



**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**THIRD REPORT**

**OF**

**2004**

**The Quality of Explanatory Memoranda  
Accompanying Bills**

**24 March 2004**



**SENATE STANDING COMMITTEE**

**FOR THE**

**SCRUTINY OF BILLS**

**THIRD REPORT**

**OF**

**2004**

**The Quality of Explanatory Memoranda  
Accompanying Bills**

**24 March 2004**

**ISSN 0729-6258**



# Contents

	<b>Page</b>
<b>Members of the Committee</b>	v
<b>Summary of Recommendations</b>	vii
<b>Chapter 1 Introduction</b>	<b>69</b>
<b>Chapter 2 Explanatory Memoranda</b>	<b>73</b>
The purpose of explanatory memoranda	73
Guidance provided for the drafting of explanatory memoranda	74
<i>Legislation Handbook</i>	74
<i>Legislation Circulars</i>	77
<i>Office of Parliamentary Counsel Drafting Directions</i>	78
<b>Chapter 3 Committee’s Consideration of Explanatory Memoranda</b>	<b>81</b>
Retrospective commencement or application	82
<i>Retrospective commencement</i>	82
<i>Retrospective application</i>	84
Unclear or delayed commencement of legislation or part of the legislation	85
Commencement on proclamation	87
Delegation of powers and functions	87
Legislation by press release	89
Provision of absolute and strict liability offences	90
Reversal of onus of proof	93
Other matters	93
A Private Senator’s Bill	94
Conclusion	95
<b>Chapter 4 Improving the Quality of Explanatory Memoranda</b>	<b>97</b>
Measures to improve the quality of explanatory memoranda	97
<i>Guidance for officers preparing explanatory         memoranda</i>	97
<i>Other measures</i>	98
Conclusion	101



# SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

## MEMBERS OF THE COMMITTEE

Senator T Crossin (Chair)  
Senator B Mason (Deputy Chairman)  
Senator G Barnett  
Senator D Johnston  
Senator J McLucas  
Senator A Murray

## TERMS OF REFERENCE

### Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
  - (i) trespass unduly on personal rights and liberties;
  - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
  - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
  - (iv) inappropriately delegate legislative powers; or
  - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.





# Summary of Recommendations

## **Chapter 2 — *Legislation Handbook***

The committee recommends that the Department of the Prime Minister and Cabinet amend the *Legislation Handbook* to provide further guidance on the matters that the committee considers should be addressed in explanatory memoranda, including those matters that have been identified in paragraphs 2.10 and 2.11 of this report. (Recommendation page 9)

## **Chapter 3 — A Private Senator's Bill**

The committee recommends that the Department of the Senate develop a set of guidelines to assist senators in the preparation of private bills. (Recommendation page 26)

## **Chapter 4 — Improving the quality of explanatory memoranda**

The committee recommends that information relevant to the preparation of explanatory memoranda currently contained in the *Legislation Handbook*, Legislation Circulars and OPC Drafting Directions be consolidated into one primary source of information, namely the *Legislation Handbook*. (Recommendation page 30)

The committee recommends that, before a bill is introduced into the Parliament, an appropriately qualified person should check the explanatory memorandum accompanying that bill to ensure it explains fully the effect and operation of the proposed legislation and complies with the requirements contained in the *Legislation Handbook*, as amended. (Recommendation page 31)

The committee recommends that consideration be given to developing a course to train departmental officers in the preparation of explanatory memoranda. (Recommendation page 32)



# Chapter 1

## Introduction

1.1 The Scrutiny of Bills Committee was established in 1981 for the purpose of examining all bills introduced into the Parliament to ensure that they do not:

- (a) trespass unduly on personal rights and liberties;
- (b) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (c) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (d) inappropriately delegate legislative powers; or
- (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>1</sup>

1.2 When a bill is introduced, it is usually accompanied by an explanatory memorandum. The committee relies on the explanatory memorandum to explain the purpose and effect of the associated bill and the operation of its individual provisions. In particular, the committee expects that an explanation will be given for any provision within a bill that appears to test or infringe the committee's terms of reference and provide reasons or justifications for this.

1.3 On a number of occasions, the committee has commented on the inadequacy of the information provided in explanatory memoranda. The committee has noted a decrease in the quality of information in a number of these documents to the extent where any correspondence to ministers is often aimed at discovering *whether* a bill attracts its terms of reference as opposed to *why*.

---

<sup>1</sup> Standing Order 24(1), *Standing Orders and other orders of the Senate*, The Senate, Canberra, February 2004.

1.4 The committee has also noted that rather than, or as well as, seeking an explanation, it has increasingly found the need to seek clarification from the relevant minister of the effect of a provision which could have been avoided if the explanatory memorandum had been clearer.

1.5 The committee's continuing dissatisfaction with these documents culminated in a series of statements to the Senate during 2003<sup>2</sup> in which it highlighted its concerns with the quality of explanatory memoranda, noting deficiencies and providing guidance to government agencies on the matters that it expected to be addressed.

1.6 In particular, on 19 March 2003, the committee noted that:

The most common comment in the Alert Digests tabled by the Committee is that the explanatory memorandum for a bill does not explain the background and reasons for measures which on their face might affect personal rights or parliamentary propriety. The result is that explanatory memoranda are less useful than intended and the Committee is obliged to initiate correspondence with Ministers.

These problems are by no means universal, with many comments in Alert Digests noting an apparent concern which was met by a full explanation in the explanatory memorandum. Nevertheless the Committee was disappointed at the standards of some explanatory memoranda.<sup>3</sup>

1.7 Notwithstanding that many explanatory memoranda provide sufficient information that allows the committee to determine whether legislative provisions infringe its terms of reference, the ongoing problem with the poor quality of information in a number of these documents warrants further examination.

1.8 The purpose of this report is to examine the difficulties experienced by the committee with the quality of information being provided in some explanatory memoranda and to assess whether the current drafting practices and requirements

---

<sup>2</sup> Senate *Hansard*, 19 March 2003, p. 9714; 14 May 2003, p. 10955; 18 June 2003, p. 11881 and 25 June 2003, p. 12531.

<sup>3</sup> Senate *Hansard*, p. 9714.

are sufficient to ensure that these documents explain fully the operation and effect of proposed legislation.



## Chapter 2

### Explanatory Memoranda

#### The purpose of explanatory memoranda

2.1 An explanatory memorandum is a companion document to a bill. It is required to provide a statement of the purpose of the legislation, an outline of why it is required, the effect of the principle provisions, an explanation of the policy background and notes on the clauses of the bill. The information provided in this document should be of such a quality that the committee, members of Parliament, the courts and the public are able to understand the overall objective and operation of the bill.

2.2 Government agencies are usually required to provide explanatory memoranda to all bills (except appropriation bills) introduced into the Parliament. A private bill introduced by a senator or a Member of the House of Representatives may also be accompanied by an explanatory memorandum.

2.3 Courts may use extrinsic material such as explanatory memoranda to confirm the ordinary meaning of an Act. The *Acts Interpretation Act 1901* was amended in 1984 to define and confine the range of materials and the way in which they may be used by the courts. Section 15AB provides that a court may use explanatory memoranda to interpret legislation:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provisions taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to 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 is unreasonable.<sup>4</sup>

---

<sup>4</sup> *Acts Interpretation Act 1901*, section 15AB.

## **Guidance provided for the preparation of explanatory memoranda**

2.4 Explanatory memoranda are generally drafted by departmental officers who are guided by the Department of the Prime Minister and Cabinet *Legislation Handbook*, Legislation Circulars and the Office of Parliamentary Counsel (OPC) Drafting Directions. The requirements specified in these documents are discussed below.

### ***Legislation Handbook***

2.5 The *Legislation Handbook* is the principle source of information for departmental officers on the procedures involved in making a Commonwealth Act. Chapter 8<sup>5</sup> of the Handbook establishes the requirements for the preparation of explanatory material that is to accompany a bill or amendments to a bill, that is, an explanatory memorandum and a second reading speech. All agencies are expected to comply with the provisions of that chapter.

2.6 The chapter specifically states that the aim of explanatory memoranda is to assist the reader ‘to understand the objectives and detailed operation of the clauses of the bill’.

2.7 Paragraph 8.8 of the Handbook further advises that 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.’ It should include a general outline, incorporating a brief but clear statement of the purpose and objective of the bill, an explanation of why the bill is required, the effect of the principal provisions, the policy background, a formal impact statement and, where required, a full regulation impact statement.

---

<sup>5</sup> Chapter 8: Preparing the Support Material: The Explanatory Memorandum and Second Reading Speech, *Legislation Handbook* as amended to incorporate Update of No. 1 of May 2000.



2.8 Paragraph 8.18 covers notes on clauses. The paragraph states that ‘[n]otes 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.’ Where appropriate the notes on clauses should give instances of their intended effect and the problem which they are intended to address. In a number of instances, however, the committee noted that the explanatory memorandum did not comply with these requirements as it failed either to explain all the clauses in the bill or to provide an explanation for a complete schedule to the bill. The committee expects that an explanatory memorandum will explain all aspects of the accompanying bill, including the effect of its individual clauses.

2.9 The Handbook refers to the Scrutiny of Bills Committee and its role in relation to the passage of a bill. Paragraph 8.19 draws the drafter’s attention to the committee’s requirements, noting that ‘[w]here 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.’ The committee notes that guidance is provided for the drafting of provisions that provide for commencement (either retrospectively or on proclamation), offence provisions, discretions and the review of administrative decisions, but the only comment on the committee’s position is that it is opposed to the use of open-ended commencement provisions. Drafters are not provided with any further guidance on the matters that would be subject to comment by the committee.

2.10 The committee is of the opinion that although the Handbook provides guidance on a number of issues that would attract its attention and comment, it does not provide sufficient guidance to enable a departmental officer to determine whether provisions in a bill may infringe the committee’s terms of reference. The committee believes that an officer’s understanding of the committee’s position on

provisions that affect personal rights and liberties would be enhanced if the Handbook included examples of the types of matters that attract the committee's attention in its *Alert Digests* and *Reports*. For example, in keeping with the Handbook, explanatory memoranda should give reasons for providing for commencement provisions that are retrospective, unclear, extended or that commence on proclamation and should advise whether any person would be adversely affected by the retrospective commencement of the bill or include an assurance that no person would be affected.

2.11 Other examples of the types of matters that would attract the committee's interest and comment under its terms of reference and for which it would expect an explanation in the explanatory memorandum include:

- the wide delegation of powers, such as to 'a person';
- delegated legislation that is not subject to parliamentary scrutiny by tabling and possible disallowance;
- strict or absolute liability offences;
- reversal of the usual onus of proof;
- curtailment of existing rights;
- discretions with no merits review;
- entry and search provisions; and
- technical corrections, regulation-making powers and transitional and application provisions.

2.12 The above list is not exhaustive. It is an indication of the types of matters under the committee's terms of reference that have not been adequately explained in the past. Departmental officers are still encouraged to continue to note any concerns that the committee may raise in its *Alert Digests* and *Reports*.

### **Recommendation**

**The committee recommends that the Department of the Prime Minister and Cabinet amend the *Legislation Handbook* to provide further guidance on the matters that the committee considers should be addressed in explanatory memoranda, including those matters that have been identified in paragraphs 2.10 and 2.11 of this report.**

### ***Legislation Circulars***

2.13 The committee wrote to the Acting Parliamentary Secretary to the Prime Minister, the Hon Peter Slipper MP, on 5 March 2003 raising concerns with the standard of a number of explanatory memoranda. The committee noted that the core of the problem did not appear to lie with the general principles contained in the *Legislation Handbook* or the Legislation Circulars issued by the Department of the Prime Minister and Cabinet, both of which correctly advise the relevant requirements. Instead, the disappointing standard of some explanatory memoranda seems to relate to a failure to comply with those requirements. The committee therefore asked whether it would be possible to issue a more detailed Legislation Circular, ‘setting out in fuller terms the types of matters which an explanatory memorandum should comprehensively explain’.

2.14 On 13 May 2003, the Department of the Prime Minister and Cabinet issued *Legislation Circular No. 7 of 2003* to government agencies reminding them that guidance for the preparation of an explanatory memorandum is set out in the *Legislation Handbook* and alerting them to the concerns expressed by the committee in its *First* and *Second Report of 2003*. In particular, agencies were reminded that:

... where a measure in a bill is not sufficiently explained in an explanatory memorandum, the Committee will seek a written explanation from the responsible minister. If explanatory memoranda accord with the *Legislation Handbook* and

address the concerns of the Committee, the need for the Committee to seek clarification will be reduced.<sup>6</sup>

2.15 The committee believed that these measures, if implemented, would have effected improvements in the standard of explanatory memoranda, thus enhancing their intended role in assisting parliamentarians, administrators, the courts and the public. The committee also expected there would be a reduction in correspondence with ministers as a result of the improvement in the quality of information provided in explanatory memoranda.<sup>7</sup> Unfortunately, there has been no apparent improvement in the quality of the information provided in explanatory memoranda since the circular was issued, particularly by some departments.

### ***Office of Parliamentary Counsel Drafting Directions***

2.16 In addition to the *Legislation Handbook*, Drafting Directions are issued by OPC providing advice on any further information that should be provided in explanatory memoranda. *Drafting Direction No. 3 of 2003* is of particular interest to the committee as it sets out the requirements for the drafting of commencement provisions.

2.17 The drafting direction advises that a proclamation made by the Governor-General is the preferred method of providing a discretion to fix a commencement date. In 1988 senators raised concerns with this practice as a number of Acts were passed but then not proclaimed to commence. On 27 September 1988 the Senate made an order of return requiring the tabling of a list of laws not proclaimed, a statement of reasons for the failure to proclaim them and a timetable for their operation. Senate Standing Order 139 requires the government to table this list on or before 31 August of each year. The Department of the Prime Minister and Cabinet has since introduced a policy that imposes restrictions on the period within which an Act, or a provision of an Act, may be proclaimed and requires that a

---

<sup>6</sup> *Legislation Circular No. 7 of 2003*, p. 2.

<sup>7</sup> Letter to the Acting Parliamentary Secretary to the Prime Minister, 5 March 2003.

commencement provision should provide for either a period or a date to be specified after Royal Assent. The direction specifies that:

If the specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum.

If the specified date option is chosen, there is no restriction on how long commencement may be deferred. However, any substantial deferrals should be explained in the Explanatory Memorandum, and it may in fact be sensible to explain the significance of the specified date whenever this option is used.

Clauses providing for commencement by Proclamation, but without the restrictions mentioned above, should be used only in unusual circumstances, where the commencement depends on an event whose timing is uncertain and generally not within the Government's control (e.g. enactment of complementary State legislation). Commencement provisions of this kind should be explained in the Explanatory Memorandum.<sup>8</sup>

## 2.18 Officers who are responsible for drafting the bills are reminded that:

[t]he Senate Standing Committee for the Scrutiny of Bills takes an interest in delayed commencement provisions. The Committee is aware of the policy originally adopted in the late 1980s, and generally looks for an explanation for any commencement provision that departs from the standard policy. If you are asked to draft a Proclamation commencement provision that does not comply with the policy ... you should advise your instructors of the Committee's interest, and recommend that they explain any departure from the policy in the Explanatory Memorandum.<sup>9</sup>

## 2.19 It remains a matter of concern to the committee that compliance with the requirements in the direction has not been consistent across government agencies.

---

<sup>8</sup> Office of Parliamentary Counsel, *Drafting Direction 2003, No. 3 Commencement provisions*.

<sup>9</sup> *ibid.*



## Chapter 3

### Committee Consideration of Explanatory Memoranda

3.1 For a number of years, the committee has expressed concern with the quality of the information provided in explanatory memoranda accompanying bills. The committee is concerned that there has been a deterioration in the quality of this information in a number of explanatory memoranda either because departmental officers have not complied with the requirements in the *Legislation Handbook*, *Legislation Circulars* and *Drafting Directions*, or because insufficient information has been provided to enable the committee to determine whether the provisions infringe its terms of reference.

3.2 The most prevalent problem identified by the committee was the inadequacy of the information provided on the following matters:

- retrospective commencement or application of legislation;
- unclear or delayed commencement of legislation or part of the legislation;
- commencement on proclamation;
- delegation of powers and functions;
- legislation by press release;
- provision of absolute and strict liability offences; and
- reversal of the onus of proof.

3.3 The committee is concerned that these problems continue even though the deficiencies have been highlighted over the years in its *Reports* to the Senate. The committee's concern with the quality of the information provided on these matters is discussed below.

## **Retrospective commencement or application**

3.4 Retrospectivity is always a matter of parliamentary and public interest. It is the practice of the committee to draw attention to any bill which seeks to have retrospective impact and it will comment adversely where such a bill has a detrimental effect on people. For this reason, the committee has continued to insist that where there is a proposal for legislation to have retrospective effect, the explanatory memorandum should set out in detail the reasons that retrospectivity is sought and whether it adversely affects any person other than the Commonwealth.<sup>10</sup>

### ***Retrospective commencement***

3.5 During 2003, the committee had occasion to comment on explanatory memoranda that did not explain the reason for the retrospective commencement of proposed legislation. In particular, the committee raised concern with regard to the Family Law Amendment Bill 2003, where by virtue of various items in the table to subclause 2(1) of the bill, the amendments proposed by various items in Schedules 4, 5 and 7 commenced immediately after the commencement of Schedule 2 to the *Family Law Amendment Act 2000*, which occurred on 27 December 2000. The explanatory memorandum did not indicate whether any of these amendments would adversely affect any person. All the memorandum did was to refer to the fact that various items in those Schedules were to commence immediately after the commencement of the *Family Law Amendment Act 2000* (although the committee noted that the numbering of the items in the various Schedules was not in accordance with the numbering either later in the explanatory memorandum or in the bill itself). The explanatory memorandum went on to assert that ‘the effect of the actual provisions is described below’. Unfortunately, that promise was not completely fulfilled. The explanations of the effect of the particular items in each

---

<sup>10</sup> *The Work of the Committee during the 37<sup>th</sup> Parliament May 1993 – March 1996*, June 1997, p. 15; *The Work of the Committee during the 38<sup>th</sup> Parliament May 1997 – August 1998*, June 1999, p. 10; and *The Work of the Committee during the 39<sup>th</sup> Parliament November 1998 – October 2001*, June 2002, p. 14.



Schedule did not address the fact that the amendment had retrospective effect, and did not advise whether that retrospectivity would adversely affect any person.<sup>11</sup>

3.6 In 2002 the committee drew the Senate's attention to the Superannuation Legislation (Commonwealth Employment) Repeal and Amendment Bill 2002 which contained a number of provisions that were to commence retrospectively. The committee sought confirmation from the minister that these amendments would not detrimentally affect the rights of any person. The minister responded that no person would be adversely affected by the changes which were made to reflect the manner in which the legislation had been administered since 1995. The committee thanked the minister for his detailed explanation and requested that an additional explanatory memorandum be tabled setting out the information provided in the response. The minister agreed on 19 December 2002 to arrange for an additional explanatory memorandum to be tabled when the bill was next considered by the Senate.<sup>12</sup> The minister tabled this document on 26 June 2003.

3.7 The committee also sought the tabling of an additional explanatory memorandum for the Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002<sup>13</sup> and the Aboriginal and Torres Strait Islander Commission Amendment Bill 2002<sup>14</sup> to reflect additional information provided by the relevant ministers in response to its query on particular provisions in the bills. The additional information in these instances provided background information on the current legal position with regard to the enforceability of bargaining service fee clauses in certified agreements and to the reason for the retrospective application of criminal conviction and sentencing provisions in relation to the eligibility of persons to stand for a Regional Council.

---

<sup>11</sup> *Eighth Report of 2003*, 20 August 2003, pp. 188-194.

<sup>12</sup> *First Report of 2003*, 5 February 2003, pp. 23-27.

<sup>13</sup> *Fifth Report of 2002*, 19 June 2002, pp. 240-242.

<sup>14</sup> *Eighth Report of 2002*, 21 August 2002, pp. 326-328.

3.8 The committee notes that an additional explanatory memorandum was not tabled with regard to the Aboriginal and Torres Strait Islander Commission Bill as it was amended to remove the relevant provision. The committee is disappointed, however, to note that the information on bargaining service fees was not included in the explanatory memorandum to the Workplace Relations Bill when it was reintroduced in 2003.

3.9 On other occasions the committee sought an assurance that no person other than the Commonwealth would be affected by the retrospective commencement of the *Petroleum (Timor Sea Treaty) Act 2003*<sup>15</sup>, and the *Taxation Laws Amendment (Medicare Levy and Medicare Levy Surcharge) Act 2002* because the information was not provided in the explanatory memoranda.<sup>16</sup>

### ***Retrospective application***

3.10 The committee noted that ‘by virtue of items 2 and 5 of Schedule 1 to the Migration Legislation Amendment Bill (No. 1) 2002, the amendments proposed by items 1 and 4 (which concern certain rights of non-citizen children) would apply from 1 September 1994 — a period of more than 7 years before the Act was passed. The explanatory memorandum merely stated the effect of these items but provided no reason for their retrospective application (other than a reference to the date on which the concept of “immigration clearance” was introduced into the Act). In response to a request from the committee, the minister advised that the provisions were beneficial as they clarified the status of non-citizen children in relation to the provision of information in immigration clearance.<sup>17</sup> Had this information been included in the explanatory memorandum, together with the assurance that no person would be disadvantaged by the retrospective application of the bill the committee’s concerns would have been satisfied, thereby negating the need to write to the minister.

---

<sup>15</sup> *Fourth Report of 2003*, 14 May 2003, pp. 121-123.

<sup>16</sup> *First Report of 2003*, 5 February 2003, pp. 32-34.

3.11 The committee noted that by virtue of item 18 of Schedule 1 to the Taxation Laws Amendment Bill (No. 4) 2003, the amendments proposed by that Schedule were to apply from 1 July 2001. Unfortunately, the explanatory memorandum did not make it clear whether this retrospective application would adversely affect any taxpayers.<sup>18</sup> The committee also noted that the explanatory memorandum to the Family and Community Services and Veterans' Affairs Legislation Amendment (2003 Budget and Other Measures) Bill 2003 failed to explain the reason for the retrospective application of the amendments.<sup>19</sup>

3.12 By comparison, the Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2000 provided an explanation for the retrospective application of the amendments.<sup>20</sup>

### **Unclear or delayed commencement of legislation or part of the legislation**

3.13 The committee expects that where the commencement of the proposed legislation is unclear in the bill, the explanatory memorandum should indicate when it is expected that the legislation will commence and why. The following are examples where the committee sought further information from the relevant ministers because the commencement provisions were not clearly explained in the explanatory memoranda.

3.14 The committee noted there was an inconsistency in commencement of the Dried Vine Fruits (Rate of Primary Industry (Customs) Charge) Validation Bill 2001 where the explanatory memorandum specified a date but the clause specified the legislation commenced on Royal Assent.<sup>21</sup>

3.15 There was an inadequate indication of the commencement date(s) of the Australian Heritage Council Bill 2002 and Australian Heritage Council

---

<sup>17</sup> *Second Report of 2003*, 5 March 2003, pp. 63-64.

<sup>18</sup> *Third Report of 2003*, 26 March 2003, pp. 91-96.

<sup>19</sup> *Twelfth Report of 2003*, 15 October 2003, pp. 273-276.

<sup>20</sup> *Tenth Report of 2001*, 22 August 2001, pp. 456-461.

(Consequential and Transitional Provisions) Bill 2002. The items in the bills indicated that the legislation was to commence at the same time as a schedule in another bill (the *Environment and Heritage Legislation Amendment Act (No. 1) 2002*) but the explanatory memoranda gave no indication as to whether that Act was likely to commence before or after the bills had been debated and passed by both Houses.<sup>22</sup>

3.16 The committee also sought information on the commencement of the Financial Sector Legislation Amendment Bill (No. 1) 2002,<sup>23</sup> the Customs Legislation Amendment Bill (No. 1) 2002, the Higher Education Funding Amendment Bill 2002 and the Import Processing Charges (Amendment and Repeal) Bill 2002.<sup>24</sup> In each case the explanatory memorandum failed to indicate when the bill would commence and, if retrospective, whether any person other than the Commonwealth would be adversely affected.

3.17 The committee expects that where commencement is delayed, the explanatory memorandum should set out the reasons for that delay. The OPC *Drafting Direction No. 3 of 2003* notes that:

[r]ecently, the Senate Scrutiny of Bills Committee seems to have taken the view that any significant deferral of commencement should be explained. This includes cases in which a guaranteed commencement is provided for, but is deferred for more than 6 months after Royal Assent (eg commencement 12 months after Royal Assent). If your instructors request such a provision, you should advise them to include in the Explanatory Memorandum some sort of explanation for the length of the deferral.<sup>25</sup>

3.18 No explanation was provided for an eight to ten month delay in introducing customs proposals resulting in them being applied retrospectively in the Customs Tariff Amendment Bill (No. 2) 2001 and the Excise Tariff Amendment Bill (No. 1) 2001.<sup>26</sup>

---

<sup>21</sup> *Seventh Report of 2001*, 20 June 2001, pp. 266-268.

<sup>22</sup> *Fifteenth Report of 2002*, 4 December 2002, pp. 498-503.

<sup>23</sup> *Seventh Report of 2002*, 26 June 2002, pp. 300-303.

<sup>24</sup> *Ninth Report of 2002*, 28 August 2002, pp. 369-381.

<sup>25</sup> Office of Parliamentary Counsel, *Drafting Direction 2003, No.3 Commencement provisions*, p. 7.

3.19 The committee noted that Schedule 2 of the Copyright Amendment (Parallel Importation) Bill 2002 commenced 12 months after Royal Assent. The explanatory memorandum did not comply with the drafting direction and provide a reason for the delayed commencement. The committee raised this issue with regard to an identical bill introduced in the previous Parliament and had received a satisfactory response from the minister. The committee can only surmise that the explanatory memorandum had not been checked to ensure it complied with the drafting direction before the bill was reintroduced.

### **Commencement on proclamation**

3.20 Where legislation is to commence on proclamation, the committee expects that the explanatory memorandum will be drafted in accordance with the OPC *Drafting Instruction No. 3 of 2003* as noted in paragraphs 2.16 to 2.19 of Chapter 2. The drafting direction particularly notes that:

If the specified period option is chosen, the period should generally not be longer than 6 months. A longer period should be explained in the Explanatory Memorandum.

3.21 During 2003 the committee sought advice from the relevant ministers on the reasons for the delayed commencement being longer than 6 months for the Legislative Instruments Bill 2003<sup>27</sup>, the Civil Aviation Legislation Amendment Bill 2003<sup>28</sup> and the Taxation Laws Amendment Bill (No. 4) 2003.<sup>29</sup> The committee is concerned that in these instances the drafters did not comply with the drafting direction.

### **Delegation of powers and functions**

3.22 The committee likes to see a limit set on either the sorts of powers that can be delegated or the categories of people to whom they are given. It considers that

---

<sup>26</sup> *Sixth Report of 2001*, 23 May 2001, pp. 208-210.

<sup>27</sup> *Eleventh Report of 2003*, 8 October 2003, pp. 261-263.

<sup>28</sup> *Seventh Report of 2003*, 13 August 2003, pp. 170-172.

those to whom powers are delegated should be confined to the holders of nominated offices, or to members of the Senior Executive Service, or to persons holding specified qualifications.

3.23 The committee raised concerns about the Age Discrimination Bill 2003 that provided for power to be delegated to ‘another person or body of persons’. Paragraph 55(c) of the bill permitted the Human Rights and Equal Opportunities Commission to delegate ‘all or any of the powers and functions conferred on it’ by the proposed legislation to ‘another person or body of persons’. The explanatory memorandum provided no explanation for this delegation. The minister advised that the provision allowed the Commission to delegate its powers to people with specific expertise (such as specialists in child psychology) to enable it to undertake its responsibilities in the most effective manner. The committee considered that the advice provided by the minister would have enhanced the information provided in the explanatory memorandum.<sup>30</sup>

3.24 By comparison, the committee commented on a government amendment to the General Insurance Reform Bill 2001 which substituted a new paragraph 59(1)(b) that authorised an inspector to delegate his or her powers to an APRA staff member or to ‘a person included in a class of persons approved in writing by APRA’. The supplementary explanatory memorandum that accompanied the amendment advised that this wide and apparently unfettered power would allow the inspector to call on particular expertise in carrying out an investigation.<sup>31</sup> Under its remit, the committee examines all amendments passed by either House of the Parliament and expects that the quality of the information provided in supplementary explanatory memoranda would be the same as that required for the original explanatory memoranda. In this instance a satisfactory explanation was included in the supplementary explanatory memorandum.

---

<sup>29</sup> *Third Report of 2003*, 26 March 2003, pp. 91-96.

<sup>30</sup> *Fifteenth Report of 2003*, 3 December 2003, pp. 334-336.

<sup>31</sup> *Seventh Report of 2002*, 26 June 2002, pp. 307-308.

## Legislation by press release

3.25 On 8 November 1988 the Senate resolved that:

... where the Government has announced, by press release, its intention to introduce a Bill to amend taxation law, and that Bill has not been introduced into the Parliament or made available by way of publication of a draft Bill within 6 calendar months after the date of that announcement, the Senate shall, subject to any further resolution, amend the Bill to provide that the commencement date of the Bill shall be a date that is no earlier than either the date of introduction of the Bill into the Parliament or the date of publication of the draft Bill.<sup>32</sup>

3.26 The committee commented on the Taxation Laws Amendment Bill (No. 5) 1994 that introduced changes to the *Income Tax Assessment Act 1936* that would operate from the date of the press release (12 January 1994) but the relevant legislation was not introduced until 7 December 1994 (almost 11 months later). The explanatory memorandum provided no reason for this apparent lengthy delay in implementing the changes announced on 12 January 1994. The committee wrote to the minister pointing out that more than 6 months had elapsed between the press release and introduction of the bill into the Parliament. The minister advised that a draft bill was circulated for comment on 12 July 1994. If the explanatory memorandum had contained this information there would not have been any need for the committee to enter into correspondence with the minister.

3.27 The committee notes that the resolution of the Senate relates to press releases on taxation matters. The committee will, however, comment where it appears that another legislative initiative has been implemented following a ministerial announcement and no reasons have been provided for backdating the legislation to the date of that announcement.

3.28 For example, the committee noted that by virtue of item 2 in the table to subclause 2(1) to the Crimes (Overseas) Amendment Bill 2003, the amendments proposed in Schedule 1 commenced retrospectively on 1 July 2003. The explanatory memorandum stated that the purpose of the retrospectivity was to

enable regulations to be made which would (in effect) make the amendments in the bill apply to Australians in Iraq and the Solomon Islands since that date. However, the explanatory memorandum provided no explanation for the retrospectivity. The second reading speech indicated the reason for the date of 1 July 2003 being chosen as the commencement date was that the Attorney-General issued a media statement, jointly with the Minister for Justice and Customs and the Minister for Foreign Affairs, on 26 June 2003, ‘stating that Australian criminal jurisdiction would be extended to Australian civilians serving in Iraq from 1 July 2003.’ It therefore appeared that this bill was yet another example of ‘legislation by press release’.

3.29 In his response, the Attorney-General advised that the date of 1 July 2003 was chosen to ensure that ‘Australians deployed to Iraq and the Solomon Islands were protected by Australian criminal jurisdiction for the maximum period possible’ and the media release ensured that those Australians were aware that criminal jurisdiction was to be extended to them.<sup>33</sup> The committee thanked the Attorney-General for this explanation and noted that the inclusion of this information in the explanatory memorandum would have assisted its examination of the bill.

### **Provision of absolute and strict liability offences**

3.30 Under a strict liability offence, a person may be punished for doing something, or failing to do something, whether or not they have a guilty intent. In other words, someone is held legally liable for their conduct irrespective of their moral responsibility. Such offences are rare in traditional criminal law, but seem to have become excessive and more common as statutory offences have developed.<sup>34</sup>

---

<sup>32</sup> *Journals of the Senate*, No.109, 8 November 1988, p. 1104.

<sup>33</sup> *Eleventh Report of 2003*, 8 October 2003, pp. 257-259.

<sup>34</sup> *Ninth Report of 2001*, 8 August 2001, p. 392.



3.31 The committee therefore expects that where a bill creates an offence of absolute or strict liability, the reasons for its imposition should be set out in the explanatory memorandum.<sup>35</sup>

3.32 In the last three years, the committee has found it necessary to seek advice on the reason for the imposition of such offences on a number of occasions. In particular, it sought advice on the reason for providing for strict liability offences in the *Great Barrier Reef Marine Park Amendment Act 2001*. The committee noted that although the explanatory memorandum explained the effect of imposing strict liability for a criminal offence, it also indicated that the offences created by the new sections imposed liability if the offender failed to exercise reasonable care (or intended to commit the relevant act). This was not borne out by the provisions themselves, which, in stating that they created offences of strict liability, did not oblige the prosecution to prove any mental state on the part of the accused. The committee therefore sought advice as to whether the explanatory memorandum and the bill were consistent on the issue of strict liability, and why it was appropriate that strict liability be imposed in relation to the nominated offences. The minister provided an explanation for the imposition of these offences.<sup>36</sup>

3.33 The committee also sought further advice on the provision of strict liability offences in the Financial Sector Reform Bill 2001<sup>37</sup>, the Medical Indemnity Bill 2002<sup>38</sup>, the Financial Sector Legislation Amendment Bill (No. 2) 2003<sup>39</sup>, the Workplace Relations Amendment (Registration and Accountability of Organisations) Bill 2002<sup>40</sup>, the Border Security Legislation Amendment Bill 2002<sup>41</sup>, the *Health and Aged Care Legislation Amendment (Application of Criminal Code)*

---

<sup>35</sup> Scrutiny of Bills Committee, *The Work of the Committee during the 39<sup>th</sup> Parliament November 1998-October 2001*, June 2002, p. 34.

<sup>36</sup> *ibid*, pp. 400-405.

<sup>37</sup> *Ninth Report of 2001*, 8 August 2001, pp. 390-395.

<sup>38</sup> *Sixteenth Report of 2002*, 11 December 2002, pp. 552-554.

<sup>39</sup> *Fifteenth Report of 2002*, 4 December 2002, pp. 507-511.

<sup>40</sup> *Twelfth Report of 2002*, 16 October 2002, pp. 429-430.

<sup>41</sup> *Fourth Report of 2002*, 15 May 2002, pp. 146-153.

*Act 2001*<sup>42</sup>, the Migration Legislation Amendment Bill (No. 1) 2002<sup>43</sup> and the *Quarantine Amendment Act 2002*.<sup>44</sup>

3.34 The Proceeds of Crime (Consequential Amendments and Transitional Provisions) Bill 2002 provided for absolute criminal liability in new sections dealing with proceeds of crime in varying amounts. The committee was concerned that no explanation for the imposition of this liability had been included in the explanatory memorandum and wrote to the minister seeking an assurance that this offence provision was appropriate for the circumstances in which it would be applied.<sup>45</sup>

3.35 In contrast to the above bills, the committee found that although the Cybercrime Bill 2001 provided for offences of absolute liability, the explanatory memorandum explained the reason for the imposition of this offence.

3.36 There are occasions when explanatory memoranda provide information on provisions but the explanation is not sufficient for the committee to determine whether they infringe its terms of reference. For example, the committee noted that the explanatory memorandum to the Law and Justice Legislation Amendment (Application of Criminal Code) Bill 2000 provided an explanation for the application of absolute and strict liability offences but it did not go far enough to satisfy the committee's concerns and the minister was asked to provide background on the reasons for the decision to make strict liability offences in this legislation to resolve uncertainty.<sup>46</sup>

---

<sup>42</sup> *First Report of 2002*, 20 February 2002, pp. 36-38.

<sup>43</sup> *Second Report of 2003*, 5 March 2003, pp. 62-68.

<sup>44</sup> *First Report of 2003*, 5 February 2003, pp. 18-22.

<sup>45</sup> *Eighth Report of 2002*, 21 August 2002, pp. 339-345.

<sup>46</sup> *Second Report of 2001*, 28 February 2001, pp. 47-50.

## **Reversal of the onus of proof**

3.37 Where provision has been made in legislation to reverse the usual onus of proof, the committee expects that the explanatory memorandum should justify this decision.

3.38 In 2001, the committee noted that the explanatory memoranda to the Financial Services Reform Bill 2001 and the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* did not respectively explain why it was necessary to reverse the onus of proof, imposing an evidential burden on a defendant charged with an offence relating to insider trading<sup>47</sup> or placing a burden on a defendant to raise issues of the content of foreign law.<sup>48</sup>

## **Other matters**

3.39 The committee also noted that, in addition to the above matters, a number of explanatory memoranda failed to provide reasons for:

- curtailing existing rights with no provision being made for merits review of the discretions;
- extending the commencement period of the bill;
- removing protection provided by derivative-use immunity;
- including search and seizure provisions with no indication whether the committee's *Fourth Report of 2000: Entry and Search Provisions in Commonwealth Legislation* was taken into account when formulating the provisions;
- not subjecting delegated legislation to parliamentary scrutiny by providing for tabling and possible disallowance;
- not subjecting provisions to review under the *Administrative Decisions (Judicial Review) Act 1977*; and
- not setting an upper limit on levies in primary legislation.

---

<sup>47</sup> *Ninth Report of 2003*, 8 August 2001, pp. 390-395.

<sup>48</sup> *Second Report of 2003*, 28 February 2001, pp. 32-37.

3.40 In other instances, the committee found explanatory memoranda:

- made no reference to the relevant provision, while in others only a brief inadequate explanation was given;
- presented information in a technical manner which did little to explain the proposed operation of the bills but merely repeated their provisions; and
- obscured or omitted material relevant to its terms of reference.

3.41 The lack of information in the above instances resulted in subsequent correspondence between the committee and the relevant ministers, correspondence which might have been avoided had there been an appropriate explanatory memorandum to accompany the bill.

### **A Private Senator's Bill**

3.42 Most of the bills considered by the Parliament are government bills introduced by ministers. Senators and Members of the House of Representatives may, however, introduce bills to change existing laws or to introduce new legislative initiatives. These bills are known as either a Private Senator's Bill or a Private Member's Bill. In most instances, these bills are accompanied only by a second reading speech. The committee's consideration of these bills is assisted if they are accompanied by explanatory memoranda. The committee therefore suggests that there may be merit in the Department of the Senate developing a set of guidelines to assist senators in the preparation of private bills. These guidelines would act as a trigger to inform senators of the types of material that should be included with their bills when tabled, such as explanatory memoranda.

#### **Recommendation**

**The committee recommends that the Department of the Senate develop a set of guidelines to assist senators in the preparation of private bills.**

3.43 The committee makes no comment on the manner in which private bills are prepared by Members of the House of Representatives.

## **Conclusion**

3.44 Explanatory memoranda are essential to the understanding of the purpose and operation of proposed legislation. Although the committee has often commented adversely on the quality of explanatory memoranda, it should be noted that, on occasion, it has commented on those that have effectively addressed the content of the bill. One such case was the explanatory memorandum to the Customs Legislation Amendment Bill (No. 2) 2003.

3.45 As highlighted in this chapter, an increasing number of explanatory memoranda have failed to provide sufficient information to enable the committee to determine whether provisions in the bills infringe its terms of reference. In most cases, after the minister responded to a request for further information, the committee was satisfied that the provisions met its requirements.

3.46 The committee is concerned that it has to continually seek information from ministers that should have been included in the explanatory memoranda. Some departments regularly attract the attention of the committee even though previous *Reports* to the Senate expressed concern with the quality of the explanatory memoranda that accompanied their bills. In most instances, the officer responsible for preparing the explanatory memoranda appears not to have complied with the requirements as set out in the *Legislation Handbook* and *OPC Drafting Direction No. 3 of 2003*. On other occasions, although information was provided, it was not sufficiently detailed to allow the committee to satisfy itself that the provisions did not affect personal rights and liberties. The only conclusion to be drawn is that quality control checks on the final explanatory memoranda are inadequate or ineffective.



## Chapter 4

### Improving the Quality of Explanatory Memoranda

4.1 Explanatory memoranda fulfil an important role in the legislative process. The quality of the information provided in these documents enhances the transparency of the legislative process, the quality of the legislation and the ability of people to read and understand the laws passed by the Parliament. The standard of information provided by these documents is therefore an issue of concern to the committee, the Parliament, the courts and the public.

4.2 The committee and senators look to explanatory memoranda to clearly explain the operation and impact of legislative provisions. In the committee's experience, as highlighted in Chapter 3, there continues to be a number of explanatory memoranda that do not fulfil this purpose. The committee therefore believes that steps should be taken to improve the quality of the information provided in these documents.

#### **Measures to improve the quality of explanatory memoranda**

4.3 The committee does not believe there is a single solution to address the problem with the drafting quality of explanatory memoranda but proposes that consideration be given to implementing the following measures.

#### ***Guidance for officers preparing explanatory memoranda***

4.4 The committee notes in Chapter 2 that the guidance provided to departmental officers responsible for preparing explanatory memoranda is spread across three different documents — the *Legislation Handbook*, Legislation Circulars and Drafting Directions. Departmental officers who prepare explanatory memoranda are required to refer to the three publications to ensure that they have met all the requirements for preparing an explanatory memorandum. The committee considers

there may be merit in bringing these guidelines together into one source document, preferably the *Legislation Handbook*. This publication is the primary source of information for the legislative process and the consolidation of the advice into this document would provide greater assistance to officers, particularly if they are new to the legislative process and under pressure to develop legislation within a tight timeframe.

### **Recommendation**

**The committee recommends that information relevant to the preparation of explanatory memoranda currently contained in the *Legislation Handbook*, *Legislation Circulars* and *OPC Drafting Directions*, be consolidated into one primary source of information, namely the *Legislation Handbook*.**

### ***Other measures***

4.5 On 5 March 2003, the committee sought comment from the former First Parliamentary Counsel, Ms Hilary Penfold QC, on the committee's concerns with the quality of explanatory memoranda and sought any further suggestions that may help to ensure a satisfactory standard of these documents. Ms Penfold advised that OPC's experience with the officers who prepare these documents suggested that there may be more fundamental problems underlying the failure to prepare satisfactory explanatory memoranda beyond non-compliance with the requirements in the *Legislation Handbook*, these being the level of experience of the officers preparing explanatory memoranda and the time available to prepare these documents.

4.6 The committee's examination of explanatory memoranda also indicates that there is a problem with the apparent lack of quality control checks on the final product.



## **Recommendation**

**The committee recommends that, before a bill is introduced into the Parliament, an appropriately qualified person should check the explanatory memorandum accompanying that bill to ensure it explains fully the effect and operation of the proposed legislation and complies with the requirements contained in the *Legislation Handbook*, as amended.**

### *Experience of instructors responsible for preparing explanatory memoranda*

4.7 The First Parliamentary Counsel noted that from its experience with instructors over the years, OPC's perception is that the responsibility for legislative work has been delegated to staff whom they have found tended to be 'inexperienced in legislative work' and received 'little in the way of guidance and training from their supervisors'.<sup>49</sup>

4.8 Ms Penfold further noted that:

... many of our instructors have little or no previous instructing experience, and the experience (if any) of more senior agency staff is not applied to the agency's legislative projects. Since the people we deal with as instructors are usually the same people who prepare EMs, presumably this lack of experience in legislative projects affects the quality of EMs as well.<sup>50</sup>

4.9 Ms Penfold suggested that, given the level of experience of the instructors OPC has encountered in government agencies, there would be merit in developing a course dealing with the preparation of explanatory memoranda. The committee supports this suggestion and believes consideration should be given to whether it be conducted within each government agency or offered as a course across the public service. The committee acknowledges that, as the coordinator of the legislative process, the Department of the Prime Minister and Cabinet may be the best agency to develop a training course that would cover the wider public service.

---

<sup>49</sup> Letter, First Parliamentary Counsel, 27 March 2003, p. 2.

<sup>50</sup> *ibid* p. 2.

## **Recommendation**

**The committee recommends that consideration be given to developing a course to train departmental officers in the preparation of explanatory memoranda.**

### *Timing of bills*

4.10 Another area that the First Parliamentary Counsel identified as impacting on the quality of explanatory memoranda is the timing of the legislative program where the deadlines for lodging explanatory memoranda are the same as that for lodging bills with the Department of the Prime Minister and Cabinet. Given the tight deadlines for many legislative initiatives, ‘bills are often finished right on those deadlines (or after them), so the scope for any final polishing of explanatory memoranda is in many cases non-existent’.<sup>51</sup> Explanatory memoranda examined by the committee that provided insufficient information or provided information with the provisions as previously drafted and not as amended may be a result of these tight deadlines. A recent example of this problem occurred with the Family Law Amendment Bill 2003 where the committee noted that the numbering of the items in the various Schedules was not in accordance with the numbering either later in the explanatory memorandum or in the bill itself. The minister noted:

... that the numbering of the commencement provisions in the Bill and the body of the Explanatory Memorandum is correct. However, there is an error in paragraphs 4 & 5 of Clause 2 of the Explanatory Memorandum where a summary of commencement dates is provided. A draft Correction to the Explanatory Memorandum in relation to this is attached for information.<sup>52</sup>

The Minister tabled a correction to this explanatory memorandum but only after the bill had passed the House of Representatives and had been introduced into the Senate.

---

<sup>51</sup> *ibid* p. 2.

<sup>52</sup> *Eighth Report of 2003*, 20 August 2003, p. 189.

4.11 The committee acknowledges that the deadlines in the legislative process may leave little time for the drafting or finalisation of explanatory memoranda, particularly when a bill is considered to be urgent. As a result of these deadlines, explanatory memoranda may be tabled that do not accurately reflect the bill or do not provide sufficient information to explain the provisions of the bill. Notwithstanding that there may be pressure to introduce bills, explanatory memoranda should be checked by an appropriately qualified person to ensure they comply with the requirements in the *Legislation Handbook*.

## **Conclusion**

4.12 This report highlights the difficulties the committee has experienced in its examination of proposed legislation when the information provided in explanatory memoranda has not been of a quality to sufficiently explain the purpose and operation of the bills. The reasons for this inadequacy cannot be explained solely by non-compliance with the requirements of the *Legislation Handbook* or the guidance provided by that publication. As discussed above, the level of experience of the instructors, the legislative process and the standard of the checking undertaken by the departments also impacts on the quality of the information provided in the final explanatory memoranda.

4.13 The committee recognises that the responsibility for the quality and accuracy of explanatory memoranda rests with the relevant ministers. The committee therefore draws their attention to the concerns raised in this report and to its recommendations for improving the quality of explanatory memoranda.

4.14 This report has been prepared with the expectation that it will improve the quality of the information provided in explanatory memoranda thus enhancing the transparency of the legislation introduced into the Parliament. Ministers and the Department of the Prime Minister and Cabinet are strongly urged to note the committee's concerns and to implement its recommendations, thus ensuring future explanatory memoranda meet the requirements of the *Legislation Handbook*, as

amended, and fully explain the objectives and operation of proposed legislation. Consideration may need to be given to implementing additional measures if explanatory memoranda continue to fail to meet the standards expected by the committee.

Trish Crossin  
Chair