released comprehensive guidelines that focus on best practice for the development of regulation in 2008 and 2007 respectively.

While the current Regulatory Impact Statement Guidelines which were released in June 2009, reflect the intent of some aspects of the best practice principles, they only apply to a small proportion (approximately five per cent) of the subordinate legislation developed or amended in Queensland. There is a need for more overarching guidance to policy officers to clarify how to apply the principles when developing plans to implement government policy that may include a regulatory response. Audit also found that many policy officers interviewed were unaware of the COAG best practice principles.

²⁰ Office of the Queensland Parliamentary Counsel, *Annual Report, 2007-2008*.

As audit found that none of the agencies audited have documented policies and guidelines on developing regulation (see Section 3.3), it is therefore even more critical that the guidance material provided by central agencies is current and aligns with best practice principles. Outdated materials could lead to policy officers seeing the regulatory impact assessment process as unnecessary or of little value. The guidance materials need to clearly explain how the elements of the process will provide decision makers with the information they need to make good regulation.

4.3 Training for quality

It is essential that staff are fully equipped to undertake the responsibilities expected of them. Training provides opportunities to build on existing skills and approaches, and develop new ones. Training and continuous support also provides a means of changing attitudes towards new approaches that can initially be met with resistance. The Organisation for Economic Cooperation and Development (OECD) research²¹ has found that successful implementation of regulatory assessment processes and policy require a change in the culture of the system.

The four agencies audited did not have any training programs specifically targeted at policy officers developing regulation and there is currently no centrally coordinated training. The lack of on-going training means that skills, knowledge and attitudes to developing good regulation are not being systematically and consistently developed across the sector. Current approaches to determining appreciable cost, developing an effective case for action and managing efficient consultation practices are not being disseminated. Without a coordinated focus on training, the cultural change and skills needed by policy officers to develop good regulation cannot be assured.

As the burden on individual agencies of developing and running training programs for policy officers may be excessive, a centrally coordinated approach could provide a more cost and quality effective way of providing training. It could also develop a culture across the budget sector that supports best practice.

4.4 Seeking timely advice

The development of primary or subordinate legislation involves a series of complex tasks including the formation of government policy (Cabinet submissions), the completion of a RIS (where specified) and the drafting of legislation and accompanying Explanatory Notes (EN). There are critical processes and timelines to understand and principles to follow to deliver a good outcome.

The steps in implementing government policy include distinct stages in the Cabinet process. The submissions involved are:

Stage 1 Policy Submissions – documents that primarily form the basis on which major government policies are determined.

Stage 2 Policy Memorandum – provides broad canvassing of all policy options for a particular issue or problem.

²¹ Organisation for Economic Cooperation and Development (OECD), *Building an Institutional Framework for Regulatory Impact Analysis (RIA)*, 2008.

Stage 3 Authority to Prepare a Bill – explains the reasons for initiating a legislative proposal and seeks Cabinet approval to commence drafting.

Stage 4 (for primary legislation) Authority to Introduce a Bill – provides sufficient information to facilitate introduction of the Bill to Parliament.

Stage 5 (for subordinate legislation) Authority to Forward Significant Subordinate Legislation – addresses the core issues, and includes the compliance statement and RIS.

A key step in the RIS process is to undertake a thorough analysis of the various options to implement government policy. However, audit noted that advice on developing options was sought by agencies from QORE at the ‘authority to forward significant legislation’ stage (Stage 5) after the decision to regulate had already been made by Cabinet, which often occurs at the policy development stage (Stages 2 and 3).

QORE’s ability to influence the development of a more complete range of policy options that considers alternatives to regulation is lessened by being involved at this late stage. This is because tight Cabinet timeframes and rigid processes make it difficult for agencies to reconsider alternative approaches.

If QORE were consulted at the policy submission stage it could have greater influence on the analysis of the options and consultation processes that occur at this early stage. This could provide government with advice on options that have also considered non-regulatory approaches and thereby lessen the regulatory burden on business and the community.

Audit was informed by all line agencies audited, that the advice provided in how to follow the processes, meet the timelines, and conduct the RIS, was greatly appreciated by the policy officers. The advice and support provided by the drafting teams of Office of the Queensland Parliamentary Counsel in particular, was very highly regarded.

4.5 The national agenda

As a member of the COAG, Queensland agreed to a number of reforms aimed to better control the quality and quantity of the regulation produced. Queensland’s commitments, all due for implementation in late 2007, included:

- establishing a Cabinet Committee to direct and drive the national and state regulatory reform agenda at a whole-of-government level
- enhancing current gatekeeping arrangements and impact assessment processes
- implementing strategies for improving consultation arrangements with respect to legislation development and review
- developing more robust and user friendly guidelines to regulatory agencies on regulatory development, implementation and review.²²

Queensland Treasury advised that at 30 June 2009, progress against these commitments have been made in the following areas:

- The Treasurer is now leading and directing the national and State regulatory reform agenda across the Queensland Government, with the same role and responsibilities as proposed for the Cabinet Committee.

²² Council of Australian Governments, *COAG National Reform Agenda: Regulatory Reform Plan*, April 2007.

- The QORE was transferred from the former Department of State Development to Treasury Department in early 2008 to better support the Treasurer in this role to centrally drive the implementation of the Smart Regulation Reform Agenda across government.
- QORE has implemented several initiatives to enhance the current gatekeeping arrangements and regulatory impact assessment processes including the revised RIS self assessment form to include impacts on government and revised 2009 RIS Guidelines.
- QORE, working with Smart Services Queensland, now require all agencies to publish notification of consultation on all RIS and Public Benefit Test documents, and any other significant policy proposal, via the Queensland Government's **Get Involved: Have Your Say** site.
- In June 2009, QORE released a revised version of the RIS Guidelines. This 2009 version contains more comprehensive information about the RIS process and RIS requirements for agencies under the SIA.
- Queensland Government agencies have undertaken, and continue to conduct, reviews in consultation with industry to identify and address regulatory issues for business.
- Queensland Government has set an initial target in reducing the compliance burden to business and the administrative burden to government is \$150 million per annum by the end of 2012-13.

Ongoing progress against these commitments and others have been included in the *National Partnership Agreement to Deliver a Seamless National Economy*. It is encouraging that this activity is underway in the development of primary and subordinate legislation, however, audit found that as the legislation assessed was drafted prior to 2008, there were only a few isolated examples of best practice. While Treasury Department has responsibility to implement a regulatory reform agenda for the development of primary and subordinate legislation, the legislation audited pre-dated these initiatives. As a consequence the impact of these commitments will need to be assessed as part of a subsequent audit.

Audit observed that the impact of not having a centralised gatekeeper with sufficient authority and oversight for the development of both primary and subordinate legislation combined with agencies having ad hoc systems, was that the development of regulation was ad hoc and inconsistent.

In 2008, an OECD report said '*Checks and balances can only be in place where information and decisions are shared, transparent and accountable*'.²³

²³ Organisation for Economic Cooperation and Development, *Building an Institutional Framework for Regulatory Impact Analysis: Guidance for Policy Makers*, 2008.

4.6 Conclusion

Guidance and support is available to policy officers developing regulations from a range of experts, however, the suite of guidance materials provided by central agencies does not provide clear guidance to policy officers on how to apply the principles of best practice regulation. This has encouraged a siloed and inconsistent approach to regulation. Agencies are relying on the expertise of their policy staff but are not providing on-going training or clearly documented policy frameworks in which to operate. Given the heavy reliance of agencies on the skills and expertise of their staff, greater support for policy officers would seem to be a prudent investment.

Audit noted that the lack of a dedicated gatekeeper with accountability for overseeing all regulatory processes and ensuring consistency, credibility and quality, resulted in no one focusing on driving a culture of best practice or coordinating agencies in the reduction of red tape at a State level.

This central body or position needs adequate authority and skills to perform this function. Experience from Europe *'suggests that the units are best located at the centre of government, such as the ministry of finance or the prime ministers' office, in order to indicate that regulatory quality is a high priority for the government and that reform is broad-based with the specific goal of improving the quality of citizens' lives.'*²⁴

Fragmented governance has led to central agencies not providing effective guidance and support, and line agencies focusing on Cabinet's requirements and timelines. This is causing a lack of compliance with the *Legislation Standard Act 1992* and SIA, as well as inconsistencies in the application of best practice. This is where the role of gatekeeper has the potential to encourage consistent compliance with the requirements and facilitate cohesive and coordinated practices across government to produce good quality regulations.

4.7 Recommendations

It is recommended that:

- **central agencies review their guidance materials to align them with the principles of best practice regulation**
- **Department of the Premier and Cabinet work with Treasury Department to facilitate the development of a training framework for policy officers developing regulations**
- **central agencies collaborate to identify and develop the role of a regulatory gatekeeper to ensure a smooth and consistent governmental approach to developing quality regulation (both primary and subordinate).**

²⁴ Organisation for Economic Cooperation and Development, *Building an Institutional Framework for Regulatory Impact Analysis: Guidance for Policy Makers*, 2008.

5 Appendices

5.1 Extract *Legislative Standards Act 1992*

Section S23 Content of Explanatory Note for Bill

- (1) An Explanatory Note for a Bill must include the following information about the Bill in clear and precise language:
 - a) the Bill's short title
 - b) a brief statement of the policy objectives of the Bill and the reasons for them
 - c) a brief statement of the way the policy objectives will be achieved by the Bill and why this way of achieving the objectives is reasonable and appropriate
 - d) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives and why the alternative was not adopted
 - e) a brief assessment of the administrative cost to government of implementing the Bill, including staffing and program costs but not the cost of developing the Bill
 - f) a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency
 - g) a brief statement of the extent to which consultation was carried out in relation to the Bill
 - h) a simple explanation of the purpose and intended operation of each clause of the Bill
 - i) if the Bill is substantially uniform or complementary with legislation of the Commonwealth or another State:
 - i) a statement to that effect; and
 - ii) a brief explanation of the legislative scheme.
- (2) If the Explanatory Note does not include the information mentioned in subsection (1), it must state the reason for non-inclusion.

5.2 Extract *Statutory Instruments Act 1992*

S44 Content of Regulatory Impact Statement

A Regulatory Impact Statement must include the following information about the proposed subordinate legislation in clear and precise language:

- a) the provision of the Act or subordinate legislation under which the proposed legislation will be made (the authorising law)
- b) a brief statement of the policy objectives of the proposed legislation and the reasons for them
- c) a brief statement of the way the policy objectives will be achieved by the proposed legislation and why this way of achieving them is reasonable and appropriate
- d) a brief explanation of how the proposed legislation is consistent with the policy objectives of the authorising law
- e) if the proposed legislation is inconsistent with the policy objectives of other legislation:
 - i) a brief explanation of the relationship with the other legislation; and
 - ii) a brief statement of the reasons for the inconsistency.
- f) if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making subordinate legislation) and why the alternative was rejected
- g) a brief assessment of the benefits and costs of implementing the proposed legislation that:
 - i) if practicable and appropriate, quantifies the benefits and costs; and
 - ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated under paragraph (f).
- h) a brief assessment of the consistency of the proposed legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.

5.3 Council of Australian Governments' Principles of Best Practice Regulation

Council of Australian Governments (COAG) has agreed that all governments will ensure that regulatory processes in their jurisdiction are consistent with the following principles:

1. establishing a case for action before addressing a problem
2. a range of feasible policy options must be considered, including self-regulatory, co-regulatory and non-regulatory approaches, and their benefits and costs assessed
3. adopting the option that generates the greatest net benefit for the community
4. in accordance with the Competition Principles Agreement, legislation should not restrict competition unless it can be demonstrated that:
 - a) the benefits of the restrictions to the community as a whole outweigh the costs, and
 - b) the objectives of the regulation can only be achieved by restricting competition.
5. providing effective guidance to relevant regulators and regulated parties in order to ensure that the policy intent and expected compliance requirements of the regulation are clear
6. ensuring that regulation remains relevant and effective over time
7. consulting effectively with affected key stakeholders at all stages of the regulatory cycle
8. government action should be effective and proportional to the issue being addressed.

5.4 Assessment of the information provided to Parliament in the Explanatory Notes

Figure 5A below set outs the assessments of the level of compliance of the Explanatory Notes (EN) audited against the requirements of the *Legislative Standards Act 1992* (LSA).

Figure 5A : Summaries of the assessments of the sample of EN

Agency	Explanatory Note	LSA 1992 Section 23								
		a	b	c	d	e	f	g	h	i
JAG	Retirement Villages Amendment Bill 2006	✓	✓	✓	✓	✓	✓	✓	✓	✓
JAG	Consumer Credit (Queensland) and Other Acts Amendment Bill 2008	✓	✓	✓	✓	✓	✓	✓	✓	✓
JAG	Defamation Bill 2005	✓	✓	✓	✓	✓	✓	✓	✓	✓
EPA	Environmental Protection and Other Legislation Amendment Bill 2007	✓	✓	✓	✓	✓	x	✓	✓	✓
EPA	Environmental Protection and Other Legislation Amendment Bill 2008	✓	✓	✓	✓	✓	✓	✓	✓	✓
EPA	Nature Conservation Amendment Bill 2006	✓	✓	✓	✓	✓	x	✓	✓	✓
Treasury	Liquor Amendment Regulation (No. 4) 2008	✓	✓	✓	✓	✓	x	✓	✓	✓
Treasury	Airport Assets (Restructuring and Disposal) Bill 2008	✓	✓	✓	✓	✓	✓	✓	✓	✓
Treasury	Revenue and Other Legislation Amendment Bill 2008	✓	✓	✓	✓	✓	x	✓	✓	✓
Treasury	Future Growth Fund Bill 2006	✓	✓	x	✓	x	x	x	✓	✓
Treasury	Queensland Competition Authority Amendment Bill 2008	✓	✓	✓	✓	x	x	✓	✓	✓
NRW	Water (Commonwealth Powers) Bill 2008	✓	✓	✓	x	x	✓	✓	✓	✓
NRW	Wild Rivers Bill 2005	✓	✓	✓	x	x	✓	✓	✓	✓
NRW	Wild Rivers and Other Legislation Amendment Bill 2007	✓	✓	✓	x	x	✓	✓	✓	✓

✓ Indicates compliance with the requirements

x Room for improvement in the completeness of the information

JAG Department of Justice and Attorney-General

EPA Environmental Protection Agency

NRW Department of Natural Resources and Water

5.5 Assessment of the information provided to Parliament in Regulatory Impact Statements

Figure 5B below set outs the assessments of the level of compliance of the Regulatory Impact Statements (RIS) audited against the requirements of the *Statutory Instruments Act 1992* (SIA).

Figure 5B : Summaries of the assessments of the sample of RIS

Agency	Regulatory Impact Statement	SIA 1992 Section 44							
		a	b	c	d	e	f	g	h
JAG	Security Providers Regulation 2008	✓	✓	✓	✓	✓	✓	✓	✓
JAG	Body Corporate and Community Management Regulation 2008	✓	✓	✓	✓	✓	✓	✓	✓
EPA	Nature Conservation (Administration) Regulations 2006	✓	✓	x	✓	✓	✓	✓	✓
EPA	Recreation Areas Management Regulation 2007	✓	✓	✓	✓	✓	✓	✓	✓
EPA	Environmental Protection (Water) Amendment Policy (No. 1) 2006	✓	✓	✓	✓	✓	✓	✓	x
EPA	Marine Parks (Declaration) Regulation 2006 Marine Parks Regulation 2006	✓	✓	✓	✓	✓	✓	✓	x
Treasury	Liquor and Other Legislation Amendment Regulation (No. 1) 2008	✓	✓	✓	✓	✓	✓	✓	x
NRW	Water Amendment Regulation (No. 1) 2005	✓	✓	x	✓	x	✓	✓	✓

- ✓ Indicates compliance with the requirements
- x Room for improvement in the completeness of the information
- JAG Department of Justice and Attorney-General
- EPA Environmental Protection Agency
- NRW Department of Natural Resources and Water

5.6 Comments by the Scrutiny of Legislation Committee

This material has been drawn from the Queensland Scrutiny of Legislation Committee's *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*²⁵.

Issues affecting Explanatory Notes and Regulatory Impact Statements	Guidance from the Scrutiny of Legislation Committee
Clear and precise language	<ul style="list-style-type: none"> • Drafting should be in 'plain English' style and should not use archaic or anachronistic language. • Saying too much is preferred to saying too little.
A brief statement of the policy objectives and the reasons for them	<ul style="list-style-type: none"> • Give adequate reasons for the policy objectives as the reasons are as important as the policy objectives themselves.
A brief statement of the way the policy objectives will be achieved and why this way of achieving them is reasonable and appropriate	<ul style="list-style-type: none"> • Present a justification for the approach adopted in the Bill. • The reasons for the policy objectives being reasonable and appropriate must be properly addressed and not ignored. • Must state why it is reasonable and appropriate (e.g. must not just state that 'it is reasonable and appropriate').
A brief assessment of the administrative cost to government	<ul style="list-style-type: none"> • The word 'assessment' is viewed by the Committee as an appraisal of the relevant issues. • Show that departmental officers have given the matter serious consideration. • Provide information which is useful to the reader. • Present more than a simple assertion. Even if there are no costs to government, an analysis should be provided.
A brief assessment of the consistency with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency	<ul style="list-style-type: none"> • A possible breach should be addressed even where the breach is perceived as justified or justifiable. • There should be more than a simple assertion that the legislation is 'consistent with Fundamental Legislative Principles (FLP) unless it is very clear that it is. • If issues such as retrospective provisions and Henry VII clauses have been included in the legislation, this should be raised as a FLP issue. • The legislation does not need to exhibit strict compliance with FLP, but rather it needs to have 'sufficient regard' to them.
A brief statement of the extent to which consultation was carried out	<ul style="list-style-type: none"> • Requires at least the groups or persons consulted with be suitably identified (preferably by means of a list). • Additional information about the consultation process may be required depending on the nature and importance of the Bill. This might include: the form of consultation, summary of the views expressed, the resultant impact of the consultative process on the content of the Bills and if no consultation occurred, reasons for that.

²⁵ Queensland Scrutiny of Legislation Committee, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*, August 2001.

6 Acronyms, glossary and references

6.1 Acronyms

BCA	Business Council of Australia
COAG	Council of Australian Governments
DPC	Department of the Premier and Cabinet
EN	Explanatory Note
FLP	Fundamental Legislative Principles
LSA	<i>Legislative Standards Act 1992</i>
OECD	Organisation for Economic Cooperation and Development
OQPC	Office of the Queensland Parliamentary Counsel
QORE	Queensland Office for Regulatory Efficiency
RIS	Regulatory Impact Statement
SIA	<i>Statutory Instruments Act 1992</i>

6.2 Glossary

Appreciable cost

A significant social, economic, employment or environmental cost on the community or parts of the community as a result of a proposed subordinate legislation.

Effectiveness

The achievement of the objectives or other intended effects of activities at a program or entity level.

Efficiency

The use of resources such that output is optimised for any given set of resource inputs, or input is minimised for any given quantity and quality of output.

Explanatory Notes

Documents which provide information about the contents, background and operation of proposed legislation.

Fundamental legislative principles

Principles that underlie a parliamentary democracy based on the rule of law which require that legislation has sufficient regard to rights and liberties of individuals and the institution of parliament. Refer to Section 4 of the *Legislative Standards Act 1992*.

Regulation

*'Regulation refers to the broad range of legally enforceable instruments which impose mandatory requirements upon business and the community, as well as to those government voluntary codes and advisory instruments for which there is a reasonable expectation of widespread compliance.'*²⁶

Primary legislation

A law made by the Parliament, and known as an Act of Parliament. An Act comes into being when a Bill that has passed all three readings in the Legislative Assembly receives royal assent from the Governor.

Subordinate legislation

Legislation authorised by an Act of Parliament, delegating authority to a Minister, department, court, local or statutory authority to make orders, regulations, by-laws or rules having the force of law.

Regulatory Impact Statement

A statement required to be prepared about proposed subordinate legislation if is likely to impose appreciable costs on the community or a part of the community.

Significant subordinate legislation

Subordinate legislation for which a Regulatory Impact Statement must be prepared under the *Statutory Instruments Act 1992*.

²⁶ Council of Australian Governments (COAG), *Best Practice Regulation Guide For Ministerial Councils and National Standard Setting Bodies*, 2007.

6.3 References

- Business Council of Australia, *A Scorecard of State Red Tape Reform*, 2007.
- Council of Australian Governments, *Best Practice Regulation: Guide for Ministerial Councils and National Standard Setting Bodies*, October 2007.
- Council of Australian Governments, *COAG National Reform Agenda, COAG Regulatory Reform Plan*, April 2007.
- Financial Accountability Act 2009*.
- Office of the Queensland Parliamentary Counsel, *Annual Report, 2007-2008*.
- Organisation for Economic Cooperation and Development (OECD), *Building an Institutional Framework for Regulatory Impact Analysis (RIA)*, 2008.
- Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Quantity and Quality, Research Report*, 2007.
- Queensland Government, *The Queensland Legislation Handbook*, 2004.
- Queensland Scrutiny of Legislation Committee, *Report to Parliament on the Committee's Monitoring of the Operation of the Explanatory Notes System*, August 2001.
- Queensland Scrutiny of Legislation Committee, *Report of Study Tour – Melbourne*, 4 and 5 March 2008.
- State of Queensland, Department of Premier and Cabinet, *The Queensland Legislation Handbook*, August 2004.
- The Office of Best Practice Regulation, *Users Guide to Best Practice Regulation Handbook*, Australian Government, August 2007.
- World Economic Forum, *The Global Competitiveness Report 2008-2009*.

7 Auditor-General's reports

7.1 Tabled in 2009

Report No.	Subject	Date tabled in Legislative Assembly
1	Auditor-General's Report No. 1 for 2009 Results of local government audits Financial and Compliance Audits	20 May 2009
2	Auditor-General's Report No. 2 for 2009 Health service planning for the future A Performance Management Systems Audit	9 June 2009
3	Auditor-General's Report No. 3 for 2009 Transport network management and urban congestion in South East Queensland A Performance Management Systems Audit	23 June 2009
4	Auditor-General's Report No. 4 for 2009 Results of audits at 31 May 2009 Financial and Compliance Audits	30 June 2009
5	Auditor-General's Report No. 5 for 2009 Management of patient flow through Queensland hospitals A Performance Management Systems Audit	29 July 2009
6	Auditor-General's Report No. 6 for 2009 Providing the information required to make good regulation A Performance Management Systems Audit	August 2009

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