

Appendix – Extract from *Legislation Handbook*

[*Legislation Handbook*, Department of Prime Minister and Cabinet, 1999 (May 2000 update), pp.38–43.
www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf]

EXPLANATORY MEMORANDUM

The purpose of an explanatory memorandum

8.1 An explanatory memorandum is a companion document to a bill, to assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of the bill.

8.2 The *Acts Interpretation Act 1901* (section 15AB) allows an explanatory memorandum (and also a second reading speech – see paragraph 8.28) to be used by a court to interpret legislation to:

- (a) confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) determine the meaning of a provision when:
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or unreasonable.

When an explanatory memorandum is required

8.3 An explanatory memorandum is usually provided for every bill introduced in Parliament except for the annual appropriations bills (see paragraph 8.27 for other exceptions). The minister presents the memorandum during the process of introducing the bill. To meet the requirements of the *Acts Interpretation Act 1901* (paragraph 15AB(2)(e)), the explanatory memorandum, and any supplementary, revised or replacement explanatory memorandum or correction to an explanatory memorandum must be presented to the House or the Senate. Explanatory memoranda should be printed by your print provider.

8.4 Preparation and printing of the explanatory memorandum are the responsibility of the instructing department. Departments should commence preparation of the explanatory memorandum as soon as an early draft of the bill is received from OPC. The memorandum must be available for consideration by the

Parliamentary Secretary to Cabinet as part of the legislation approval process at the same time as the finalised bill; printing of the explanatory memorandum usually occurs after the approval process. (See chapter 9 on the legislation approval process and appendix O on the copies of documents required.)

The form and content of an explanatory memorandum

8.5 An explanatory memorandum must have:

- (a) a cover sheet (see paragraphs 8.9 and 8.10);
- (b) a general outline (see paragraphs 8.11 to 8.17) including:
 - (i) a financial impact statement;
 - (ii) a regulation impact statement, where required; and
- (c) notes on clauses or on amendments (see paragraphs 8.18 to 8.20).

8.6 An explanatory memorandum is circulated by authority of the responsible minister (either the portfolio minister or another minister in the portfolio), irrespective of whether he or she is a minister in the house in which the bill is to be introduced. The memorandum should be submitted to the minister for approval at the same time as the bill prior to the legislation approval process (see paragraph 7.6 and chapter 9).

8.7 As the explanatory memorandum is available publicly once a bill is introduced, it should not contain any confidential material.

8.8 In its report of June 1995, the House of Representatives Standing Committee on Procedure expressed disappointment at the general standard of explanatory memoranda⁸. An explanatory memorandum must be written in plain English and should focus on explaining the effect and intent of the bill, or the amendments, rather than repeating the provisions. Information contained in the explanatory memorandum must be accurate and not misleading, and must reflect the final form of the bill to be introduced or the amendments to be moved (see chapter 10 for requirements where a bill is amended during passage).

COVER SHEET

8.9 The cover sheet should indicate:

- (a) the year(s) of the current Parliament (as shown on the bill), eg. 1998 or 1998-99;
- (b) a heading “The Parliament of the Commonwealth of Australia”;
- (c) the name of the house in which the bill is first to be introduced (see paragraph 12.4);

⁸ The House of Representatives Standing Committee on Procedure *Time for Review: Bills Questions and Working Hours - Report of the review of procedural changes operating since 21 February 1994*, June 1995, p6

- (d) the exact title of the bill;
- (a) a heading “Explanatory Memorandum”; and
- (b) a statement that the bill is circulated by authority of the Hon Yyy, Minister for Xxx.

8.10 Different information is required on the cover sheet of an explanatory memorandum depending on whether the memorandum is:

- (a) for a bill being introduced for the first time (appendix G);
- (b) a supplement to a memorandum (paragraphs 10.13 to 10.15 and appendix H);
- (c) a replacement for a memorandum (appendix I);
- (d) a correction to a memorandum (appendix J);
- (e) for use in the second house where the bill has been amended in the first house (appendix K); or
- (f) for more than one bill (paragraph 8.27 and appendix L).

GENERAL OUTLINE

8.11 The general outline should have:

- (a) the exact title of the bill across the top of the page (or, in the case of a supplementary explanatory memorandum, “Amendments to the XYZ Bill”);
- (b) a brief but clear statement of the purpose/objective of the bill;
- (c) an outline of why the bill is required, the effect of the principal provisions, and an explanation of the policy background;
- (d) a financial impact statement (see paragraphs 8.14 to 8.15); and
- (e) a full version of the regulation impact statement (RIS), where a RIS is required (see paragraphs 8.16 to 8.17).

8.12 The general outline commences on page 1 of an explanatory memorandum and should be sequentially numbered where the outline is more than one page. The statement of purpose/objective, the outline of the bill and financial impact statement should be kept to one page if possible. A sample general outline is at appendix M.

8.13 Additional copies of the general outline, including the financial impact statement, must be provided to the Legislation Section separate from the copies of the explanatory memorandum for use in the legislation approval process (see paragraph 9.12, and appendix O for the number of copies required). These general outlines are circulated to non-government parties in the Senate at the time of a bill’s introduction.

Financial impact statement

8.14 A financial impact statement follows immediately on from, and forms part of, the outline. It describes both the direct and indirect financial impact for the Commonwealth of the proposed bill including any savings, expenses, revenue losses or gains, or changes in net asset position or the fiscal balance resulting from the

proposal(s) (see appendix M). The financial impact of legislative proposals is to be shown to one decimal place in \$million, eg \$18.2m, \$0.5m. If it is not possible to provide precise figures, an estimate of savings, expenses, revenue losses or gains, impact on net assets or the fiscal balance or a statement of the variable factors and difficulties in estimating the impacts must be included. If it is not possible to provide even an estimate of the impacts, the statement should give a broad outline of the expected financial impacts and reasons why it is not possible to provide figures. If there is no financial impact, this should be indicated.

8.15 Where the bill provides for taxation concessions, the explanatory memorandum should explain why the taxation system is preferred to direct outlays for giving assistance. Any impact of the bill on industry and other sections of the community should be addressed in the regulation impact statement.

Regulation impact statement

8.16 Responsibility for preparing a RIS lies with the department and the content of the RIS should be cleared by the minister. Nevertheless, a RIS should be prepared in consultation with ORR and in accordance with its *Guide to Regulation*⁹. See also paragraphs 2.9 to 2.14. The RIS follows the financial impact statement and forms part of the outline. A consultation statement should be incorporated into the RIS where consultation has been undertaken with those affected by the proposed legislation, in accordance with ORR's *Guide to Regulation*. The statement should explain the consultation process and state the views of the main interested parties.

8.17 Where ORR has advised that a RIS is not required in the explanatory memorandum, there should be no reference to the absence of a RIS. Neither should an explanation of why a RIS is not required or the advice from ORR to the department be included. If the RIS relates to particular schedules and not to the whole bill, this should be indicated at the beginning of the RIS. An explanation of why the RIS does not cover the whole bill should not be included.

NOTES ON CLAUSES

8.18 Notes on clauses are intended to be a companion explanation to the clauses of a bill. They should not simply repeat the words of the bill or restate them in simpler language. The notes should explain the purpose of the clause and relate it to other provisions in the bill, particularly where related clauses do not appear consecutively in a bill. Examples of the intended effect of the clause, or the problem it is intended to overcome, may assist in its explanation.

8.19 The House of Representatives Standing Committee on Procedure, in commenting on the standard of explanatory memoranda, quoted the following criticism by a member on one explanatory memorandum: "a prose rendering of each provision of this bill, a mere jargonistic paraphrase, (which) gives little understanding

⁹ Office of Regulation Review, Productivity Commission, *A Guide to Regulation*, 2nd Edition, December 1998, Internet: <http://www.pc.gov.au/orr>

of the operation of these provisions”¹⁰. Officers drafting explanatory memoranda should ensure that notes on clauses clearly and adequately explain their operation and purpose. Where a measure in a bill is likely to be the subject of comment by the Senate Standing Committee for the Scrutiny of Bills, the reasons for proceeding in the manner proposed in the bill should be explained in the explanatory memorandum (see paragraphs 6.17, 6.29 and 14.53 to 14.55).

8.20 Notes on clauses should commence on a new page, be serially numbered, and immediately follow the general outline, financial impact statement and, where required, the RIS. The notes should have internal paragraph numbers and a centered or shoulder heading for each clause or group of clauses. The heading should be the same as the heading in the bill for that clause or group of clauses. The pages should be numbered in series following on from the general outline. Sample notes on clauses are at appendix N.

Printing an explanatory memorandum

8.21 An explanatory memorandum must be printed on international B5 size paper for presentation to Parliament. For the legislation approval process the explanatory memorandum should be on A4 paper.

8.22 The instructing department is responsible for arranging printing of the memorandum. This generally occurs after the memorandum has been approved by the ministers and cleared through the legislation approval process. The printer should be supplied with an original “camera ready” copy of the memorandum for printing. The department funds the setting up cost of printing, introduction copies and any additional copies required for their own purposes; AusInfo will bear the cost of any run-on copies it requires for sale. Departments should advise AusInfo of any anticipated large demand for particular legislation to ensure sufficient sale copies are printed. The text of the explanatory memorandum on disk should be supplied to the Table Offices and AusInfo for electronic conversion for the parliamentary network. See appendix O for information on technical requirements for the disk.

8.23 If it is necessary to arrange printing of the explanatory memorandum in advance of the legislation approval process, departments should contact the Legislation Section before arranging printing.

Distributing an explanatory memorandum

8.24 The department is responsible for delivering copies of the explanatory memorandum to the Legislation Section for the legislation approval process, and to the Parliament and the PLOs prior to introduction. Copies should be delivered to both Table Offices before introduction in the first house. See appendix O for details of the number of copies required and their distribution.

¹⁰ The House of Representatives Standing Committee on Procedure *Time for Review: Bills Questions and Working Hours - Report of the review of procedural changes operating since 21 February 1994*, June 1995, p6

Replacement explanatory memorandum/correction to a memorandum

8.25 Where, before the passage of a bill, an explanatory memorandum is found to contain a mistake which needs correcting, it may be necessary to issue a replacement explanatory memorandum or a correction to the explanatory memorandum. A correction to an explanatory memorandum would normally be used where a minor correction is being made which could be contained on one or two pages. If the correction is more substantial or involves correction to several areas of the explanatory memorandum, then a replacement explanatory memorandum should be issued.¹¹ In any event, the department must alert the PLOs and the relevant Table Office to arrange for the minister to present the correction to the explanatory memorandum or the replacement explanatory memorandum to the Parliament without delay.

8.26 A sample cover sheet for a replacement explanatory memorandum and an example of a correction to a memorandum are at appendices I and J. See chapter 10 for information about supplementary explanatory memoranda.

Cognate bills and a combined explanatory memorandum

8.27 A separate explanatory memorandum is normally required for every bill, including cases where two or more related bills are to be debated cognately. However, in those rare cases where a number of very closely related bills are introduced at the same time, a single document incorporating explanatory memoranda for all the bills may be used if this is the most convenient way to present the information. A combined explanatory memorandum is appropriate only where all the bills are short and simple and closely related and where a single outline and financial impact statement will adequately explain the operation and effect of all bills in the package. A sample cover sheet for a combined explanatory memorandum is at appendix L.

¹¹ A revised explanatory memorandum is prepared for the second house if the bill has been amended in the first house (see paragraphs 8.37 and 10.21).