



Guideline for instructors

Remaking subordinate legislation

Introduction

In general, subordinate legislation expires 10 years after it is made (see the *Statutory Instruments Act 1992*, section 54). The purposes for this staged automatic expiry are set out in the *Statutory Instruments Act 1992*, section 53. In summary, the purposes are to:

- reduce regulatory burden
- ensure subordinate legislation is relevant
- ensure the Queensland statute book is of the highest standard.

As such, remaking subordinate legislation that is due to expire is not simply an exercise in changing the year in its short title. In the 10 years since the subordinate legislation was made, many things may have changed. From a legislative perspective, this may include changes to the authorising Act for the subordinate legislation or the making of new legislation (such as the *Human Rights Act 2019*) which affect how legislation is to be drafted and its lawfulness.

In ensuring the statute book is of the highest standard, OQPC is responsible for ensuring that any subordinate legislation that is made to replace an expiring instrument is lawful, well-drafted and consistent with current drafting styles and practices.

This guideline sets out some of the things OQPC will work with you to consider when re-writing subordinate legislation. It also sets out some of the matters you should consider when preparing your drafting instructions.

Matters OQPC considers when rewriting subordinate legislation

Authorising provisions
Is there an authorising provision (or head of power) in the authorising Act for each provision of the subordinate legislation?
Amendments made to authorising Act and proposed amendments
<ul style="list-style-type: none"> • Has the authorising Act been amended in a way that affects the expiring subordinate legislation? For example: <ul style="list-style-type: none"> - Has a provision of the authorising Act been omitted, making provisions of the expiring subordinate legislation redundant or outside of power? - Has a provision of the authorising Act been inserted or amended in a way that has resulted in the expiring subordinate legislation saying the same thing as, or something that is inconsistent with, the Act? • Are there any proposed amendments to the authorising Act or expiring subordinate legislation (e.g. in a Bill, uncommenced Act or uncommenced subordinate legislation) that will affect/need to be incorporated in the new subordinate legislation?
Policy objectives of expiring subordinate legislation
<ul style="list-style-type: none"> • What are the policy objectives of the expiring subordinate legislation? • Is there a better way to achieve the policy objectives in the new subordinate legislation?



Fundamental legislative principles and human rights

- Is the subordinate legislation consistent with the fundamental legislative principles set out in the *Legislative Standards Act 1992*, section 4?
- Is the subordinate legislation compatible with human rights under the *Human Rights Act 2019*?

The fact that the expiring subordinate legislation is inconsistent with a fundamental legislative principle or human right is not sufficient justification for the new subordinate legislation being inconsistent with the fundamental legislative principle or human right. In remaking subordinate legislation, we are making a new law and we must consider how this new law affects fundamental legislative principles and human rights.

If the expiring subordinate legislation is incompatible with human rights, we must consider whether the Human Rights Act 2019, section 48 might affect the validity of the subordinate legislation (that is, does the head of power under which the subordinate legislation is made authorise the making of subordinate legislation that is incompatible with human rights?).

Structure

Could the structure of the subordinate legislation be improved?

For example:

- Does the structure align with the structure of the authorising Act?
- Could the structure be made more logical and user-friendly?

Over time, new provisions may have been inserted into the expiring subordinate legislation. A rewrite is a good opportunity to consider whether these new provisions are in the most logical, user-friendly location.

Terms defined in the authorising Act

- Does the subordinate legislation include a definition that is also in the authorising Act?
- Does the subordinate legislation define a term that is defined in a different way in the Act?

References to provisions of authorising Act, other legislation and external documents

- Are these references still correct?
- Do these instruments still exist?
- Should we be referring to a more current document? (e.g. a more current Australian Standard)

Drafting style

Is the subordinate legislation drafted in a way that is consistent with OQPC's current drafting rules and precedents?

OQPC regularly reviews its drafting rules and precedents to ensure the statute book is of the highest standard. This includes updating drafting rules and precedents in light of case law and legislative changes.

Language

- Is the language used in the subordinate legislation consistent with the language of the authorising Act?
For example, if the authorising provision states that 'a person' must do something, the subordinate legislation should not refer to 'an entity'.
- Is the language used in the subordinate legislation internally consistent?
For example, are provisions dealing with similar matters drafted in a similar way? If not, is there a reason for the differences?

Over time, an instrument may be amended many times, resulting in internal inconsistency of language. A rewrite is a good opportunity to make provisions more consistent, unless there is a good policy reason for the differences.



Legislation of general application
Does the subordinate legislation deal with something that is now dealt with in legislation of general application (e.g. the <i>Acts Interpretation Act 1954</i> , the <i>Statutory Instruments Act 1992</i> , the <i>Electronic Transactions (Queensland) Act 2001</i> or the Uniform Civil Procedure Rules)? For example, does the subordinate legislation define a term instead of relying on a definition in the <i>Acts Interpretation Act 1954</i> , schedule 1?
Improvements generally
<ul style="list-style-type: none"> • Can the drafting be made clearer e.g. is it plain English? • Can the provisions of the subordinate legislation be simplified or made more concise? • Do they work? • Are there gaps? • Are there overlaps? • Can information be presented in a different way to make it easier to use/read? (e.g. tables, schedules)
Transitional provisions
<ul style="list-style-type: none"> • Are transitional provisions needed to deal with the transition from the expiring subordinate legislation to the new subordinate legislation? • Are there transitional provisions in the expiring subordinate legislation that need to have ongoing effect after it expires?

Matters for instructors to consider

When you are preparing instructions to remake expiring subordinate legislation, it would be helpful if you could consider the following issues and address them in your instructions:

Authorising provisions
Is there an authorising provision in the Act for each provision in the subordinate legislation? If not, you may need to consider whether the authorising Act should be amended to either include the provision or provide a head of power for the provision.
Policy objectives of expiring subordinate legislation
<ul style="list-style-type: none"> • Can you explain the policy objectives to be achieved by the subordinate legislation? • Have the policy objectives changed?
Fundamental legislative principles and human rights
Is the subordinate legislation consistent with fundamental legislative principles and human rights ?
<i>As stated above, the fact that the expiring subordinate legislation is inconsistent with a fundamental legislative principle or human right is not sufficient justification for the new subordinate legislation being inconsistent with the fundamental legislative principle or human right. Also, if the subordinate legislation is incompatible with human rights, and the incompatibility is not authorised by the authorising Act, the subordinate legislation will not be valid.</i>
Proposed amendments
Are you aware of any proposed amendments to the expiring subordinate legislation (other than changes being made as part of the re-make) or the authorising Act?
Case law and legal advices
Are you aware of any case law or legal advices about the expiring subordinate legislation? If case law or a legal advice constrains the extent to which a provision can be changed or interprets a provision in a way that is inconsistent with the policy intent, it would be helpful to share these with your drafter.

**Implementation and administrative issues**

- Consider how your department or agency **implements** the subordinate legislation.
 - Do processes, practices and requirements in the expiring subordinate legislation still work?
 - Can they be improved or done differently?
 - Are there problems or issues that typically arise in implementing the subordinate legislation?
 - Are all of the provisions still required? Are new provisions required to achieve the department's policy objectives?
- Do you have any **suggestions for overall improvements** to the subordinate legislation?
For example, are particular provisions confusing and often misinterpreted by users? Could structural changes be made to make it easier to find relevant provisions?
- Are there any provisions that, if changed, would cause significant **administrative issues** for the department?
For example, would changes to particular provisions require the department to completely redesign a costly electronic system used in implementing the subordinate legislation?

Transitional issues

- Are there any **transitional issues** that need to be addressed?
- What is the department's policy intent in relation to these transitional issues?