Subordinate Legislation Act 1994 Guidelines

TABLE OF CONTENTS

Note: The **Subordinate Legislation Act 1994 Guidelines** are located at the Department of Premier and Cabinet's website: https://www.vic.gov.au/.

INDEX OF ACRONYMS AND ABBREVIATIONS

BRV	Better Regulation Victoria
CBR	Commissioner for Better Regulation
COES	Certificates of Electrical Safety
CPC	Chief Parliamentary Counsel
DJCS	Department of Justice and Community Safety
DPC	Department of Premier and Cabinet
DTF	Department of Treasury and Finance
ILA	*Interpretation of Legislation Act 1984*
OCPC	Office of the Chief Parliamentary Counsel
OGC	Office of the General Counsel, DPC
LI Regulations	Subordinate Legislation (Legislative Instruments) Regulations 2021
RIS	Regulatory Impact Statement
SARC	Scrutiny of Acts and Regulations Committee
Secretary, DTF	Secretary, to the Department of Treasury and Finance (or their delegate)
SL Act	*Subordinate Legislation Act 1994*
VGPB	Victorian Government Purchasing Board

INTRODUCTION

The *Subordinate Legislation Act 1994* ('the SL Act') governs requirements for the preparation and making of statutory rules and legislative instruments in Victoria.

These Guidelines are made under the SL Act to assist in:

- the preparation, content, publication and availability of statutory rules and legislative instruments; and
- the procedures to be implemented and the steps to be undertaken for the purpose of ensuring consultation, co-ordination and uniformity in the preparation of statutory rules and legislative instruments (the SL Act, s 26(1)).

These Guidelines also deal with the matters listed in Schedule 1 to the SL Act (the SL Act, s 26(2)). The matters listed in Schedule 1 include guidelines as to:

- the types of matters appropriate for inclusion in statutory rules rather than in Acts or in instruments which are not of a legislative character (clause 1);
- the procedures to be adopted to ensure that:
    - an agency preparing or considering a proposed statutory rule identifies and consults other relevant agencies (clause 4(a));
    - where appropriate, independent advice is obtained as to the nature and content of the proposed statutory rule (clause 5(b));
    - proper consultation takes place with any sector of business or the public which may be affected (clause 5(c));
    - proper consultation takes place in circumstances where consultation is required under section 6 (clause 5(d));
- circumstances in which a statutory rule imposes a significant economic or social burden on a sector of the public (clause 6).

The SL Act imposes obligations on responsible Ministers to comply with the Guidelines in matters such as consultation, and in the preparation of a regulatory impact statement (RIS). Therefore, agencies must familiarise themselves with the SL Act and the Guidelines to properly inform their Minister of the Minister's responsibilities under the SL Act.

Ultimately, responsibility for decisions about statutory rules and legislative instruments lies with the responsible Minister (or, in the case of some legislative instruments, the instrument maker). Failure to comply with the SL Act and the Guidelines may result in an adverse report, or a recommendation of disallowance, from the Scrutiny of Acts and Regulations Committee (SARC). A court could also find that non-compliance with obligations imposed by the Guidelines in the preparation of statutory rules or legislative instruments raises issues about the validity of those rules or instruments once made.

In exercising responsibilities and making judgements under the SL Act, agencies should also draw on other relevant material such as the Subordinate Legislation (Legislative Instruments) Regulations 2021 ('the LI Regulations') and the resources listed in Division 4 below.

DIVISION 1 - Mandatory requirements and good practice examples

The SL Act imposes some mandatory requirements on responsible Ministers, such as the requirement for consultation under sections 6 (statutory rules) and 12C (legislative instruments) and the requirement to prepare a RIS under sections 7 (statutory rules) and 12E (legislative instruments), unless an exemption applies. Part 3 of these Guidelines provide more detail on those requirements.

Agencies are strongly encouraged, as good practice:

- to engage in early, and have ongoing, consultation with Better Regulation Victoria (BRV) e.g. when assessing whether a RIS is required for proposed subordinate legislation;
- if preparing statutory rules, to engage in early consultation with the Office of the Chief Parliamentary Counsel (OCPC);
- at the beginning of the year, to advise OCPC and BRV of the proposed timetable and program of regulations for the coming year;
- to apply the impact assessment framework when analysing policy issues and preparing advice for government even where an impact assessment is not required, as discussed in BRV's Victorian Guide to Regulation; and
- to include, in a RIS, an assessment of the impacts on small business, even though an assessment is not mandatory.

DIVISION 2 - Definitions

The definitions in section 3 of the SL Act apply to terms used in these Guidelines.

'Statutory rule' and 'legislative instrument'
'Statutory rule' and 'legislative instrument' are defined in section 3 of the SL Act.

A statutory rule is subordinate legislation made under the authority of an Act. Statutory Rules commonly take the form of regulations that are made by (or with the approval or consent of) the Governor in Council or local authority.

In contrast, legislative instruments are instruments that are legislative in character and made under an Act or statutory rule. An instrument will generally be considered to have 'legislative character' if it contains mandatory requirements with general application to undertake certain action(s), often accompanied by penalties or sanctions for non-compliance. These do not include instruments of purely administrative character. Section 3(2) of the SL Act provides examples of instruments of purely administrative character.[1] Part 1 of these Guidelines provides further guidance on the definition of 'legislative instrument'.

[1] The non-exhaustive list in section 3(2) SL Act of instruments to be of purely administrative character include:
(a) an instrument of delegation;
(b) an evidentiary certificate;
(c) an instrument of appointment or an instrument which changes conditions or terms of appointment;
(d) an instrument which has the sole purpose of giving notice of the making of another instrument;
(e) an instrument which grants, renews, varies, transfers, suspends or cancels a lease, licence or permit that authorises a specified entity to do any act or not to do any act or an instrument refusing to grant, renew, vary or transfer such a lease, licence or permit;
(f) an instrument that registers a specified entity or an instrument refusing to register a specified entity;
(g) an instrument that renews, varies, transfers, suspends or cancels a registration of a specified entity or an instrument refusing to renew, vary, transfer, suspend or cancel a registration of a specified entity;

'Minister' and 'responsible Minister'
The SL Act makes a distinction between the 'Minister' (meaning the Minister administering the SL Act) and the 'responsible Minister' (the Minister administering the authorising Act or statutory rule under which a statutory rule or legislative instrument is proposed to be made), which should be kept in mind. The General Order will assist in determining which Minister (or Ministers) are responsible for administering an authorising Act. The distinction between 'Minister' and 'responsible Minister' has implications about what each Minister must do or comply with under the SL Act and these Guidelines. Where extra clarity is required when referring to 'the Minister', these Guidelines instead refer to 'the Minister administering the SL Act'.

'Agency' and 'department'
The Guidelines use the term 'agency' rather than 'department'. This is to capture both departments and statutory bodies that may also be responsible for preparing and making statutory rules and legislative instruments.

DIVISION 3 - Roles of BRV, DPC, OCPC and SARC

Better Regulation Victoria ('BRV')
The Commissioner for Better Regulation ('CBR') or its successor office provides independent advice and guidance for agency staff preparing RISs, including RIS adequacy for statutory rules and legislative instruments, unless there is a vacancy in the office of the CBR or its successor office, then the Secretary to the Department of Treasury and Finance (or their delegate) ('Secretary, DTF') can provide the independent advice. Better Regulation Victoria (BRV) supports the CBR. Refer to BRV's website for further information or call on 03 7005 9772. BRV also offers training, including a regular course for VPS staff on designing regulations and preparing RISs. BRV can provide tailored training to a specific VPS agency.

Department of Premier and Cabinet ('DPC')
DPC supports the Minister in administering the SL Act and the LI Regulations, and reviews the LI Regulations on an annual basis. DPC's Office of the General Counsel ('OGC') is DPC's lead branch undertaking such work, including providing training about these Guidelines and the LI Regulations. See Part 1, Division 1 and Part 4, Divisions 2 and 5 of these Guidelines for further detail about DPC's role in relation to sunsetting and extension of statutory rules. Further information, including training, is also available here. OGC can be contacted by email to GeneralOrdersLegislativeInstruments@dpc.vic.gov.au.

Office of the Chief Parliamentary Counsel ('OCPC')
OCPC settles all statutory rules and the Chief Parliamentary Counsel ('CPC') issues certificates under section 13 of the SL Act that are required for the making of statutory rules other than court rules. See Part 4, Divisions 4 and 5 of these Guidelines for further detail about OCPC's role. OCPC also offers training on the drafting of statutory rules. Refer to OCPC's website for further information.

Scrutiny of Acts and Regulations Committee ('SARC')

(h) an instrument imposing conditions on a lease, licence, permit or registration held by a specified entity;
(i) an instrument for the principal purpose of taking disciplinary or enforcement action to ensure compliance with an Act, subordinate instrument or any other law.

SARC is responsible for examining statutory rules and legislative instruments to ensure that they do not exceed the powers conferred by an Act and do not unduly trespass on rights and freedoms. For example, SARC may report to Parliament if it considers a statutory rule or legislative instrument:

- does not appear to be within the powers conferred by the authorising Act; or
- has retrospective effect or imposes any tax, fee, fine, imprisonment or other penalty without clear and express authority being conferred by the authorising Act.

Refer to SARC's website for further information.

DIVISION 4 - Key resources and guidance materials

Key resources and guidance materials include:

- BRV's Victorian Guide to Regulation, which explains the Government's approach and requirements for regulatory impact analysis.
- toolkits that support the Victorian Guide to Regulation with more practical or detailed advice which are available here.
- DTF's Pricing for Value Guide that aims to improve consistency and capability in setting Victorian Government fees and charges. The Guide contains 12 Pricing Principles for setting fees and charges. The Guide replaced the former Cost Recovery Guidelines on 1 July 2021.
- OCPC's Notes for Guidance on the Preparation of Statutory Rules ('Guidance on Statutory Rules') contains information relating to the role of OCPC and the preparation of statutory rules.
- SARC's Resources for Legislation Officers, annual reports and alert digests.
- DPC's Public Engagement Framework 2021-2025.

Note that DPC, OCPC and BRV's websites may contain additional resources. DPC also maintains a list of hyperlinks to relevant documents on its website.

DIVISION 5 - Further assistance

If you have queries about the Guidelines, the LI Regulations or the SL Act, please contact DPC's OGC.

Agencies should refer to OCPC's Guidance on Statutory Rules or contact OCPC if further guidance regarding the preparation of statutory rules is required.

PART 1

WHAT IS A STATUTORY RULE OR LEGISLATIVE INSTRUMENT?

1. To establish whether the SL Act applies, it is necessary to identify whether an instrument is a statutory rule or a legislative instrument. If it is neither, the requirements under the SL Act do not apply.

2. Statutory rules and legislative instruments can only be made where there is a power to make them under an authorising Act or statutory rule. Therefore, the type of instrument to be made will be dictated by the authorising Act or statutory rule. However, in some cases it may be possible to achieve the same objectives through alternative, non-legislative means (see Part 2, Division 3 of these Guidelines).

Statutory rules

3. Section 3 of the SL Act provides an exhaustive definition of 'statutory rule'. If the proposed instrument does not fall within the definition, it is not a statutory rule and is not subject to the requirements that apply to statutory rules under the SL Act.

4. However, the authorising Act itself might deem an instrument to be a statutory rule (e.g. section 86(5) of the *Wildlife Act 1975* provides that sections 15, 23, 24 and 25 of the SL Act applies to a notice under section 86(1) prohibiting, regulating or controlling the taking, destroying or hunting of wildlife, as if that notice were a statutory rule under the SL Act).

Legislative instruments

5. Under section 3 of the SL Act, an instrument can only be a 'legislative instrument' if it is of a legislative character and is made under an Act or statutory rule. An instrument will generally be considered to have 'legislative character' if it contains mandatory requirements with general application to undertake certain action(s), often accompanied by penalties or sanctions for non-compliance. See Part 1, Division 2 of these Guidelines for further explanation and criteria that may apply. See also the Appendix to these Guidelines for further assistance on establishing whether an instrument is a 'legislative instrument' for the purposes of the SL Act.

6. The definition of 'legislative instrument' expressly excludes certain types of instruments, including instruments of a purely administrative character. See section 3(2) of the SL Act for a non -exhaustive list of instruments that are of a purely administrative character.

DIVISION 1 – THE IMPORTANCE OF THE LI REGULATIONS FOR LEGISLATIVE INSTRUMENTS

7. The LI Regulations provides guidance as to whether an instrument is a 'legislative instrument' and which provisions of the SL Act apply to them.

8. The LI Regulations prescribe certain instruments as:
    - instruments that are not legislative instruments (that are not subject to the SL Act's requirements) – Schedule 1;
    - legislative instruments (that are subject to the SL Act's requirements) – Schedule 2; and
    - instruments exempt from most of the SL Act's requirements (other than Government Gazettal publication) – Schedule 3.

9. The LI Regulations also prescribe that certain instruments are exempt from particular parts of the requirements under the SL Act, including the requirement for publication in the Government Gazette (see regulations 9 and 10 of the LI Regulations for exempt instruments made under *Emergency Management Act 2013* and *Emergency Management Act 1986*).

10. Schedules 1 and 2 to the LI Regulations may assist agencies where it is unclear whether an instrument is a legislative instrument. However, the LI Regulations do not list every single instrument made in Victoria, so agencies may need to assess whether an instrument is a legislative instrument, or a statutory rule, as required.

Requests to amend the LI Regulations

11. Agencies can request that instruments or classes of instruments be added, moved, or removed from, or their description be amended in, the Schedules to the LI Regulations. Agencies should make such requests to DPC's OGC.

12. OGC reviews the LI Regulations annually, with the process commencing in the second quarter of the year and finalised by the end of the year. Requests for changes will usually be considered as part of this annual cycle. There may be some time before the requests can be inserted into the LI Regulations. If your request is urgent, please include the reasons to support the urgency when you make your request.

13. Before making requests, agencies should first consider whether a particular instrument is a 'legislative instrument'. Relevant guidance can be found in Part 1, Division 2 below. Agencies can contact OGC for assistance through DPC's website.

14. Next, agencies should provide the following information to OGC:
    - if requesting changes to the LI Regulations –
        - the title of the instrument (including the clause number); and
        - whether the agency wants the instrument removed or amended and the reason for the request; or
    - if requesting additions –
        - the title of the instrument;
        - the authorising Act and the provision under which it is made;
        - the schedule in which the agency wants the instrument included (if relevant);
        - a copy of the instrument and a summary of the effect of the instrument; and
        - any evidence (such as legal advice, if sought) supporting the characterisation of the instrument as a legislative or non-legislative

instrument, and its inclusion of the instrument in a Schedule to the LI Regulations.

15. Further details for requests to OGC are set out on DPC's website.

Types of regulation – the legislative hierarchy

16. Primary legislation should deal with the following matters:
    - matters of substance or important procedural matters (particularly where they also affect individual rights and liberties – e.g. provisions that reverse the onus of proof or certify evidentiary matters);
    - matters relating to a significant policy question, including the introduction of new policy or fundamental changes to existing policy;
    - matters which have a significant impact on individual rights and liberties (e.g. powers of entry and search, arrest warrants, seizure and forfeiture), or which deal with property rights or traditional liberties and freedoms;
    - matters imposing significant criminal penalties (such as fines exceeding 20 penalty units or imprisonment); and
    - provisions imposing taxes.

    For a discussion of these principles of what should be included in primary legislation, see for example the Victorian Parliament Law Reform Committee's Final Report on the *Powers of Entry, Search, Seizure, and Questioning by Authorised Persons* (May 2002).

Subordinate legislation

17. Subordinate legislation is made by an entity delegated a power by Parliament. Subordinate legislation is usually more detailed than primary legislation and must be consistent with the principles and objectives of the policy issue that the primary legislation addresses. Subordinate legislation must also comply with the SL Act. There are two forms of subordinate legislation:
    - First, the primary legislation can provide for regulations ('statutory rules'), which are made by the Governor in Council. Statutory rules detail how an authorising Act is to be implemented practically.
    - Second, the primary legislation can provide for the creation of orders, codes of practice or directions, or other instruments. When such instruments are legislative instruments, they are subject to the SL Act.

18. When deciding whether to make a statutory rule or legislative instrument, agencies and responsible Ministers should consider the most appropriate way to achieve their objective, whether that is primary or subordinate legislation, or if a legislative approach is required at all.

19. The following are more appropriately dealt with by subordinate legislation:
    - matters relating to detailed implementation of the policy reflected in the authorising Act, including standards, principles and guidelines;
    - prescribing fees to be paid for various services;
    - prescribing forms for use in connection with legislation; and

- prescribing processes relating to the enforcement of legal rights and obligations under the primary legislation.

Setting performance standards

20. Where performance standards, rather than detailed requirements, are proposed, agencies and responsible Ministers should consider whether a statutory rule or legislative instrument is most appropriate to achieve the regulatory objectives.

21. Agencies involved in instructing OCPC in the legislative drafting process should first refer to the authorising Act or statutory rule to determine whether to set performance standards or to prescribe detailed requirements. If either approach is allowed, agencies should assess the advantages and disadvantages of a statutory rule versus a legislative instrument, including the cost of different regulatory structures and their effectiveness in achieving the objectives. BRV can provide support.

22. Agencies should consult the responsible Minister as they will likely be aware of the nature of the relevant industry and the general risks associated with the different regulatory approaches. This is important because the responsible Minister usually decides whether to proceed to make the instrument or rule.

23. Officers should also consult industry groups and other stakeholders on a proposed statutory rule or legislative instrument, which might help to identify potential advantages and disadvantages. This consultation might be part of an initial consultation that takes place before the RIS process (see Part 3, Division 1 of these Guidelines).

Non legislative regulation

24. Non-legislative means of achieving the regulatory objectives are discussed at Part 2, Division 3 of these Guidelines.

DIVISION 2 - POSSIBLE FACTORS TO CONSIDER WHEN DETERMINING LEGISLATIVE CHARACTER

25. Under section 3 of the SL Act, an instrument can only be a 'legislative instrument' if it is of a legislative character and is made under an Act or statutory rule. The definition of 'legislative instrument' expressly excludes certain types of instruments, including instruments of a purely administrative character[2]. Agencies must usually consider whether an instrument is of a legislative character on a case by case basis. To assist, a non-exhaustive list of relevant factors for that consideration is set out below. There is no simple rule for determining whether an instrument is of legislative character. Agencies should take a holistic and global approach to assessing such factors as they are not all equally important and none of the factors on their own are necessarily determinative. Some factors carry more weight than others, for example the publication requirement is of less importance.

[2] See section 3(2) of the SL Act for a non-exhaustive list of instruments that are of a purely administrative character and Division 2 of Introduction.

26. Where it is not clear whether an instrument is of legislative character, agencies may wish to obtain legal advice before making a final decision. The indicative list of instruments of administrative character in section 3(2) of the SL Act may also assist.

General or limited application

27. This factor can be a strong indicator of legislative character. Where an instrument is of general application or provides a general rule, it is more likely to be legislative in character, as opposed to an instrument applying a rule to particular facts, which is more likely to be administrative in character.

28. For example, Part 2 of the *Safety on Public Land Act 2004* allows the Secretary to declare an area of State forest to be a public safety zone. A declaration may prohibit certain activities in this zone. Such a declaration has general application, as it applies to the public generally within the specified zone. This suggests that the instrument may be of a legislative character.

29. In contrast, the Minister granting a lease on unreserved Crown land under section 121 of the *Land Act 1958,* or the Secretary granting an agistment permit under section 133A of the *Land Act 1958,* or the Secretary determining fees to be charged with the supply of any service under section 28 of the *Conservation, Forests and Land Act 1987*, are examples of instruments which are administrative in character because they apply to particular cases in accordance with administrative practice.

Mandatory compliance

30. This may be another key factor in assessing legislative character. Legislative instruments are generally binding in nature and require mandatory rather than voluntary compliance. Conversely, voluntary codes of conduct, non-binding guidelines and Codes of Practice are unlikely to be legislative, although there may be exceptions to this.

31. If an instrument allows sanctions to be imposed, or if failure to comply with the instrument triggers an offence or penalty, the instrument is more likely to be legislative.

32. Whether an instrument requires mandatory compliance can be determined by looking at the words used in the instrument.

33. For example, a declaration of a public safety zone under Part 2 of the *Safety on Public Land Act 2004* may prohibit certain activities in that zone. The word 'prohibition' indicates that the instrument is mandatory, as well as an offence under section 13 of that Act for non-compliance (penalty – 20 penalty units).

34. In contrast, guidelines relating to the protection of Aboriginal cultural heritage made pursuant to section 143(1)(e) of the *Aboriginal Heritage Act 2006* is an example of an instrument of administrative character. These guidelines are not mandatory in compliance and may be issued by the Secretary to assist in compliance with the requirements to protect Aboriginal cultural heritage and the administration of the *Aboriginal Heritage Act 2006.*

Disallowance by Parliament

35. Where an instrument's authorising Act or statutory rule expressly grants Parliament power to disallow it, it is more likely to be of a legislative character. For example:
    - Section 69AAE of the *Health Services Act 1988* – a determination of the Minister's intention to grant a lease or licence provides for the disallowance by resolution by both House of Parliament; and
    - Section 47D of the *National Parks Act 1975* – a management plan for the Alpine National Park can be disallowed by resolution by both Houses of Parliament.

Wide public consultation requirements

36. A requirement to consult broadly during the development of an instrument may indicate that it is of a legislative character.

37. For example, a Code of Practice made under Part 5 of the *Conservation, Forests and Lands Act 1987* requires the Minister to give (and publish) a notice when proposing to make (vary or revoke) a Code of Practice stating that submissions may be made to the Minister within such time (being not less than 28 days from the publication of the notice) as is specified in the notice. Those submissions made must be considered by the Minister if received within the time specified before making the Code (or varying it or revoking it). This consultation requirement suggests that a Code of Practice is of a legislative character.

38. In contrast, Division 1 of Part 4 (along with Schedule 2) of the *Catchment and Land Protection Act 1994* requires an authority to consult with affected persons in the preparation and approval of a regional catchment strategy, if the Authority makes such a strategy. It is not mandatory to make a regional catchment strategy. If an authority does prepare a regional catchment strategy, the authority may recommend to a planning authority under the *Planning and Environment Act 1987* that amendments be made to a planning scheme to give effect to the strategy (section 25 of the *Catchment and Land Protection Act 1994*). This would suggest that the strategy is not a legislative instrument for the purposes of the SL Act.

Breadth of policy considerations

39. Where the instrument maker must consider a broad range of issues when making an instrument, this suggests that it is of a legislative character.

40. For example, under section 69 of the *Fisheries Act 1995*, the Governor in Council may declare particular marine life to be protected. Any determination must be consistent with any criteria for the declaration determined by the Minister and published in the Government Gazette. Such criteria include social, economic and environmental considerations, suggesting that the declaration instrument is of a legislative character.

Control over variation of the instrument

41. If the instrument can only be varied by or controlled by the instrument maker, this suggests that the instrument may be of a legislative character.

42. For example, section 27 of the *Biological Control Act 1986* grants the Victorian Biological Control Authority power to declare an organism to be an 'agent organism' for the purpose of that Act. Such a declaration cannot be controlled or varied by any other part of the executive, including the responsible Minister. This supports the view that the declaration may be of a legislative character.

No merits review process

43. Administrative instruments often affect individuals rather than the general public. For example, a permit issued to an individual or classes of persons, or an instrument of appointment is an administrative instrument relating to the specific permit-holder or appointee.

44. Commonly, a merits review process is available when an administrative instrument is made, allowing the individual to apply for the review of a decision that affects them personally (such as a right to internal review, or a right to appeal to VCAT).

45. By contrast, there is generally no merits review process available for legislative instruments, although these instruments might be subject to other types of review (such as a review to determine whether an instrument was validly made).

46. For example, there is no provision for internal review or appeal to VCAT after the Governor in Council has declared particular marine life to be protected under section 69 of the *Fisheries Act 1995* (referred to above). This supports the view that such a declaration is a legislative instrument.

The instrument must be published

47. A requirement that an instrument be published may indicate legislative character. However, it is not a compelling indication of legislative character. Some decisions which are clearly administrative must be notified in the Government Gazette.

PART 2

WHEN TO MAKE A STATUTORY RULE OR LEGISLATIVE INSTRUMENT

DIVISION 1 – CONFIRMING AUTHORITY TO MAKE A STATUTORY RULE OR LEGISLATIVE INSTRUMENT

48. Before deciding to make a statutory rule or legislative instrument, agencies should ensure the authorising Act or statutory rule provides the power to make the rule or instrument. Such rules or instruments can only cover matters permitted by the authorising Act or statutory rule and must be consistent with the purposes and objectives of that Act or statutory rule.

49. For example, for statutory rules, an authorising Act might apply to 'prescribed' matters (together with a regulation-making power with respect to certain matters) that must or may be provided for in the LI Regulations.

DIVISION 2 – WHAT SHOULD BE INCLUDED IN A STATUTORY RULE OR LEGISLATIVE INSTRUMENT?

50. When considering the making of a statutory rule or legislative instrument, agencies and the responsible Ministers should consider the issues that a statutory rule or legislative instrument aims to address. Statutory rules and legislative instruments may relate to new initiatives or amendments to existing regimes. Key stakeholders such as business and community groups may identify problems or areas for improvement or further consideration.

51. Agencies should also ensure the proposed statutory rule or instrument can be justified before it is made. For example, where the SL Act requires preparation of a RIS for the proposed statutory rule or legislative instrument (see Part 3, Division 4 of these Guidelines), the RIS should assess the economic, social and environmental costs and benefits of the proposal. Agencies should also consider the principles of good regulatory design as described in the Victorian Guide to Regulation and supporting toolkits (see relevant links in the Introduction to these Guidelines).

52. Statutory rules and legislative instruments can be effective policy tools used by government to achieve a range of policy objectives, such as to:
    - control how government agencies exercise power;
    - prevent or reduce activity which is harmful to business, the environment or to people;
    - ensure that people engaged in certain occupations maintain a requisite level of knowledge and competence;
    - impose mandatory codes of conduct;
    - fix fees such as registration or application fees;
    - respond to emergencies such as power supply failures or pest and disease outbreaks;
    - protect consumers from harmful products; and
    - further define rights, entitlements or obligations.

53. The level of regulation required will depend on the circumstances. For example, statutory rules and legislative instruments may:

- prohibit an activity or restrict the carrying out of an activity by regulating those who engage in the activity or imposing conditions and limitations on the activity;
- create an obligation to do something;
- encourage organisations and individuals to consider the effects of their activities on the community and the environment and modify their activities accordingly; or
- provide for voluntary 'codes of conduct'.

DIVISION 3 – Alternative Means of Achieving Objectives

54. Agencies and/or the responsible Minister should consider the advantages and disadvantages of subordinate legislation, as well as what kind of instrument can be made under the SL Act. For example, where the authorising Act provides for fees to be prescribed in a statutory rule only, the fees cannot be set by another method.

55. Alternatives to subordinate legislation include:

- providing better information to affected groups to raise awareness of their rights and/or obligations;
- introducing voluntary codes of conduct (see below for the distinction between voluntary and mandatory codes of conduct);
- winding back existing regulation;
- encouraging the establishment of self-regulation or quasi-regulation;
- encouraging organisations and individuals to consider the impact of their activities on the community and the environment;
- amending existing primary legislation;
- establishing a mandatory code of practice for the conduct of an activity;
- compliance and enforcement regimes; and
- developing efficient markets to deal with the issue.

Codes of conduct

56. Codes of conduct are usually drafted to incorporate large bodies of technical specifications or to guide compliance with generally-worded 'performance-based' regulation. They can be voluntary or compulsory in nature.

57. Self-regulatory, voluntary codes (including quasi-regulatory codes) can be an effective alternative because they can educate and inform consumers and traders without significantly adding to business costs.

DIVISION 4 – FORMULATION AND INCLUSION OF OBJECTIVES

58. Before proceeding with a proposed statutory rule or legislative instrument, agencies and responsible Ministers should clearly define the intended objectives and the reasons for those objectives, to ensure that:

- they are reasonable and appropriate for the intended level of regulation;
- they can be clearly and succinctly set out;
- they conform with the objectives, principles, spirit and intent of the authorising Act or statutory rule;
- they are not inconsistent with the objectives of other legislation, subordinate legislation and stated government policies; and
- any associated costs or disadvantages are not greater than the benefits or advantages.

59. Sections 10(1)(a) (regarding statutory rules) and 12H(1)(a) (regarding legislative instruments) of the SL Act requires a statement of the objectives of a proposed statutory rule or legislative instrument to be included in any associated RIS. This is a requirement for all proposed statutory rules and legislative instruments which require a RIS.

Inclusion of objectives in a statutory rule

60. Pursuant to section 13 of the SL Act, proposed statutory rules to be made by, or with the consent or approval of the Governor in Council must be submitted to the CPC for the issue of a section 13 certificate. OCPC must have settled the proposed statutory rule before an agency requests a section 13 certificate.

61. In the section 13 certificate, the CPC specifies, among other things, that the proposed statutory rule 'appears to be consistent with and achieves their stated objectives authorising Act'. A clear statement of the objectives is, therefore, required so that the CPC can issue a section 13 certificate.

62. The objectives stated in the statutory rule itself might differ from those in the RIS as RIS objectives should be stated in terms of intended outcomes, rather than means. The objectives in statutory rules are usually narrower than the RIS objectives. They are a brief summary of what the statutory rule does, rather than any policy implications of the statutory rule.

63. An Explanatory Memorandum must be attached to any proposed statutory rule submitted to the Governor in Council. A clear statement of the effect of a proposed statutory rule must be included in the Explanatory Memorandum. The form of the Explanatory Memorandum is discussed in Part 3, Division 6 of these Guidelines.

Objectives in legislative instruments

64. There is no general requirement to include a statement of objectives in a legislative instrument. However, it is good practice for agencies in developing a legislative instrument to determine and consider the objectives for the instrument, even where a RIS is not required. A section 13 certificate is not required in relation to a legislative instrument. The Victorian Guide to Regulation and supporting toolkits (see the Introduction of these Guidelines) provides advice on the rationale for, and development of, policy objectives.

PART 3

MAKING A STATUTORY RULE OR LEGISLATIVE INSTRUMENT

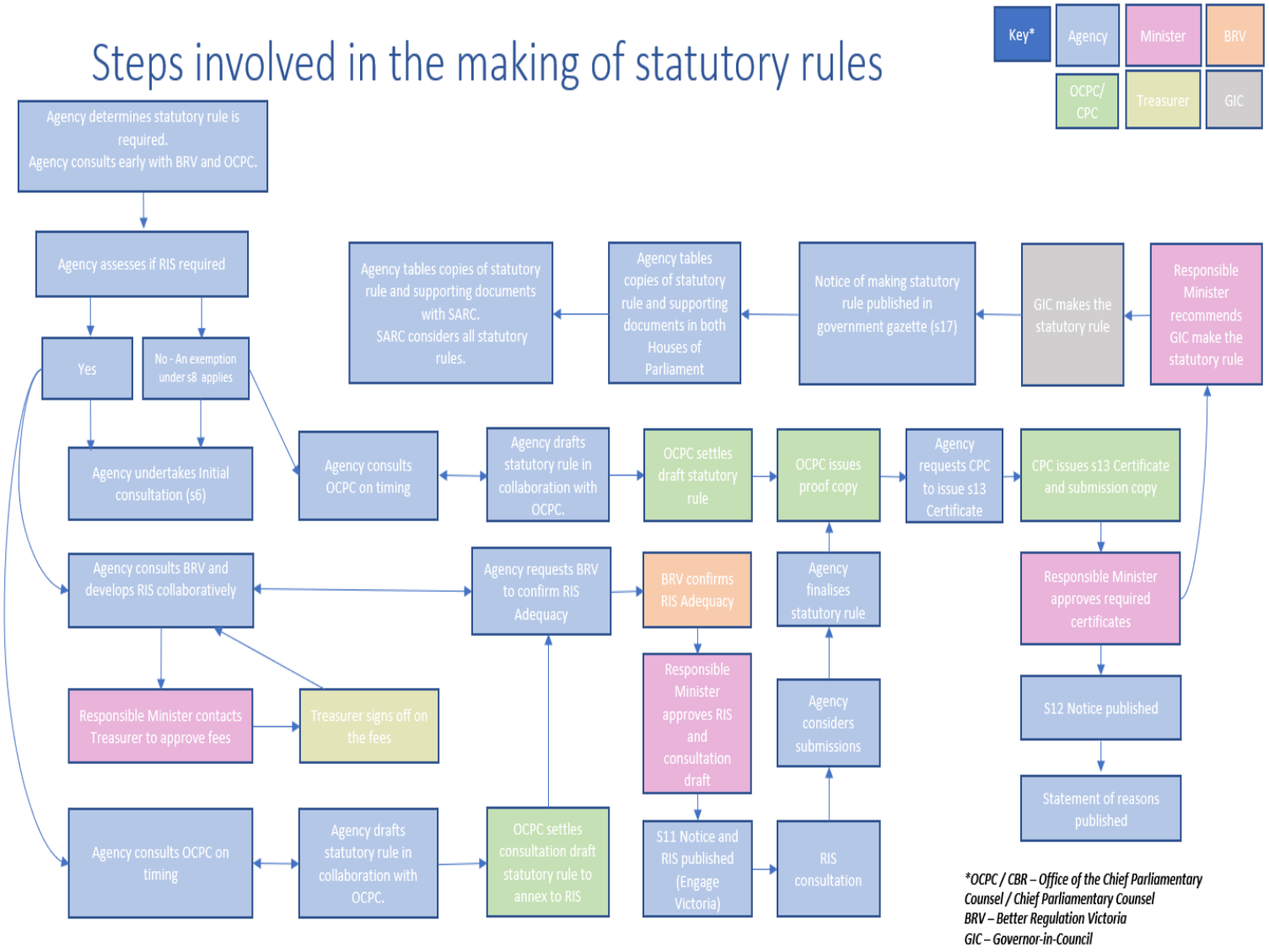
The process

65. Once an agency has considered the scope of the statutory rule or legislative instrument making power and has determined the appropriate matters for inclusion in the statutory rule or instrument, the agency can begin the drafting process.

Process for statutory rules

The flowchart below identifies the usual steps involved in the making of statutory rules.

Steps involved in the making of statutory rules



OCPC / CBR – Office of the Chief Parliamentary Counsel / Chief Parliamentary Counsel
BRV – Better Regulation Victoria
GIC – Governor-in-Council

Process for legislative instruments

66. Agencies must comply with the legislative instrument making process set out in the authorising Act.

67. Agencies can draft and settle legislative instruments themselves. Agencies may also use OCPC's services to prepare legislative instruments. Agencies should contact OCPC to discuss whether OCPC is able to advise on, settle or draft a particular legislative instrument. Unlike statutory rules, OCPC does not settle all legislative instruments and the SL Act does not require CPC to provide a certificate under section 13.

68. Agencies should assess if a RIS is required and whether an exemption applies (see section 12F of the SL Act). The RIS process for a legislative instrument is similar to that for a statutory rule.

DIVISION 1 – CONSULTATION

69. The SL Act generally requires proposed statutory rules and legislative instruments to undergo two separate consultation processes:
    - The initial consultation occurs in the early stages of policy development. This ensures the responsible Minister identifies other Ministers, agencies and stakeholders who may be affected by the proposed changes and considers the impact the proposed statutory rule or legislative instrument is likely to have on those groups (see sections 6 and 12C of the SL Act).
    - The second is formal public consultation. Where a RIS has been prepared, public consultation occurs following the public release of the proposed statutory rule or legislative instrument along with its RIS. This gives members of the public the chance to comment on the proposed instrument before it is made. Public consultation is discussed at Part 3, Division 5 of these Guidelines.

70. The appropriate level of consultation for any statutory rule or legislative instrument will depend on the nature of the subordinate legislation. However, in all cases, instrument makers must comply with the consultation requirements under the SL Act.

Initial consultation

71. Sections 6 (statutory rules) and 12C (legislative instruments) of the SL Act require consultation to occur in accordance with these Guidelines. Where initial consultation is required, it must take place before:
    - the RIS is prepared; and
    - the statutory rule or legislative instrument is released for public consultation.

72. Initial consultation occurs firstly with other relevant portfolio Ministers. This ensures a whole of Victorian Government perspective is considered before consulting external stakeholders.

73. Generally, initial consultation is required for all proposed statutory rules and legislative instruments, even where the responsible Minister anticipates there will be no

significant burden imposed. However, initial consultation will not be required where the responsible Minister proposes to make:

- a legislative instrument that is prescribed under the LI Regulations as being exempt from Part 2 of the SL Act; or
- an extension regulation under section 5A of the SL Act.

74. Part 3, Division 3 of these Guidelines sets out additional circumstances in which initial consultation will not be required for a proposed statutory rule or legislative instrument that will be exempted under sections 8 or 9 (statutory rules) or sections 12F or 12G (legislative instruments) of the SL Act. However, in some cases initial consultation will be required for exempt instruments as the consultation will assist in determining whether an exemption should, in fact, apply.

75. During initial consultation, the responsible Minister must consult with other Ministers and the public, as specified in the paragraphs below. The responsible Minister may also identify the type of proposed regulatory approach and discuss the alternative means of achieving the objectives.

Initial consultation with other Ministers – sections 6(a) and 12C(a)

76. Ministers considering a new regulatory initiative, a change to an existing regulatory regime or the re-enactment of an existing regime should identify other Ministers' portfolios or agencies which may be affected by the proposed statutory rule or legislative instrument. Consultation should occur early in the development of policy options to avoid any potential overlaps or conflicts before the proposal becomes significantly developed.

77. Where there is no other Minister or agency whose area of responsibility will be affected by the proposed statutory rule or legislative instrument, the responsible Minister should note that on the certificate of consultation issued under sections 6(a) or 12C(a).

Initial consultation with the public – sections 6(b) and 12C(b)

78. The responsible Minister must ensure that consultation is carried out, in accordance with these Guidelines, with any sector of the public on which a significant economic or social burden may be imposed by a proposed statutory rule or legislative instrument. This may include, for example, business groups, community groups and special interest groups.

79. When making an initial assessment of whether a significant burden may be imposed, only potential costs or negative impacts (i.e., the burden) should be assessed. While relevant at other stages in the RIS process, the benefits of a proposal do not change the significance of the burden it imposes.

80. Burdens and benefits may not fall equally on the same groups. This highlights the importance of consultation, as particular groups may face a significant burden and not benefit from proposed regulations. Other groups may not face a burden but benefit from proposed regulations. See Part 3, Division 2 of these Guidelines in relation to what constitutes a 'significant burden'.

81. The initial consultation will assist agencies to identify all relevant burdens and benefits including indirect burdens and benefits, which may not have been apparent early in the policy development process.

82. Agencies should consider the impact of the proposed statutory rule or legislative instrument on:
- individuals directly affected by the regulation;
- particular industries and sectors directly affected; and
- the economy and the community more broadly.

83. Consultation with stakeholders is beneficial because they:
- play an important role in identifying and considering alternative methods of achieving the stated objectives;
- greatly assist in the identification of innovative techniques for dealing with particular community concerns about the industry or sector;
- have extensive knowledge about the costs of regulatory proposals; and
- assist agencies to gain a better understanding of how the regulatory framework will actually function and how it will be enforced.

84. All stakeholder input should be evaluated and assessed. An agency may decide to undertake a RIS process even if a ground for an exemption applies under sections 8 or 12F of the SL Act (as well as sections 9 and 12G).

85. Agencies and responsible Ministers can only state that the proposed statutory rule or legislative instrument will yield the maximum net benefit if they have identified and assessed all the relevant impacts. There is a distinction between the issue of whether there is a net benefit and whether the statutory rule or legislative instrument would impose a significant burden (see Part 3, Division 2 of these Guidelines).

86. Also, while agencies and the responsible Minister should try to identify all impacts before initial consultation, ensuring proper consultation with all those who may be affected can reveal impacts which would otherwise not be identified and will also inform the RIS process.

Process for initial consultation

87. The responsible Minister should determine the level of initial consultation required depending on the nature of the proposed statutory rule or legislative instrument.

88. Factors suggesting more than usual initial consultation is required include:
- whether the statutory rule or legislative instrument is being introduced into a previously unregulated area;
- the nature of the industry that will be affected – does it have peak bodies that can or should be consulted?
- whether the proposed statutory rule or legislative instrument will replace an existing voluntary regime – e.g. voluntary code of conduct; and

- whether the proposed statutory rule or legislative instrument will impose criminal or civil penalties.

89. Preliminary consultation may occur through focus groups and briefing sessions with key stakeholders before deciding that a regulatory proposal is the most appropriate response to an issue. Peak industry bodies and local government should be notified during the development of regulatory proposals. Issue papers can also be used as a preliminary vehicle for communication and gathering information from stakeholders.

90. The procedures to be adopted will also vary with the nature of the proposed statutory rule or legislative instrument. For example, where the area was previously unregulated, consultation may take the form of a discussion paper on the issues requesting input from interested stakeholders. Where only relatively minor changes to the regulatory environment are proposed, targeted consultation may be more appropriate, such as inviting selected stakeholders to comment on the proposed changes.

Certificates of consultation – sections 6(c) and 12C(c)

91. The responsible Minister must ensure that where these Guidelines require initial consultation, a certificate of consultation is issued (see sections 6(c) and 12C(c) of the SL Act). A consultation certificate should provide details of who was consulted. An example of a certificate is included in BRV's resources and guidance materials (please refer to the Introduction of these Guidelines).

92. Where a Ministerial exemption certificate is issued under sections 8 (statutory rules) or 12F (legislative instruments), limited formal consultation or no consultation may be acceptable. Refer to Part 3, Division 3 of these Guidelines for the consultation requirements applicable to each exemption ground.

93. A certificate of consultation may form part of a composite certificate (see Part 4, Division 1 of these Guidelines for further detail).

94. The certificate of consultation must be laid before Parliament and provided to SARC (sections 15, 15A, 16B and 16C of the SL Act). See generally Part 3, Division 6 of these Guidelines.

DIVISION 2 – SIGNIFICANT BURDEN

95. This Part of the Guidelines outlines circumstances in which a statutory rule or legislative instrument is considered to impose a significant economic or social burden on a sector of the public. This is important at two stages.

96. First, in determining whether a significant burden will be imposed (see Part 3, Division 1 of these Guidelines in relation to consultation under sections 6(b) (statutory rules) and 12C(b) (legislative instruments)).

97. Secondly, in determining whether a proposed statutory rule or legislative instrument imposes a significant economic or social burden on a sector of the public, and therefore whether a RIS should be prepared or an exemption certificate, exempting the

preparation of a RIS applies (see Part 3, Division 3 of these Guidelines in relation to consultation under sections 8(1)(a) (statutory rules) and 12F(1)(a) (legislative instruments)).

98. In considering whether a proposed statutory rule or legislative instrument imposes a significant economic or social burden on a sector of the public, the responsible Minister must consider:
    - the base case (that is, the status quo in the absence of the proposed rule or instrument);
    - whether the proposed statutory rule or legislative instrument imposes a burden on one or more sectors of the public; and
    - whether that burden is a 'significant economic or social burden'.

99. Each of these considerations is discussed in more detail below.

The base case

100. The base case is relevant for considering whether to prepare a RIS and for characterising the problem that the proposed statutory rule or legislative instrument seeks to address while preparing the RIS.

101. The relevant base case can be determined by considering what the situation would be if the statutory rule or legislative instrument were not made. This will usually be either the existing regulatory environment, or no regulation, except in unusual circumstances, such as when Commonwealth regulations affecting Victorians are changing.

102. No regulation is the appropriate base case if:
    - a statutory rule or legislative instrument is new and is not replacing an existing statutory rule or legislative instrument;
    - a statutory rule is made to replace an existing statutory rule that is automatically being revoked in accordance with section 5 of the SL Act (i.e. 'sunsetting'); or
    - a statutory rule or legislative instrument is made to replace an existing statutory rule or legislative instrument that is expiring, other than by sunsetting.

103. In some circumstances, it may not be feasible to use the base case for a quantitative analysis because the regulations have been in place for a long time and the base case is speculative, or because the base case is unusual or complex. In those circumstances, it is recommended that BRV be consulted to establish how best to analyse the base case.

104. For a proposed statutory rule or legislative instrument that will amend an existing statutory rule or legislative instrument (that is not expiring), the base case is the burden imposed by the existing regulatory environment. The same approach should be used where regulations are revoked and replaced before the sunset date.

Sector of the public

105. A statutory rule or legislative instrument may impose a burden on either the whole community to impact a 'sector of the public' or on one or more identifiable groups of people within the community. Public sector bodies (within the meaning of the *Public Administration Act 2004*) and local government are excluded from these considerations but other exempt bodies are not. How many, and which people can constitute a sector of the public is a matter of judgement in each case. It will depend on the nature of the proposed statutory rule or legislative instrument.

106. For example, a statutory rule or legislative instrument might impose a burden on a sector of the public if it:

- affects a number of businesses, community groups, or individuals; or
- has an aggregate impact on the Victorian economy.

107. In some circumstances, a statutory rule or legislative instrument may have a significant effect on a particular group, region or industry. In such cases, the burden on that group, region or industry may mean that the burden as a whole is significant even though the majority of the population is not affected.

Significant burden

108. 'Significant burden' cannot be precisely defined. 'Burden' is a broad concept which may include a range of negative effects or impacts. For example, a financial or other type of resource burden (e.g. time) may be placed on businesses or individuals, restrict the access of a sector of the public to certain amenities or areas, or restrict an individual's ability to make choices about certain things.

109. Whether a burden is 'significant' should be determined according to the ordinary meaning of 'significant'.

110. Ministers should consider the burden imposed by the statutory rule or legislative instrument itself (rather than the authorising legislation). In some cases, the burden imposed will derive from obligations set out in the authorising Act and the statutory rule or legislative instrument will merely be declaratory or machinery. 'Declaratory' refers to changes that update legislative references and text, without material change to the substance or the status quo. For example, removing an obsolete definition or reference. 'Machinery' refers to changes that are mechanical, routine, not material or substantial in nature that clarify or correct a provision without changing procedural requirements. For example, prescribing an address for service. A proposed statutory rule or legislative instrument that imposes a significant burden is, on its face, not machinery. A proposed statutory rule or legislative instrument is not 'machinery' just because it gives effect to the authorising Act under which it is made.

111. Whether a significant burden may be imposed should be assessed initially with reference only to the costs or negative impacts on a sector of the public. That is, potential costs should not be offset against potential benefits. Costs and benefits of the proposed statutory rule or legislative instrument are compared in the RIS (if one is prepared).

112. To determine whether a 'significant burden' is imposed, all potential costs must be assessed, regardless of how readily quantifiable those costs are. The analysis may need to include both quantitative and qualitative aspects. When the costs are not easily quantified, it may help to consider stakeholders' views on likely or desired outcomes.

Assessing qualitative burdens

113. Some statutory rules or legislative instruments will impose a burden that is primarily qualitative in nature, for example, those that significantly impact on rights, access to services or the ability to innovate or compete. These burdens are less readily quantifiable and require careful assessment to ensure all potential negative impacts are identified and the relative size of each is adequately assessed. Whether a burden is significant in these cases may not ultimately be able to be determined based on quantitative estimates.

114. In considering whether a proposed statutory rule or legislative instrument imposes a significant burden, the responsible Minister must also consider the likely effect of the proposed statutory rule or legislative instrument on the rights in the *Charter of Human Rights and Responsibilities Act 2006* (the 'Charter'). See Part 4, Division 1 of these Guidelines in relation to human rights certificates.

Assessing quantitative burdens

115. Where the impacts of the proposed statutory rule or legislative instrument are readily quantifiable, indicative data may be gathered to assess the likely costs of the proposal. This may involve seeking views from some of those likely to be affected.

116. Generally, if the preliminary analysis suggests the measurable social or economic costs to any sector of the public (including the Victorian community as a whole) are likely to be greater than $2 million per year, compared with the relevant base case, then there is likely to be a significant burden. For the applicable base case, see paragraphs 99 to 103 above.

117. The $2 million threshold is indicative only and should be reserved for situations where it is not otherwise clear that a significant burden may be imposed. Further, a statutory rule or legislative instrument may impose a significant burden on a sector of the public even if it imposes quantifiable costs of less than $2 million per year – for example, if the impact is concentrated on a particular group, region or industry.

118. In determining whether a significant burden is imposed, quantifiable costs need to be considered together with qualitative costs.

Examples of where a significant burden may be imposed

119. A significant burden may be imposed on a sector of the public where the proposed statutory rule or legislative instrument has one or more of the following effects:

- imposes restrictions on entry into, or exit out of, an affected industry;
- alters the ability or incentives for business to compete in an industry;

- requires business, community groups or individuals to spend significant additional funds or devote a significant amount of additional time to compliance activities, change current practices or seek external advice (whether the additional resources required are significant will, to some degree, depend on the nature of the businesses or industry affected);
- changes the structure of markets or sectors or creates a market that could alter the viability of existing markets;
- creates a significant disincentive to private investment – e.g. by increasing potential delays for approvals;
- imposes significant penalties for non-compliance (either on businesses or individuals);
- imposes minimum requirements or standards on businesses or individuals, such as building requirements or environmental standards; or
- significantly affects individual rights and liberties in some other way.

120. The list above is a not exhaustive. Each policy proposal should be assessed based on its impact and the size of the impact.

121. Examples of cases where a RIS has been prepared include:
- The Prevention of Cruelty to Animals Regulations 2019. These regulations include requirements for specific activities such as the use of electronic and other devices on animals, transportation of animals and use of fruit netting. The regulations impact on animal welfare as well as people who own or handle animals. Some of the key burdens of the regulations were quantified in the RIS while other more difficult to quantify burdens were analysed qualitatively.
- Electrical Safety (General) Regulations 2019. These regulations prescribe standards for electrical installations and set fees for Certificates of Electrical Safety (COES). In the RIS, it was estimated that COES apply to more than 500,000 electrical installations each year and the proposed fees would have raised about $11.2 million in 2018-19.
- The Supreme Court (Fees) Regulations 2018 set fees for users of the Supreme Court in civil law matters. These regulations introduced a tiered fee structure with corporate, standard and concession fees. In the RIS, it was estimated that about $20 million in fees would be raised per year under the regulations.

122. RISs from 2011 onwards are generally available on BRV's website. Agencies are encouraged to discuss any policy proposals with BRV early in the development to clarify RIS requirements.

Statutory rules and legislative instruments that impose fees or charges

123. Where statutory rules and legislative instruments introduce new fees or charges, or increase fees or charges by more than the Treasurer's annual rate, a significant burden assessment must be conducted.

124. Statutory rules and legislative instruments that increase fees or charges by an amount not exceeding the Treasurer's annual rate are exempt from the requirement to prepare a RIS (the SL Act, sections 8(1)(d) and 12F(1)(c)). Where an agency is proposing to

increase fees by a percentage that is no greater than the Treasurer's annual rate but would exceed the significant burden threshold then the agency would rely on a section 8(1)(d) or section 12F(1)(c) exemption. Exemptions under section 8(1)(a) and section 12F(1)(a) would not apply.

125. The section 8(1)(d) and section 12F(1)(c) exemptions cannot apply if there is an increase in fees collected for substantially the same purpose multiple times within one financial year, and the aggregate increase across the year is greater than the Treasurer's annual rate. Fees are likely to be imposed for substantially the same purpose if they are issued under the same Act and relate to the same regulatory scheme and subject-matter. This requirement promotes transparency in the collection of fees and charges, by ensuring the additional burden is considered in light of all other fee or charge increases in that year and allowing for fully informed scrutiny by Parliament and SARC (see Part 3, Division 6 of these Guidelines).

126. A statutory rule can set a package of fees, often known as a 'basket approach'. An example is the Prevention of Cruelty to Animals Regulations 2019 (discussed above) which set many different fees for approvals for therapeutic electronic devices, approvals for the use of traps and fees related to rodeos. Where there is to be an increase in one or more individual fees within a basket of fees exceeding the Treasurer's annual rate, but the increase to the basket of fees as a whole is within that rate, then this exemption can apply.

127. Fees may be rounded to the nearest whole dollar (section 8(2) of the SL Act) without affecting whether a section 8(1)(d) exemption can apply.

128. Where a statutory rule or legislative instrument imposes a fee or charge, the responsible Minister should consider the level of the fee, the size of any increase (as compared to the current fee, if one exists) and the impact it may have on an individual, community group or business. The indicative $2 million threshold may assist with this assessment.

129. Agencies may decide that, due to the nature of the authorising Act, proposed statutory rule or proposed legislative instrument, it is appropriate for a RIS to be prepared, notwithstanding that an exemption may apply. Whether a RIS should be prepared is ultimately the responsible Minister's decision. Agencies should consult and obtain advice from their Minister, as it is ultimately the Minister's decision as to whether a RIS should be prepared.

130. The indicative $2 million threshold applies to the cumulative impact of the policy proposal as effected by the statutory rule or legislative instrument. It does not apply to each affected individual or business. A new fee or charge which recovers $2 million or more per year in total is likely to impose a significant burden on a sector of the public, although it may not impose a $2 million burden on an individual business or group.
The threshold will also be met if the statutory rule or legislative instrument, as a whole, imposes a burden of $2 million per year, despite the fact that any individual fee may not recover more than $2 million per year (i.e. collectively if the rule or instrument sets multiple fees).

131. Note: The Treasurer's annual rate (sections 8(1)(d) and 12F(1)(c) of the SL Act) does not form part of the base case. This means that a fee increase does not need to propose to recover an additional $2 million beyond the Treasurer's annual rate to meet the indicative significant burden threshold.

Statutory rules and legislative instruments reducing or maintaining existing fees or charges

132. Statutory rules or legislative instruments which reduce existing fees or charges payable usually do not impose a significant burden on a sector of the public. However, there are exceptions, such as where a reduction in fees could result in costs being redistributed to another sector of the public. This might occur where reducing a particular fee leads to other fees increasing. For example, if a self-funded organisation (funded by its own fees rather than government appropriations) reduces one of its fees, then it might need to increase another fee to cover its costs.

133. A statutory rule or legislative instrument that is remade and re-imposes an existing fee or charge at the same level can impose a significant burden, as the relevant base case will be no fees (see paragraphs 99 to 103 above for commentary on the base case).

Revocation of statutory rules and legislative instruments

134. Statutory rules or legislative instruments that revoke statutory rules or legislative instruments that are not being replaced may nonetheless impose a significant economic or social burden on a sector of the public. This may be the case if they increase costs or risks of harm to some parties, even if they remove the direct regulatory burden contained in the statutory rules or legislative instruments that are being revoked. Where they do not impose a significant economic or social burden on a sector of the public they would most likely be exempt from the requirement to prepare a RIS under the SL Act (section 8(1)(a) and section 12F(1)(a) SL Act).

DIVISION 3 – EXEMPTIONS FROM THE RIS PROCESS

135. Unless an exemption (under the SL Act or the LI Regulations) applies, all statutory rules and legislative instruments must undergo a RIS process (see Part 3, Division 4 of these Guidelines).

136. There are circumstances where it is not appropriate or necessary to prepare a RIS, or where formal consultation is not required. There are exemptions under the SL Act in these cases. The exemptions may be determined on a case-by-case basis by:

- the responsible Minister (see the paragraphs directly below); or
- in special circumstances, the Premier (see paragraphs 144 to 158).

Exemption certificates

137. There are two types of exemption certificates that can exempt a statutory rule or legislative instrument from the requirement for a RIS. These are:

- exemption certificates issued by the responsible Minister – sections 8 (statutory rules) and 12F (legislative instruments); and

- exemption certificates issued by the Premier – sections 9 (statutory rules) and 12G (legislative instruments).

Ministerial exemption certificates under sections 8 and 12F

138. Sections 8 and 12F of the SL Act outline the circumstances in which the responsible Minister may issue an exemption certificate. The table below summarises these sections.

Ministerial exemptions applicable to statutory rules (section 8) and legislative instruments (section 12F)

Reason for Ministerial exemption	**Statutory Rule – Exempt Provision and notes on consultation**	**Legislative Instrument – Exempt Provision and notes on consultation**
Proposed statutory rule or legislative instrument does not impose a significant economic or social burden on a sector of the public.	**Section 8(1)(a)** of the SL Act Initial consultation should be undertaken under section 6(b) to enable the responsible Minister to obtain sufficient evidence to form a view as to whether the proposed statutory rule imposes a significant burden. See Part 3, Division 2 of these Guidelines for details on what constitutes a 'significant burden'.	**Section 12F(1)(a)** of the SL Act mirrors section 8(1)(a) of the SL Act.
Proposed statutory rule relates only to a court or tribunal or the procedure, practice or costs of a court or tribunal.	**Section 8(1)(b)** Where a statutory rule is made by a court or tribunal, consultation under section 6 is not required unless the judges or magistrates of that court or the members of the tribunal determine that there should be consultation. In other cases that fall under section 8(1)(b), sufficient consultation should occur with the courts and tribunals, representative bodies of the legal profession and other relevant interest groups to ensure that the statutory rule is the most effective option available.	**Not applicable**
Proposed statutory rule or legislative instrument is of a fundamentally declaratory or machinery nature.	**Section 8(1)(c)** For such a statutory rule, no consultation is required under section 6(b). (However, consultation may still be required under section 6(a), and, if so, the responsible Minister should issue a	**Section 12F(1)(b)** of the SL Act mirrors section 8(1)(c) of the SL Act. For such a legislative instrument, no consultation is required under section 12C.

Reason for Ministerial exemption	Statutory Rule – Exempt Provision and notes on consultation	Legislative Instrument – Exempt Provision and notes on consultation
	consultation certificate under section 6(c).)	
Proposed statutory rule or legislative instrument only increases fees in respect of a financial year by an amount not exceeding the annual rate approved by the Treasurer in relation to the State Budget for the purposes of section 8 and 12F. *See 'Statutory rules and legislative instruments that impose fees or charges' above, under Part 3 of Division 2*	**Section 8(1)(d)** Extensive consultation is undertaken by the Treasurer and DTF in the development of the Budget strategy, which sets out the financial plan for the State for a 12-month period. Where a proposed statutory rule does no more than effect an increase in accordance with the Treasurer's annual rate, no additional consultation is required under section 6 of the SL Act. The current rate approved by the Treasurer can be found here.	**Section 12F(1)(c)** mirrors section 8(1)(d) of the SL Act.
Proposed statutory rule prescribing or exempting instruments under sections 4(1)(a) or 4(1)(b) of the SL Act.	**Section 8(1)(e)(i) and 8(1)(e)(ii)** No consultation is required except for consultation with the relevant responsible Minister or the body responsible for the statutory rule.	**Not applicable.**
A proposed statutory rule (extension regulations) which extends the life of sunsetting statutory rules under section 5A of the SL Act.	**Section 8(1)(e)(iii)** Extension regulations can only extend an existing regulatory regime for a maximum of 12 months. No initial consultation is required under section 6 for these proposed statutory rules.	**Not applicable.**

Reason for Ministerial exemption	Statutory Rule – Exempt Provision and notes on consultation	Legislative Instrument – Exempt Provision and notes on consultation
A proposed statutory rule that prescribes under sections 4A(1)(a), (b) or (c) of the SL Act instruments as falling within or outside the definition of legislative instrument or the operation of the SL Act.	**Sections 8(1)(e)(iv), (v) and (vi)** No consultation is required except for consultation with the relevant responsible Minister and the body responsible for the legislative instrument.	**Not applicable.**
Proposed statutory rule or legislative instrument is required under a national uniform legislation scheme and an assessment of costs and benefits has been undertaken under that scheme.	**Section 8(1)(f)** For such a statutory rule, the responsible Minister should ensure that the impact of the scheme on Victorians has been properly assessed (e.g. in a national RIS) and must be satisfied that there has been adequate consultation with relevant Victorian stakeholders. This consultation may have already occurred during the development of the national scheme and the decision for the Victorian Government to enter into that scheme. If this is the case, then the requirement for consultation under section 6(b) is satisfied. Note the responsible Minister is still required to issue a certificate of consultation under section 6(c). The certificate should outline the nature and timing of the consultation undertaken.	**Section 12F(1)(f)** mirrors section 8(1)(f) of the SL Act.
Proposed statutory rule deals with the administration or procedures within or as between departments or declared authorities within the meaning of the *Public Administration Act 2004,* or within or as between	**Section 8(1)(g)** Consultation is required under section 6(b) with the Victorian Public Sector Commissioner, and, for a statutory rule proposed under the *Parliamentary Administration Act 2005*, with	**Section 12F(1)(i)** mirrors section 8(1)(g) of the SL Act.

Reason for Ministerial exemption	Statutory Rule – Exempt Provision and notes on consultation	Legislative Instrument – Exempt Provision and notes on consultation
departments within the meaning of the *Parliamentary Administration Act 2005*.	relevant Parliamentary Officers. Otherwise the level and nature of the consultation required is a matter for the responsible Minister.	
Where notice of the proposed statutory rule or legislative instrument would render the statutory rule or legislative instrument ineffective or would unfairly advantage or disadvantage any person likely to be affected by the proposed statutory rule or legislative instrument.	**Section 8(1)(h)** Normally, after the completion of a RIS, the SL Act requires that the RIS and proposed statutory rule be released for public consultation. In some cases, the release of the rule before it commences may undermine the purpose for which the rule is being made. In other cases, notification may mean that particular people are subject to unfair advantage or disadvantage. In such cases, the statutory rule may be eligible for an exemption from the RIS process. Consultation under section 6 should be conducted only to the extent that the responsible Minister considers it appropriate.	**Section 12F(1)(j)** mirrors section 8(1)(h) of the SL Act.
Proposed legislative instrument would only impose a burden on a public sector body.	**Not applicable.**	**Section 12F(1)(d)** A 'public sector body' is defined in the *Public Administration Act 2004*. It includes a Department, an Administrative Office, IBAC, Office of the Victorian Ombudsman, VCAT, the Victorian Electoral Commission, the Victorian Public Sector Commission and a body established by or under an Act, Governor in Council or Minister with a public function.

Reason for Ministerial exemption	Statutory Rule – Exempt Provision and notes on consultation	Legislative Instrument – Exempt Provision and notes on consultation
		Initial consultation should be undertaken under section 12C(b) to enable the responsible Minister to obtain sufficient evidence to form a view as to whether the proposed legislative instrument imposes any burden on a sector of the public (see Part 3, Division 2 of these Guidelines). A determination by the responsible Minister that the economic or social burden imposed by the proposed legislative instrument is not significant under section 12F(1)(a) is not sufficient to show that the proposed legislative instrument imposes a burden only on a public sector body. The level and nature of the consultation required in each case is a matter for the responsible Minister.
Proposed legislative instrument is an order made under the *Administrative Arrangements Act 1983*.	**Not applicable.**	**Section 12F(1)(e)** The *Administrative Arrangements Act 1983* empowers the Governor in Council to make orders relating to the administration of government. These orders are machinery in nature and are unlikely to place any burden on a sector of the public. Consultation under section 12C(b) is not required.
Proposed legislative instrument is required to undergo, or has undergone an analytical and consultation process which, in the opinion of the responsible Minister, is equivalent to the RIS process required under	**Not applicable.**	**Section 12F(1)(g)** Initial consultation under section 12C must be undertaken and the responsible Minister should issue a consultation certificate under section 12C(c). This exemption is intended to avoid the duplication of analysis and consultation requirements in circumstances where an

Reason for Ministerial exemption	Statutory Rule – Exempt Provision and notes on consultation	Legislative Instrument – Exempt Provision and notes on consultation
section 12E - RIS equivalency.		authorising Act imposes requirements that are equivalent to the RIS process. Section 12H of the SL Act sets out a number of RIS requirements which should preferably be met by the equivalent process. However, as a minimum, the process must meet the following substantive requirements to qualify for exemption under this provision: • the instrument must undergo an analysis of the costs and benefits, including consideration of alternative options for achieving the regulatory goal; • the analysis must be independently assessed; and • the instrument must undergo a public consultation process for at least 28 days.
Proposed legislative instrument is of not more than 12 months duration and is necessary to respond to a public emergency, an urgent public health issue or public safety issue, or likely or actual significant damage to the environment, resource sustainability or the economy.	**Not applicable.**	**Section 12F(1)(h)** The scope of consultation required for such legislative instruments is a matter for the responsible Minister.
Proposed legislative instrument is made under a statutory rule and the RIS for that statutory rule has adequately considered the impact of the proposed legislative instrument.	**Not applicable.**	**Section 12F(1)(k)** The scope of consultation required for such legislative instruments is a matter for the responsible Minister.

Form and content of Ministerial exemption certificates

139. If the responsible Minister considers that an exemption ground in section 8(1) or section 12F(1) of the SL Act applies to a proposed statutory rule or legislative instrument, the responsible Minister must specify the reasons for that opinion in their certificate (see sections 8(3) and 12F(3) of the SL Act). An exemption certificate should contain detailed reasons justifying the exemption (see sections 8(3) and 12F(3) of the SL Act). An assertion that the exemption ground applies is not sufficient.

140. The SL Act does not prescribe any form for an exemption certificate issued under sections 8 or 12F. However, the Clerk of the Executive Council has issued template certificates documents. The Victorian Guide to Regulation and supporting toolkits (see the Introduction of these Guidelines) also includes an example form of certificate. The certificate should include:

- the name of the proposed statutory rule or legislative instrument;
- the relevant paragraphs of sections 8(1) or 12F(1) under which the exemption is made;
- an outline of the nature and effect of the proposed statutory rule or legislative instrument;
- the proposed commencement date and, if relevant, the reason for that date; and
- the reasons why the proposed statutory rule or legislative instrument falls within the relevant exemption – that is, what it is about the nature and effect of the statutory rule or legislative instrument that satisfies the exemption.

141. Where a Ministerial exemption certificate is issued in relation to a statutory rule or legislative instrument, the initial consultation requirements may also be affected. The table above provides further detail of initial consultation requirements under sections 6 (statutory rules) and 12C (legislative instruments) that apply in relation to each exemption ground.

142. A Ministerial exemption certificate may form part of a composite certificate (see Part 4, Division 1 of these Guidelines in relation to composite certificates for further detail).

143. Exemption certificates are laid before Parliament and sent to SARC (section 16C of the SL Act). See generally Part 3, Division 6 of these Guidelines regarding other tabling requirements.

144. For previous examples of exemption certificates, please contact DPC's OGC by email at GeneralOrdersLegislativeInstruments@dpc.vic.gov.au.

Premier's exemption certificates under sections 9 and 12G

145. The Premier has the power to exempt a proposed statutory rule or legislative instrument from the RIS process (see sections 9(1) and 12G(1) of the SL Act). The Premier may only issue an exemption certificate where, in the special circumstances of the case, the public interest requires that the proposed statutory rule or legislative instrument be made without complying with section 7(1) (statutory rules) or section 12E (legislative instruments). The purpose of the exemption is to ensure that

subordinate legislation can be made without delay, where warranted by the circumstances.

146. The Premier's power to grant exemptions is extremely limited. For example, the Premier may issue an exemption certificate in an emergency where there are overriding public interest reasons for the statutory rule or legislative instrument to be made without undergoing a RIS.

147. Premier's exemption certificates are not intended to provide an exemption merely because there is insufficient time to comply with the requirements of the SL Act.

148. The Premier cannot grant an exemption certificate unless the proposed statutory rule or legislative instrument will expire within 12 months of its commencement date (sections 9(2)(a) and 12G(2)(a) of the SL Act). If the Premier grants an exemption certificate, agencies must commence and complete a RIS process during the lifetime of the certificate. The Premier will rarely grant more than one certificate.

149. Moreover, the duration of the exemption will be the shortest possible period necessary to enable the RIS process to be undertaken unless there are exceptional circumstances. In considering requesting a Premier's exemption certificate, the relevant Minister should be aware that in practice, a six-month (rather than twelve month) exemption may be the maximum granted.

150. There are no set criteria for determining whether the public interest requires an exemption. Requests for a Premier's exemption certificate are assessed on a case-by-case basis. This involves balancing the public interest in the consultation and cost-benefit assessment involved in the RIS process and the public interest in making the proposed statutory rule or legislative instrument without delay.

151. While there are no set criteria to determine the 'public interest', the following examples may assist agencies:

- Example 1: The agency requested the Premier to extend a sunsetting statutory rule. The government had previously accepted recommendations in a review that directly related to the primary legislation under which the statutory rule was being made. The agency had to consult with the public about proposed amendments to the primary legislation arising from the review. After this consultation, there would then be insufficient time to conduct a RIS and make a new statutory rule replacing the sunsetting rule. The Premier issued an extension in relation to the sunsetting statutory rule to allow the reform to the primary legislation to be completed and then consultation on proposed regulations to replace the sunsetting statutory rule.
- Example 2: The agency commenced a review of the regulations but the initial consultation with stakeholders identified a number of operational issues. There was insufficient time to conduct a RIS process and amend the replacement regulations to address these concerns. Failure to extend the sunsetting regulations would mean certain offences would cease or be more difficult to prove. The agency requested the Premier to extend the operation of the sunsetting statutory rule and the Premier issued the extension.
- Example 3: The sunsetting statutory rule dealt with cost recovery fees for administering a scheme. However, amendments to a related statutory rule meant

that the number of participants in the scheme could not be known. This information was key in calculating the fees to recover the costs of administering the sunsetting scheme. The Premier granted an extension under section 9 of the SL Act.

152. To obtain a Premier's exemption certificate, the responsible Minister must request, in writing, that the Premier issue an exemption certificate under section 9(1) (statutory rules) or section 12G(1) (legislative instruments). Such requests should be made at least four weeks before the proposed date of making the statutory rule or legislative instrument.

153. The responsible Minister's letter to the Premier must explain why, in the special circumstances of the case, the public interest overrides the requirement to conduct a RIS and requires the exemption.

154. At their own discretion, the responsible Minister may choose to undertake consultation under section 6 or section 12C of the SL Act and issue a section 6 or section 12C certificate. This may involve consultation with any other Minister whose area of responsibility may be affected by the proposed statutory rule or legislative instrument and/or any sector of the public on which a significant economic or social burden may be imposed by the proposed statutory rule or legislative instrument. Whilst it is not a requirement of the SL Act to undertake such consultation when applying for a Premier's exemption certificate, choosing to undertake consultation under section 6 or section 12C of the SL Act if possible will ensure a more robust development process and a fit for purpose statutory rule or legislative instrument.

155. Before making the request for the Premier's exemption certificate, the agency should ensure that the proposed statutory rule has been settled by OCPC or the legislative instrument has been finalised. This will assist the Premier to properly assess the proposed public interest reasons. Where the certificate concerns a statutory rule, agencies must ensure that the statutory rule is settled with OCPC before the responsible Minister's formal request to the Premier. However, the request to the Premier may take place at the same time as the final stages of the settling process if time is very limited.

156. For statutory rules, the responsible Minister's request must be accompanied by a copy of the settled statutory rule. For legislative instruments, a copy of the finalised legislative instrument must be provided with the Minister's request.

157. Agencies must also confirm with OGC that CPC has notified the agency that they have lodged an electronic copy of the certificate under section 13 of the SL Act with the Executive Council. OCPC will only provide a section 13 certificate if it is informed by agencies that an exemption has been granted and the duration of the exemption is known. OCPC can, on request, provide the agency with a copy of its letter to the Executive Council that accompanies the certificate. However, if an agency wants a copy of the certificate itself, the agency must contact the Executive Council.

158. Where the Premier issues an exemption certificate for a statutory rule or legislative instrument, the agency must table the certificate in both Houses of Parliament and provide the certificate to SARC (see sections 15, 15A, 16B and 16C of the SL Act). Please also see Part 3, Division 5 of these Guidelines.

159. Where the Premier issues an exemption certificate for a statutory rule, this must also be included in the documents that must be submitted to the Governor in Council for the statutory rule to be made (see section 14 of the SL Act, and table below setting out relevant certificates required). For legislative instruments a copy of the Premier's exemption certificate must be provided to the instrument maker.

Certificates required to accompany GIC documents for a statutory rule that is to be made by or with the consent or approval of GIC (section 14 SL Act)
• 3 copies (or such other number as may be prescribed) of the proposed statutory rule (s14(a))
• a copy of the section 13 certificate (s14(b))
• **if a RIS was not required,** a copy of the exemption certificate (s14(c))
• **if a RIS was required**, a copy of the compliance certificate (s14(d));
• **if consultation was required under section 6**, a copy of the consultation certificate issued under that section (s14(db))
• if the proposed statutory rule is an **extension regulation**, a copy of the extension certificate and a copy of the Premier's certificate under section 5A(3) (s14(da))
• if the proposed statutory rule provides for the **enforcement of an offence against the statutory rule by an infringement notice**, whether under the *Infringements Act 2006* or otherwise, a copy of the certificate under section 6A (s14(e))
• **if a human rights certificate was required**, a copy of the human rights certificate (s14(f))
• **if a human rights certificate was not required**, a copy of the responsible Minister's certificate under section 12A(3) (s14(g))

160. The agency must also provide to SARC a copy of the reasons given to the Premier when seeking a Premier's exemption certificate, together with any other relevant materials (sections 15A(1)(b) and 16C(1)(c) of the SL Act).

161. If agencies experience difficulty locating previous exemption certificates, please contact DPC's OGC at GeneralOrdersLegislativeInstruments@dpc.vic.gov.au.

Exemptions under the LI Regulations (relevant only to legislative instruments)

162. As noted above in Part 1, Division 1, the LI Regulations may assist in answering the question of whether an agency needs to conduct a RIS process for a legislative instrument.

163. Summary:

- If an instrument is prescribed in Schedule 1 to the LI Regulations, agencies do not need to conduct a RIS process to make an instrument, as instruments in Schedule 1 to the LI Regulations are **not** legislative instruments.
- If an instrument is prescribed in Schedule 2 to the LI Regulations, agencies must follow the RIS process to make an instrument (unless the agency or responsible Minister obtain an exemption certificate). This is because instruments in Schedule 2

to the LI Regulations **are** prescribed to be legislative instruments and are subject to the RIS requirements in the SL Act (unless an exemption under section 12F applies).

- If an instrument is prescribed in Schedule 3 to the LI Regulations, agencies do not need to conduct a RIS process to make an instrument. This is because instruments in Schedule 3 to the LI Regulations **are** prescribed to be exempt from Parts 2A and 5A and sections 16B, 16C, 16E and 16F of the SL Act (which relate to preparation, tabling and scrutiny of legislative instruments).

DIVISION 4 – THE RIS PROCESS

164. The responsible Minister must ensure that a RIS is prepared for a proposed statutory rule or a legislative instrument, unless an exemption applies (the SL Act, sections 7 and 12E). A letter of assessment for a RIS for a statutory rule can be sought from the CBR (or its successor office or Secretary, DTF) once the proposed statutory rule has been settled by OCPC.

165. Drafting and assessment requirements for the RIS are set out in sections 10 (statutory rules) and 12H (legislative instruments) of the SL Act. The requirements relating to statutory rules and legislative instruments are very similar. Agencies should note that the authorising Act may also include requirements relevant to the impact assessment (such as in the *Environment Protection Act 2017*).

166. As outlined in the Victorian Guide to Regulation, the primary objectives of the RIS process is to present sound analysis based on credible evidence that enables the government to consider all relevant information before making a decision. This should ensure that regulations are necessary, effective and efficient.

Content of a RIS

167. RISs should be drafted in plain English to ensure they are clear and accessible to the public. They must clearly set out the regulatory requirements to be created by the proposed statutory rule or legislative instrument.

168. The RIS must include a statement of the objective of a proposed statutory rule or legislative instrument (the SL Act, sections 10(1)(a) and 12H(1)(a)). The objectives stated in the RIS are likely to differ from those which must be included in the statutory rule (and which may be included in a legislative instrument) itself, as discussed above at Part 2, Division 4 of these Guidelines. RIS objectives must be stated in terms of the policy objectives, or outcomes, being sought to resolve the identified policy problem, regardless of the form of the solution. RIS objectives should be mutually exclusive (not overlap) and completely exhaustive (cover all the key objectives).

169. A proposed statutory rule or legislative instrument may not be the only option to address the relevant policy problem, and might not be the final option selected as a result of the RIS and public consultation processes. RISs should analyse a range of regulatory and non-regulatory options.

170. Under section 10(1)(ba), note that when a proposed statutory rule will amend fees in an existing statutory rule, a table must be prepared in the RIS comparing the proposed and existing fees, including the percentage increase or decrease for each fee (the SL Act, section 10(1)(ba)). This includes when a proposed statutory rule will set new fees to replace existing fees in a statutory rule which is sunsetting or otherwise being superseded.

171. The Victorian Guide to Regulation provides more detail on the preparation of RISs. Please refer to the resources and guidance materials listed in the Introduction to the Guidelines for techniques for quantifying costs and benefits, and the use of qualitative analysis where it is difficult to assign a dollar value to anticipated benefits.

172. The responsible Minister should determine at what stage they seek expert advice on the development of a regulatory proposal. Agencies may prepare their own RISs or engage contractors or consultants to prepare RISs. If engaging consultants external to government, agencies should also consult the policies concerning engaging and managing consultants issued by the Victorian Government Purchasing Board ('VGPB'). For further information and to obtain a copy of its policies, refer to the VGPB's website.

173. Agencies should also consider any significant impacts on human rights contained in the Charter when assessing the costs and benefits of the proposal (See Part 4, Division 1 of these Guidelines for information about the preparation of a Human Rights Certificate.)

Independent assessment

174. The responsible Minister or responsible instrument maker, respectively, must ensure that independent advice on the adequacy of a RIS is obtained and considered in accordance with these Guidelines (the SL Act, sections 10(3) and 12H(3)).

175. The CBR or its successor office reviews RISs and provides the independent advice required by sections 10(3) (statutory rules) and 12H(3) (legislative instruments) of the SL Act. The CBR or its successor office will advise the responsible Minister or responsible instrument maker whether the RIS adequately addresses the matters which must be included under sections 10 or 12H of the SL Act. Where there is a vacancy in the office of the CBR or its successor office, then the Secretary, DTF can provide the independent advice. The CBR (or its successor office or Secretary, DTF) must be satisfied that the proposed statutory rule or legislative instrument is consistent with the RIS. The CBR (or its successor office or Secretary, DTF) may require a copy of the statutory rules settled by OCPC or a consultation draft of a legislative instrument before providing advice on the adequacy of a RIS.

176. The responsible Minister or instrument maker must receive CBR's (or its successor office or Secretary, DTF's) advice on adequacy before it releases the RIS for public consultation (see Part 3, Division 5 of these Guidelines) (or its successor office or Secretary, DTF). It is best practice to attach the CBR's (or its successor office or Secretary, DTF's) independent advice to the RIS.

177. Ministers and responsible instrument makers are also strongly encouraged to attach the CBR's (or its successor office or Secretary, DTF's) advice to all RISs, even where they are

assessed as being adequate. Sometimes the CBR (or its successor office or Secretary, DTF) may raise points that are relevant to stakeholders' consideration of a proposal.

178. Following the CBR's (or its successor office or Secretary, DTF's) assessment of the RIS, the responsible Minister must issue a certificate certifying that the RIS complies with the requirements of the SL Act and the Guidelines and adequately addresses the likely impact of the statutory rule or legislative instrument (the SL Act, sections 10(4) and 12H(4)). Where the CBR (or its successor office or Secretary, DTF) assesses the RIS as inadequate, the certificate should explain why the Minister believes the requirements have been met, notwithstanding the CBR's (or its successor office or Secretary, DTF's) assessment of inadequacy. Those reasons will be considered by SARC in its review of the statutory rule or legislative instrument.

179. A copy of the CBR's (or its successor office or Secretary, DTF's) assessment of a RIS must be sent to SARC after the statutory rule is made (regardless of whether the RIS is assessed as adequate or not) (see Part 3, Division 6 of these Guidelines). This promotes a transparent and accountable regulatory system.

DIVISION 5 – RELEASE OF THE RIS FOR PUBLIC CONSULTATION

180. If a RIS is required, (see Part 3, Division 2 of these Guidelines) further public consultation requirements apply. This consultation occurs after the proposed statutory rule has been settled by OCPC[3] or the legislative instrument has been finalised by the instrument maker. These documents must be released at the beginning of the consultation period. This second, more formal, phase of consultation is distinct from the initial consultation required as part of the policy development process (see Part 3, Division 1 of these Guidelines).

181. The public consultation process gives businesses and the wider community a chance to communicate to government any concerns it may have about proposed regulations which will affect its activities. One of the aims of the RIS and the public consultation process is to obtain information and comment from the widest set of possible sources. This helps identify any weaknesses in the reasoning in the RIS, test assumptions and methodology in the RIS, and ensure that competing interests are recognised and adequately considered.

182. Undertaking the RIS and the public consultation process properly ensures that any resulting statutory rule or legislative instrument is likely be effective and efficient.

Notice and publication for public consultation

183. Following initial consultation and the preparation of the RIS, the proposed statutory rule (as settled by OCPC) or proposed legislative instrument and RIS must be published by the responsible Minister, with a notice inviting comments and submissions from the public (the SL Act, sections 11 and 12I).

[3] The regulations that accompany the RIS must have been settled by OCPC and a settling letter issued. The RIS is carried out in relation to settled regulations.

184. The notice must be published in:

- the Government Gazette; and
- a daily newspaper circulating generally throughout Victoria (under section 38M of the *Interpretation of Legislation Act 1984*, publication on a website declared by the Minister under section 38N of that Act is taken to meet this requirement. Currently, the Victorian public notices website is a declared website for the purposes of section 38M).

If the responsible Minister considers it appropriate, any trade, professional or public interest publications as the responsible Minister determines.

185. The notice must set out:

- the reason for, and the objective of, the proposed statutory rule or legislative instrument;
- the locations (including the Government website) where a copy of the RIS and the proposed statutory rule can be obtained; and
- an invitation for public comments or submissions within a specified time not less than 28 days from the publication of the notice.

186. It is particularly important to ensure that the notice is published in accordance with sections 11 (statutory rules) and 12I (legislative instruments) of the SL Act. Failure to publish the notice may affect the operation or effect of the statutory rule or legislative instrument.

187. The RIS and a copy of the consultation draft of the statutory rule or legislative instrument must be available in electronic form on a government website (for example on the agency's and/or the Engage Victoria website), and on request in hard copy.

188. Under the SL Act, consultation following publication of a RIS is required for at least 28 days from public notification. However, consultation for at least 60 days is best practice.

Consideration of submissions

189. Following public consultation, the responsible Minister must consider all submissions and comments received in relation to the draft statutory rule or legislative instrument and RIS.

190. A statement of reasons summarising issues raised in submissions and explaining how the agency has responded must be prepared and published on a government website and available on request in hard copy. This allows those who have made submissions on a RIS to see how their comments have been addressed in the final version of the statutory rule or legislative instrument. Example statement of reasons include the statement of reasons for the Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019 and the Labour Hire Licensing Regulations 2018. Where there are a large number of submissions, a general letter with an attachment covering the various issues raised, and documenting how each issue has been addressed, can be used. A statement of reasons contributes to the transparency of the regulatory process.

191. If the Minister does not adequately address valid criticisms and suggestions received during consultation SARC may criticise the proposed statutory rule or legislative instrument. Under section 15A of the SL Act, SARC must be provided with a copy of **all comments and submissions** received in relation to the RIS (see generally Part 3, Division 6 of these Guidelines).

Notice of decision

192. Sections 12 (statutory rules) and 12J (legislative instruments) of the SL Act require the responsible Minister to publish a notice of the Minister's decision to make, or not to make, the relevant statutory rule or legislative instrument.

193. The notice must be published in:
- the Government Gazette; and
- a daily newspaper circulating generally throughout Victoria (under section 38M of the *Interpretation of Legislation Act 1984*, publication on a website declared by the Minister under section 38N of that Act is taken to meet this requirement. Currently, the Victorian Public Notices website is a declared website for the purposes of section 38M).

194. If an agency published the RIS on a website, the agency should also publish the Minister's notice of decision on the same website.

195. To ensure greater transparency of decisions, the responsible Minister should provide reasons for the direction taken in a final statutory rule or legislative instrument. These should address any general issues raised in submissions.

196. A statement of reasons must also be published on a government website, and available on request in hard copy. This will allow those who have made submissions on the RIS to see how their comments have been addressed in the final version of the statutory rule or legislative instrument. Examples of statement of reasons include those for the Mineral Resources (Sustainable Development) (Mineral Industries) Regulations 2019 and the Labour Hire Licensing Regulations 2018.

DIVISION 6 – MAKING, TABLING AND PUBLICATION

197. Parts 3 (statutory rules) and 3A (legislative instruments) of the SL Act specify the requirements for making, tabling and publishing statutory rules and legislative instruments. Some of these requirements differ depending on whether a statutory rule or legislative instrument is being made, while others apply to both. These Guidelines specify some requirements in addition to those imposed by the SL Act.

Making statutory rules

198. After a draft of the proposed statutory rules has been settled by OCPC and OCPC has provided a formal settling letter to the agency, the agency may request the section 13 certificate from OCPC. The section 13 certificate is one of the documents that must accompany a proposed statutory rule when it is submitted to the Governor in Council

for making (see the SL Act, section 14). Agencies must allow adequate time for the settling process and the issue of the section 13 certificate. Agencies should consult OCPC's Guidance on Statutory Rules when preparing a statutory rule.

199. Section 14 of the SL Act specifies requirements for submitting statutory rules to the Governor in Council and the documents which must accompany the proposed statutory rule.

200. In addition to the documents outlined in section 14 of the SL Act, an Explanatory Memorandum must accompany any statutory rule submitted to the Governor in Council. The Explanatory Memorandum should set out the nature and extent of any changes (if any, in the case of remade regulations) effected by the new statutory rule and the reason for the changes, particularly where no RIS has been prepared. The Explanatory Memorandum is especially important where the proposed statutory rule contains complex or detailed technical information.

201. The Explanatory Memorandum should be brief, and generally take the following form:

- a brief outline of the statutory rule;
- an explanation of the changes effected by each provision;
- a statement of the reasons for making the statutory rule;
- where applicable, the reasons no RIS was prepared;
- a statement as to whether consultation has taken place, and if it has not taken place, an explanation as to why a decision was made not to consult; and
- where a statutory rule amends fees in an existing statutory rule, a table comparing the proposed and existing fees (including the percentage increase or decrease for each fee).

202. A Recommendation page, signed by the responsible Minister, and an Agenda page, signed by the responsible Minister and Departmental Secretary (or authorised delegate), must also accompany a proposed statutory rule when it is submitted to the Governor in Council.

Making and publishing legislative instruments

203. The legislative instrument should be made in accordance with the process set out in the authorising Act.

204. Legislative instruments must also be published in full in the Government Gazette (the SL Act, section 16A(1)).

205. In certain limited circumstances it may be impracticable to gazette a legislative instrument in full, for example where the instrument contains detailed maps or diagrams or is in a format incompatible with the format of the gazette. Instead, where a full copy is available, notice of the making of the legislative instrument must be published in the Government Gazette (the SL Act, section 16A(2)).

206. Agencies must include on their websites copies of all:

- legislative instruments made or administered by the agency; and

- current consolidated versions of legislative instruments (see paragraphs 204 to 205 below).

Consolidated version of legislative instruments

207. Section 16F of the SL Act applies to a legislative instrument that amends an existing legislative instrument. In these circumstances, the instrument maker will be required to ensure that a consolidated version of the legislative instrument, as amended, is made publicly available.

208. Agencies should prepare consolidated versions of legislative instruments for which they are responsible, and make these publicly available, including on their websites.

Laying statutory rules and legislative instruments before Parliament

209. Sections 15 (statutory rules) and 16B (legislative instruments) of the SL Act require statutory rules and legislative instrument to be laid before Parliament within six sitting days of the notice of making under sections 17(2) (statutory rules) and 16A (legislative instruments). The notice of making is generally published in the Government Gazette on the day the statutory rule or legislative instrument is made. The SL Act also specifies documents which must accompany the new statutory rule or legislative instrument when laid before Parliament (and that must also be sent to SARC) by agencies and Ministers. The publication copy of the statutory rule is provided to Parliament by the Government Printer on behalf of OCPC.

210. The following documents must accompany a statutory rule or a legislative instrument, where they are required to be prepared:
- a certificate of consultation issued under section 6 or 12C (Part 3, Division 1 of these Guidelines);
- a Ministerial exemption certificate issued under section 8 or 12F (Part 3, Division 2 of these Guidelines);
- a Premier's exemption certificate issued under section 9 or 12G (Part 3, Division 2 of these Guidelines);
- a compliance certificate in relation to RIS requirements and adequacy issued under section 10(4) or 12H(4) (see Part 3, Division 4 of these Guidelines); and
- a human rights certificate or human rights exemption certificate issued under section 12A or 12D (see Part 4, Division 1 of these Guidelines).

211. The following additional documents must accompany a statutory rule where they are required to be prepared:
- an extension certificate and the Premier's certificate agreeing to the extension issued under section 5A (see Part 4, Division 5 of these Guidelines);
- an infringements offence consultation certificate issued under section 6A (see Part 4, Division 1 of these Guidelines);
- a section 13 certificate issued by the CPC (see Part 3, Division 6 of these Guidelines); and
- the responsible Minister's recommendation that the Governor in Council make the statutory rule.

A copy of the explanatory memorandum for the statutory rule or legislative instrument does **not** need to be provided to each House of the Parliament. A copy of the explanatory memorandum for the statutory rule or legislative instrument only needs to be provided to SARC (see below).

Documents which must be sent to SARC

212. Pursuant to sections 15A and 16C of the SL Act, the following accompanying documents must be sent to SARC when a statutory rule or legislative instrument is made:
    - any applicable document required to be laid before Parliament (see Part 3, Division 5 of these Guidelines);
    - if a Premier's exemption certificate has been issued – the reasons given by the responsible Minister to the Premier as to why the public interest requires that the proposed statutory rule or legislative instrument be made without preparing a RIS; and
    - if a RIS has been prepared – the RIS and a copy of all comments and submissions received.

213. A copy of each legislative instrument must also be sent to SARC under section 16C.

214. The following additional accompanying documents must also be sent to SARC when a statutory rule or a legislative instrument is made:
    - a copy of BRV's independent assessment of any RIS (see Part 3, Division 4 of these Guidelines);
    - one copy of the explanatory memorandum for the statutory rule or legislative instrument;
    - copies of any notices published in the Government Gazette, newspapers or other publications (including those online) advertising a RIS;
    - copies of any notices advising of the decision to make or not make a proposed statutory rule or legislative instrument;
    - a summary of all comments and submissions received; and
    - copies of any letters sent to those who made comments or submissions.

215. These documents must be given to SARC no later than ten working days after the making of the statutory rule or legislative instrument (the SL Act, sections 15A(2)(a) and 16C(2)(a)). If, following the proroguing of Parliament, SARC members has not yet been appointed, the documents must be given to SARC no later than ten working days after SARC they are appointed.

Scrutiny and disallowance of statutory rules and legislative instruments

216. Parts 5 (statutory rules) and 5A (legislative instruments) of the SL Act deal with SARC's powers to report to Parliament recommending that a statutory rule or legislative instrument be disallowed or amended. SARC may only recommend disallowance or amendment where it considers that one of the criteria set out in sections 21 (statutory rules) or 25A (legislative instruments) has been contravened. Agencies should familiarise themselves with these sections when considering the content of statutory

rules or legislative instruments to minimise the likelihood of disallowance. See SARC's Terms of Reference.

217. Upon SARC's recommendation, Parliament may disallow the statutory rule or legislative instrument in accordance with sections 23 or 25C.

PART 4

OTHER MATTERS

DIVISION 1 – CERTIFICATES

Human rights certificates

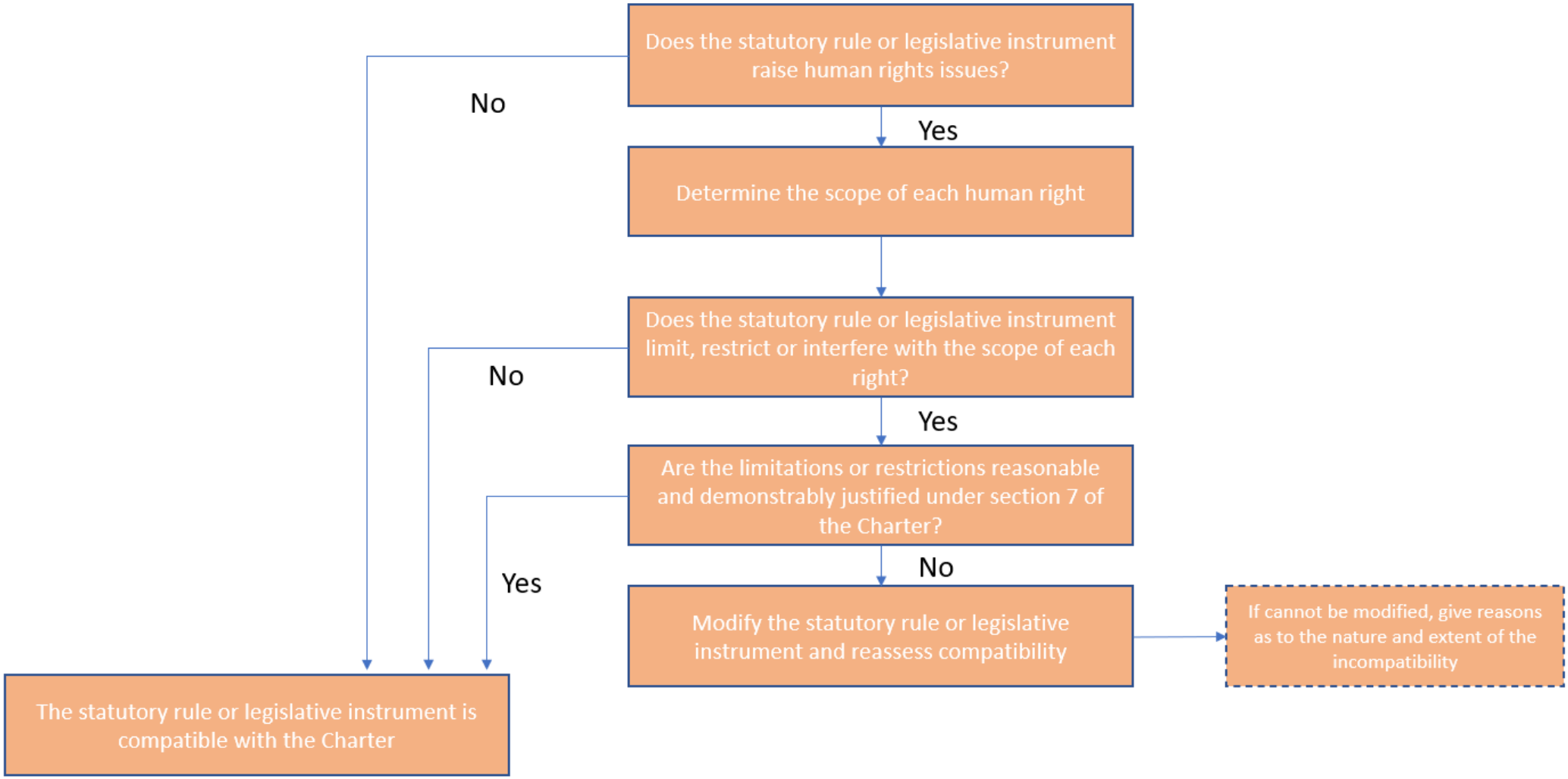
218. The responsible Minister must issue a human rights certificate in respect of a proposed statutory rule or legislative instrument under section 12A(1) or 12D(1) of the SL Act, unless the statutory rule or instrument is exempted under section 12A(3) or 12D(3). The human rights certificate will then be finalised following the completion of the RIS process – it is not included as part of the RIS documents released for public consultation.

219. Sections 12A(2) (statutory rules) and 12D(2) (legislative instruments) set out the matters which must be included in the human rights certificate.

220. Preparing a human rights certificate involves assessing the instrument's likely impact on the rights set out in the Charter. Conducting a human rights impact assessment as part of the policy development process will assist in the preparation of the human rights certificate accompanying the final statutory rule or legislative instrument. The flowchart below identifies the human rights impact assessment process. The analysis is similar to the analysis undertaken through the Statement of Compatibility process when preparing primary legislation. Agencies should note that whilst a limit placed on a human right by a subordinate instrument is reasonable or justified it does not mean that the subordinate instrument is necessarily valid. In order to be valid in such circumstances, the authorising Act must empower the instrument or provision to be valid despite incompatibility with the Charter (see section 32(3)(b) of the Charter).

221. It is recommended that agencies consult with the legal branch within their agencies. For further details on how to assess the human rights impact of proposed subordinate legislation, please refer to the resources and guidance materials in the Introduction to these Guidelines.

Flowchart of human rights impact assessment



222. The potential human rights impact of a proposed statutory rule or legislative instrument is relevant in considering whether it imposes a significant burden on a sector of the public. When considering that question, the responsible Minister must consider the likely effect of the proposed statutory rule or legislative instrument on the rights set out in the Charter (see Part 3, Division 2 of these Guidelines).

223. A proposal is likely to create a social, economic or environmental burden if it limits human rights. Whether the burden is significant will depend on the nature and extent of the limitation.

224. A detailed human rights analysis is not required in the RIS, as this is covered when preparing the human rights certificate. However, a RIS may include commentary on human rights implications and refer to rights and liberties (including Charter rights) as part of the broader concept of significant social burden.

Infringements offence consultation certificates for proposed statutory rules

225. If a proposed statutory rule provides for the enforcement of an offence by an infringement notice, the responsible Minister must issue an infringements offence consultation certificate (the SL Act, section 6A).

226. The responsible Minister must certify that:

- DJCS has been consulted about the enforcement and suitability of the offence;
- the Attorney-General's guidelines under the *Infringements Act 2006,* have been taken into account; and
- the proposed infringement offence meets the requirements of those guidelines or does not meet the requirements but should be made anyway for reasons specified in the certificate.

227. Note that an infringements offence consultation certificate can be included in a composite certificate issued under that section (the SL Act, section 12B). Note also that an infringements offence consultation certificate is not required where the proposed statutory rule are extension regulations (under section 5A of the SL Act).

Other certificates under Parts 2 and 2A of the SL Act

228. Other certificates required under Part 2 (statutory rules) and Part 2A (legislative instruments) are discussed elsewhere in these Guidelines:

- certificates of consultation – sections 6(c) and 12C(c) (see Part 3, Division 1).
- Ministerial exemption certificates – sections 8 and 12F (see Part 3, Division 3).
- Premier's exemption certificates (see Part 3, Division 3).
- RIS certificates (see Part 3, Division 4).

229. Some certificates required by the SL Act may be issued in a single composite certificate (the SL Act, sections 12B and 12K).

230. Section 12B of the SL Act provides that the responsible Minister may issue a composite certificate for a proposed statutory rule that incorporates:

- a Ministerial exemption certificate under section 8;
- a consultation certificate under section 6;
- an infringements offence consultation certificate under section 6A; and
- a RIS certificate under section 10(4).

231. Section 12K of the SL Act provides that the responsible Minister may issue a composite certificate for a proposed legislative instrument that incorporates:

- a Ministerial exemption certificate under section 12F;
- a consultation certificate under section 12C; and
- a RIS certificate under section 12H(4).

232. In order to meet the requirements of the Competition Principles Agreement the responsible Minister must also issue a competition policy certificate for proposed statutory rules for which a RIS has been prepared (see BRV's Toolkit: Requirements and processes for making subordinate legislation). The certificate states either that the proposed statutory rule:

(a) does not contain a restriction on competition; or

(b) does contain a restriction(s) but the objective can only be achieved by restricting competition, and benefits to the community outweigh costs.

DIVISION 2 – INTERACTION BETWEEN THE SUBORDINATE LEGISLATION ACT AND THE AUTHORISING ACT OR STATUTORY RULE

233. When preparing a statutory rule or legislative instrument, agencies and responsible Ministers must consider the interaction between the SL Act and the authorising Act or statutory rule (under which the proposed statutory rule or legislative instrument is made).

234. In some cases, the authorising Act or statutory rule may impose requirements, such as consultation and gazettal requirements, even though the instrument is subject to the requirements of the SL Act. In other cases, the authorising Act or statutory rule may apply provisions of the SL Act to the instrument that would not otherwise apply. This will be most common in authorising Acts or statutory rules for legislative instruments (as opposed to statutory rules).

235. In considering which requirements must be met, agencies should consider the relevant provisions of the SL Act and seek legal advice if necessary. In particular:

- if an instrument is prescribed to be a legislative instrument, any inconsistent or duplicating provision of the authorising Act does not apply to the instrument (section 4A(2)).
- if an authorising Act requires gazettal of a legislative instrument within a shorter time period than the SL Act, compliance with the authorising Act is taken to be compliance with the SL Act (section 16D(2)). The authorising Act should be complied with.

- if an authorising Act requires gazettal of a legislative instrument within a longer time period than the SL Act, the SL Act prevails over the authorising Act (section 16D(3)). The SL Act should be complied with.
- if an authorising Act requires a legislative instrument to be tabled in Parliament within a time period the same as, or shorter than, the SL Act, compliance with the authorising Act is taken to be compliance with the SL Act (section 16E(1)). The authorising Act should be complied with.
- if an authorising Act requires a legislative instrument to be tabled in Parliament within a longer time period than the SL Act, the SL Act prevails over the authorising Act (section 16E(2)). The SL Act should be complied with.

236. When preparing primary legislation, agencies should consider how the requirements of the SL Act will apply to any new statutory rule-making or legislative instrument-making powers. Except in exceptional circumstances, legislation should not contain provisions that exclude the operation of the SL Act. Agencies should contact OGC and OCPC if contemplating including such provisions in legislation.

237. Where there may be exceptional circumstances justifying an exclusion from the SL Act, the agency must consult with DPC during the policy development stage of the Bill. During the drafting stage, the agency must consult with OCPC as well as DPC.

DIVISION 3 – INCORPORATING OTHER MATERIAL

238. Section 32 of the *Interpretation of Legislation Act 1984* ('ILA') sets out when subordinate instruments, such as statutory rules or legislative instruments, may prescribe matters in other documents. This is known as incorporation by reference.

239. Generally, subordinate instruments may only incorporate by reference provisions of a Victorian or Commonwealth Act, a Code (as defined in the ILA), or a Victorian or Commonwealth statutory rule. Subordinate instruments may only incorporate other matters where there is explicit power to do so in the authorising Act.

240. Where matter is incorporated by reference, section 32 of the ILA sets out requirements for making material publicly available and for tabling the material in Parliament. The ILA requires:

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

241. It is a legal requirement that all material referred to in a statutory rule or legislative instrument (whether at a primary, secondary or tertiary level as referenced below) be freely available. Failure to fulfil this requirement could lead to problems with enforcement.

242. The Subordinate Legislation Regulations 2014 require statutory rules which incorporate material by reference to include a special footnote or endnote (regulation 5).

243. In deciding whether to incorporate material by reference, agencies should assess the drafting convenience against the effect on the accessibility of the incorporated material and the likely level of public awareness. Agencies should reserve incorporation of detailed and extensive technical material to subordinate legislation affecting industries familiar with the material.

244. Generally, material should only be incorporated by reference if the material or rule/instrument clearly describes the rights and obligations being created and the people who are subject to these rights and obligations.

245. Where it is proposed that a statutory rule or legislative instrument will incorporate material by reference, all material necessary to ensure compliance should be tabled unless such references are irrelevant to the substance of the regulation, are unnecessary or merely comprise a reference back to the primary reference material. This includes:

- primary references (references to other material – e.g. a standard);
- references to documents at a secondary level (e.g. when a primary reference refers to another document); and
- references to documents at a tertiary level (e.g. when the document referred to in the primary reference itself refers to another document).

Unless all relevant material is tabled, the statutory rule or legislative instrument does not apply, adopt or incorporate the material effectively.

DIVISION 4 – STYLE AND LANGUAGE

246. This Division outlines the style and language to be used in drafting statutory rules and legislative instruments.

Clear drafting of statutory rules and legislative instruments

247. Statutory rules and legislative instruments should be accurately and clearly drafted to increase accessibility of the public and reduce the risk of disallowance or of a court finding the instrument was made beyond the power of the authorising legislation.

248. If a proposed instrument refers to any other statutory rule or legislative instrument, it must contain a footnote or endnote identifying the statutory rule or legislative instrument referred to. It must also identify all other instruments which amend the statutory rule or legislative instrument referred to.

249. If a footnote or endnote identifies a statutory rule or legislative instrument that has been reprinted[4] in accordance with section 18 of the SL Act, the note may refer to:
- that reprint;
- the last statutory rule or legislative instrument incorporated in the reprint; and
- any statutory rule or legislative instrument which has amended the reprinted statutory rule or legislative instrument after it was reprinted.

250. All statutory rules and legislative instruments must be expressed:
- in language that is clear and unambiguous;
- in a way which ensures that its meaning is certain and there are no inconsistencies between provisions;
- in language that gives effect to its stated purpose;
- consistently with the language of the empowering Act; and
- in accordance with plain English drafting standards.

251. A statutory rule or legislative instrument should:
- not duplicate, overlap or conflict with other statutory rules, legislative instruments, or legislation (including the authorising Act);
- always reflect the intention and promote the purpose of the authorising Act;
- clearly set out as part of its text:
  - the objectives of the statutory rule or legislative instrument; and
  - the precise provision authorising the statutory rule or legislative instrument; and
- not deal with matters outside the scope of its objectives.

OCPC's role in drafting and settling statutory rules

252. An agency must contact OCPC as soon as possible after it decides to prepare a proposed statutory rule.

253. OCPC plays two roles in the statutory rule making process. First, OCPC is responsible for settling the proposed statutory rule as to power, form and content and drafting statutory rules in certain circumstances (see OCPC's Guidance on Statutory Rules). A draft copy of the proposed statutory rule, which OCPC has settled, must be included with the RIS (the SL Act, section 10(1)(g)). OCPC must settle draft statutory rules before the CBR (or its successor office or Secretary, DTF) provides independent advice on the adequacy of the RIS to ensure consistency between the RIS and the proposed statutory rule.

254. Second, if a proposed statutory rule is to be made by, or with the consent or approval of, the Governor in Council, it must be submitted to the CPC for the issue of a section 13 certificate (see Part 3, Division 6 of these Guidelines for further detail).

255. During the settling process, OCPC must consider the section 13 criteria in relation to the proposed statutory rule. The criteria go to fundamental issues concerning the power to

[4] Please note that OCPC no longer prepares formal reprints of statutory rules now that authorised prints are published electronically and are available via print on demand.

make the statutory rule under its authorising Act, the clear expression of the rule and represent the framework within which a proposed statutory rule is drafted and settled.

256. During the settling process, in the rare case where a proposed statutory rule does not meet the section 13 criteria, OCPC will consult with the relevant department to attempt to resolve these concerns so that an unqualified certificate can be issued. Should a Minister wish to proceed with a proposed statutory rule that does not meet the section 13 criteria, the CPC will issue the certificate with relevant qualifications. Such a qualification would be extremely unusual and all efforts will be made to satisfactorily resolve matters of concern before issuing a qualified certificate. Any qualification will outline how, in the CPC's opinion, the proposed statutory rule does not meet the section 13 criteria. A qualification on a section 13 certificate may affect the making of a statutory rule.

257. In accordance with the SL Act, a copy of the section 13 certificate is provided to the Governor in Council when the statutory rule is made and to SARC for consideration of the made statutory rule under Part 4 of the SL Act.

258. OCPC is also responsible for printing and publishing all statutory rules.

DIVISION 5 – SUNSETTING AND EXTENSION

Sunsetting statutory rules

259. The SL Act aims to ensure that outdated and unnecessary regulation is automatically repealed, with the automatic revocation of statutory rules ten years after they are made (section 5).

260. Agencies must maintain accurate records of the sunset dates for all statutory rules administered by their Ministers. Agencies must allow sufficient time for the review of the continuing appropriateness of all statutory rules and for the completion of the RIS process if they are to be re-made in whole, in part or in a modified form.

261. OCPC notifies agencies of statutory rules that are due to sunset and works with agencies to ensure the orderly sunsetting of statutory rules. The responsible Minister should nominate an officer to notify OCPC of the Minister's intentions about remaking any statutory rule that is due to sunset. The officer should notify OCPC at least six months before the sunset date (although 12 months is the ideal timeframe) to allow OCPC to provide timely advice and allow sufficient time to settle any proposed new statutory rule.

Extension of statutory rules – section 5A

262. Where there are special circumstances that mean there is insufficient time to comply with Part 2 of the SL Act before a statutory rule sunsets, section 5A of the SL Act allows the responsible Minister, with the Premier's agreement, to extend the statutory rule for up to 12 months. During this time, a RIS must be completed if the statutory rule is to continue operation.

Grounds for extension

263. The SL Act does not define 'special circumstances' justifying an extension of sunsetting statutory rule . However, special circumstances may be cases where the authorising Act has recently changed or a national scheme is being negotiated which makes it impossible to complete the RIS process before the sunsetting date in a way that would reflect and/or incorporate these other considerations.

264. Additionally, the special circumstances must be the cause of there being insufficient time for a RIS to be prepared. Where there is insufficient time to prepare a RIS, extension regulations should only be made where this is due to special circumstances.

265. Administrative oversight should not be considered to be a 'special circumstance'. The scheme of the SL Act is to ensure that the regulatory process is undertaken in a timely manner and in cases where it is not, to make clear the reasons for not undertaking the process.

Process for extension

266. Only one 'extension regulation' can be made for each statutory rule under section 5A. Before the responsible Minister can issue an extension certificate, section 5A(3) of the SL Act requires the Minister to obtain a certificate from the Premier agreeing to the extension.

267. Agencies should consult OCPC and DPC as soon as they believe a statutory rule may require a Premier's extension certificate. Agencies should contact DPC at least ten weeks before a statutory rule expires for guidance on what information a request for an extension certificate should include. Agencies are encouraged to provide preliminary drafts of the proposed statutory rule to DPC to assist this initial consultation at least six weeks **before** a request is made to the Premier. OCPC needs to settle extension regulations in the same way as other statutory rules and sufficient time must be allowed for this.

268. The responsible Minister should request in writing that the Premier issue an extension certificate under section 5A. Such requests should be made at least four weeks before the date by which the certificate is requested.

269. The Explanatory Memorandum submitted to the Governor in Council must also set out the special circumstances justifying the extension.

270. Extension regulations do not need to be accompanied by a RIS if the responsible Minister issues an exemption certificate under section 8(1)(e)(iii). An infringements offence consultation certificate is also not required for extension regulations.

271. Extension certificates under section 5A(1), Premier's extension certificates under section 5A(3) or exemption certificates under section 8(1)(e)(iii) must be laid before Parliament and sent to SARC. See generally Part 3, Division 3 of these Guidelines.

272. A Premier's extension certificate under section 5A(3) must also be included in the documents that must be submitted to the Governor in Council for the statutory rule to be made (see section 14 of the SL Act, and table below setting out relevant certificates required).

Certificates required to accompany GIC documents for a statutory rule that is to be made by or with the consent or approval by GIC (section 14 SL Act)
• 3 copies (or such other number as may be prescribed) of the proposed statutory rule (s14(a))
• a copy of the section 13 certificate (s14(b))
• **if a RIS was not required,** a copy of the exemption certificate (s14(c))
• **if a RIS was required**, a copy of the compliance certificate (s14(d))
• **if consultation was required under section 6**, a copy of the consultation certificate issued under that section (s14(db))
• if the proposed statutory rule is an **extension regulation**, a copy of the extension certificate and a copy of the Premier's certificate under section 5A(3) (s14(da))
• if the proposed statutory rule provides for the **enforcement of an offence against the statutory rule by an infringement notice**, whether under the *Infringements Act 2006* or otherwise, a copy of the certificate under section 6A (s14(e))
• **if a human rights certificate was required**, a copy of the human rights certificate (s14(f))
• **if a human rights certificate was not required**, a copy of the responsible Minister's certificate under section 12A(3) (s14(g))

APPENDIX

Is your instrument a "legislative instrument" for the purposes of the Subordinate Legislation Act 1994 (SL Act)?