

2339

ORIGINAL PAPER

No. 2339.....

Laid upon the Table

29 12 196

**Third Report of the  
Standing Orders Committee  
for the Seventh Assembly**

**PROCEDURES FOR THE PRESENTATION AND  
PREPARATION OF SUPPORT MATERIALS TO  
ACCOMPANY PROPOSED LAWS**

February 1996

## TABLE OF CONTENTS

1. Report of the Committee.
2. Appendix A - Review of Standing Orders and procedures for the Presentation and Introduction of Legislation - Background Paper.
3. Bibliography.
4. Appendix B - Extract from Conference on Delegated Legislation and Scrutiny of Bills, Darwin - July 1995.
5. Appendix C - Background Paper - Summary of reasons for and against Explanatory Memorandum.

**Third Report of the  
Standing Orders Committee  
for the Seventh Assembly**

**PROCEDURES FOR THE PRESENTATION AND  
PREPARATION OF SUPPORT MATERIALS TO ACCOMPANY  
PROPOSED LAWS**

The Standing Orders Committee has the honour to present its Report to the Legislative Assembly.

**Membership:** On 27 June 1994, the Assembly appointed the following Members to be the Committee of Privileges:

Mr N R Bell, MLA  
Mrs M A Hickey, MLA  
The Honourable T R McCarthy, MLA  
The Honourable D W Manzie, MLA  
Mr R A Setter, MLA.

At the first meeting of the Committee, on 1 September 1994, the Honourable T R McCarthy, MLA, was elected as Chairman of the Committee.

On 15 August 1995, the Assembly discharged the Honourable D W Manzie, MLA, and Mr N R Bell, MLA, from further attendance upon the Committee and appointed in their stead as Members of the Committee, the Honourable B F Coulter, MLA, and Ms C M Martin, MLA.

**Reference:** On Wednesday 22 February 1995, the Member for Macdonnell, Mr Bell, moved that a reference relating to the presentation and introduction of legislation be referred to the Standing Orders Committee for inquiry and report.

Following consideration of this motion, a resolution was passed by the Legislative Assembly, the terms of which are:

“This Assembly:

- (1) noting that this Assembly is a uni-cameral Parliament and there is an obligation that a uni-cameral Parliament should have in place adequate procedures for the review and scrutiny of legislation presented to it for consideration;
- (2) noting that Northern Territory Legislative Assembly does not have a Committee for the scrutiny of Bills and does not provide a mechanism for Bills to be accompanied by supporting documentation such as explanatory memoranda or notes on clauses;
- (3) refers the following matter to the Standing Orders Committee for inquiry and report:

the current Standing Orders and procedures for the presentation and introduction of legislation, with particular regard to:

- (a) the requirement for preparation of support material to be presented with proposed laws; and
  - (b) the current practice in other Australian Parliaments in this matter; and
- (4) empowers the Standing Orders Committee to send for and examine persons, papers and records, to sit in public or in private session, notwithstanding any adjournment of the Assembly and to adjourn from place to place.”.

---

In conducting its inquiry and preparing its Report, your Committee has met on four occasions.

**Methodology:** The matter referred to the Standing Orders Committee was reported at its meeting on 2 March 1995.

At that time, the Secretary reported that he had sought from all Australian Parliaments a brief description of the relevant practice relating to the provision of support materials presented with proposed laws, together with samples of those documents and any guidelines for their preparation.

The Committee also resolved to write to all Ministers requesting that they, or officers from their Departments, provide information relating to supporting materials that are presently made available by them and inviting written submissions on any matters which may be relevant to the inquiry.

It was further resolved that the Committee write to the Chairman of the Standing Committee on Subordinate Legislation and Tabled Papers (Mr R A Setter, MLA) in his role as convenor of the Conference on Delegated Legislation and Scrutiny of Bills, held in Darwin in July 1995. Mr Setter was requested to make the necessary arrangements for delegates to the Conference to provide relevant information and documentation and, if possible, to initiate discussion on the subject of this Committee's Terms of Reference.

During its initial consideration of the Reference, the Secretary reported general discussion that he had conducted with Parliamentary Counsel (Mr Jim Dorling) on the subject of support materials.

The main elements of this background discussion were as follows:

- There are several possible ways of preparing and distributing support materials, depending on how formal the materials should be, or what the proposed legal effect is going to be. For instance, in most jurisdictions where explanatory memoranda are distributed, there is a provision in their "interpretation legislation" which enables the memoranda to be used in a Court as an extrinsic aid to statutory interpretation. In such cases, it would be necessary to

incorporate the text of the explanatory memoranda as part of the *Parliamentary Record*. The effect of this would be to make the document fairly formal and cautiously prepared, rather than a free-flowing and possibly speculative explanation of the impact of the amendments.

- However, it is not necessary to be that formal if it is intended that the documents are to have a more ephemeral effect. The documents could, for instance, be merely distributed at the time of, or after, the introduction of the Bill, but only for the informal information of the Members and not as part of the formal record.
- Adopting the formal approach would put an extra workload, in checking content, on the existing limited resources of the Office of the Parliamentary Counsel. The "less formal" approach would allow the checking to be carried out by the instructing Agencies. Further, it would also not be a constraint on the finalising (and the timing of programming) of the Bills themselves. This approach might serve better than the practice in most States and could evolve and be reviewed over time.

**Responses:** Responses to the Secretary's request for details and materials were received from most Australian Parliaments. Where written responses were not received directly, oral advice was requested.

A summary of practice and procedures in other Parliaments was incorporated in a background paper which was prepared for the Committee (Appendix A).

At the Conference of Delegated Legislation and Scrutiny of Bills held in Darwin from 5 to 7 July 1995, a Conference session was held on "Support Materials for the Presentation of Legislation", chaired by Mr R A Setter, MLA. Delegates also took the opportunity to present relevant documents for the use of the Committee.

Discussion ranged over the type of materials used in the various legislatures - Explanatory Memoranda, legislative impact statements, clause notes, fact sheets, annotated Bills, together with a description of Committee proceedings and arrangements for formal briefings. The relevant extract from the Conference Transcript is at Appendix B.

The materials provided by delegates and other Parliaments have been used in providing this Committee's response to paragraph 3(b) of the Terms of Reference, which is contained in Appendix A - a summary of procedures and legislation and current practice in other Australian Parliaments.

A summary of the main arguments for and against the use of Explanatory Memoranda was prepared for the Committee from the above responses and discussions. (Appendix C).

The various documents provided have been indexed and are tabled with this Report for the purposes of providing a future reference and a permanent record.

**Government Responses:** The request to Ministers elicited some individual responses. The Committee also received a letter from the Chief Minister, dated 15 August 1995, which read as follows:

"15 August 1995

The Hon T R McCarthy, MLA  
Chairman  
Standing Orders Committee  
GPO Box 3721  
DARWIN NT 0801

Dear Mr McCarthy

Thank you for your letter of 29 May 1995 requesting details of supporting materials presently supplied by Ministers and Departments when presenting legislation in the Legislative Assembly. I am responding on behalf of the Government.

There is no practice of supplying any such material in the Assembly and the Government would not support a proposal to introduce such a practice.

When a technically difficult Bill is to be introduced, the responsible Minister has, on occasions, given advance copies of certain support material to and arranged a formal briefing for the Opposition spokesperson. This approach has always been well received and has assisted the Opposition in understanding the content of the particular Bill.

Yours faithfully,

Shane L. Stone  
Chief Minister”.

Concern was expressed by some Members of the Committee that the practice outlined in the Chief Minister’s letter made it difficult for Opposition Members (and Government backbenchers) to gain adequate background information on proposed legislation.

Having regard to the content of the Chief Minister’s letter, the Committee resolved that there would be no further benefit in continuing its inquiry, pursuant to paragraph 3 of its Terms of Reference, and that the Committee report its findings to date.

**Conclusion:**

- The Committee considers that the Government should continue to consider the preparation and issue of Explanatory Memoranda where such documents would assist Members of the Legislative Assembly in the consideration of Bills and amendment schedules of a complex or technical nature.
- During its consideration of the reference, the committee received an assurance that briefings by Ministers and officials would be made more accessible.

It is understood that the current practice is for briefings to be given at the discretion of Ministers.

Your Committee is of the opinion that detailed briefings are of significant benefit in facilitating informed consideration and debate and notes the undertaking given by the Leader of Government Business.

- Your Committee also sees merit in the range of background documentation and reference material currently provided by the officers of the Northern Territory Library on a trial basis and recommends that the current practice in this matter be expanded.

TERRY McCARTHY  
Chairman

February 1996

# APPENDIX A

## STANDING ORDERS COMMITTEE

### REVIEW OF STANDING ORDERS AND PROCEDURES FOR THE PRESENTATION AND INTRODUCTION OF LEGISLATION — BACKGROUND PAPER

#### CURRENT PRACTICE IN OTHER AUSTRALIAN PARLIAMENTS

##### Introduction

Before a review of current Standing Orders and procedures for the presentation and introduction of legislation is undertaken, it is appropriate to examine the purpose and contents of Explanatory Memoranda.

##### Purpose and Content of Explanatory Memoranda

An Explanatory Memorandum is a companion document to a Bill to assist members of Parliament and the public understand the objectives and detailed operations of the clauses of a Bill. Explanatory Memoranda are designed to assist members of a legislature and the public to understand the objectives and detailed operation of the clauses of a Bill. The information contained in Explanatory Memoranda may also be useful for the courts and the public to help them in the interpretation of a Bill after it has become law.

Explanatory Memoranda may contain a general outline of a Bill, a financial impact statement, a detailed explanation of the Bill and commencement clauses.

##### The Requirement for Preparation of Support Material to be Presented with Proposed Laws

##### Commonwealth

Section 15(A)(B) of the *Acts Interpretation Act* allows an Explanatory Memorandum 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; or
- (b) determine the meaning of a provision which is ambiguous or obscure or when the ordinary meaning would lead to a result that, in the context of the legislation, is manifestly absurd or unreasonable.

### **Australian Capital Territory**

As set out in the *ACT Legislation Handbook*, an Explanatory Memorandum accompanies every Bill introduced into the Assembly. The Minister presents the Explanatory Memorandum to the Legislative Assembly after making the presentation speech.

Similar legislation to the Commonwealth's section 15(A)(B) is provided in section 11B of the *Interpretation Act 1967*, section 11B.

### **Northern Territory**

There is no similar provision for the use of extrinsic material in the interpretation of an Act in terms of section 15(A)(B) of the Commonwealth Act. Common law rules apply as to how parliamentary and executive materials can be used in the interpretation of statutes.

### **New South Wales**

Similar legislation to the Commonwealth's section 15(A)(B) is provided in the *Interpretation Act 1967*, section 11B. Although Explanatory Memoranda are prepared, they are only distributed to all members of Parliament and are only used by the Minister handling a particular Bill.

With relation to the procedure for preparation and introduction of Public Bills, Standing Order Number 198 (8) states that the "bill shall be printed, with an explanatory note, without question put".

### **Queensland**

Similar legislation to the Commonwealth's section 15(A)(B) is provided in the *Acts Interpretation Act 1954*. However, sections 14A-14D in the *Acts Interpretation Amendment Act 1991* allows the endorsement of a purposive approach to statutory interpretation, allowing the use of extrinsic material to assist in interpretation and to facilitate the implementation of a plain English style of legislative drafting.

### **South Australia**

There is no provision for the use of extrinsic material in the interpretation of an Act in their legislation equivalent to section 15(A)(B) of the Commonwealth Act. They rely on common law for rules as to how parliamentary and executive materials can be used in the interpretation of statutes.

## **Tasmania**

There is no provision for the use of extrinsic material in the interpretation of an Act in their legislation equivalent to section 15(A)(B) of the Commonwealth Act. They rely on common law for rules as to how parliamentary and executive materials can be used in the interpretation of statutes. Although Explanatory Memoranda are not produced, "Clause Notes" accompany a Bill, and these are widely distributed. There is no provision in Standing Orders for supporting documents for Bills.

## **Victoria**

The *Interpretation of Legislation Act 1984*, section 35, provides that in the interpretation of a provision consideration may be given to any matter or document that is relevant and specifically includes Explanatory Memoranda. There is no reference of Explanatory Memoranda in Standing Orders.

## **Western Australia**

Similar legislation to the Commonwealth's section 15(A)(B) is provided in the *Interpretation Act 1967*, section 11B.

## **Current Practice in other Australian Parliaments in this Matter**

### **Commonwealth**

Relevant instructions and samples from the *Legislation Handbook*, published by the Department of the Prime Minister and Cabinet, are included at Attachment A to this Background Paper.

### **Australian Capital Territory**

As set out in the *ACT Legislation Handbook*, an Explanatory Memorandum accompanies every Bill introduced into the Assembly. The Minister presents the Explanatory Memorandum to the Legislative Assembly after making the presentation speech.

An Explanatory Memorandum is circulated by the authority of the responsible Minister, who approves it at the same time as when the text of a Bill for introduction into the legislature is provided.

These Memoranda comprise a coversheet, a general outline, a financial impact statement and notes on individual clauses.

If any Government amendments are moved, with the exception of simple or technical amendments, a Supplementary Explanatory Memorandum is prepared.

Each Bill must have its own Explanatory Memorandum. However, when a number of closely-related Bills are introduced at the same time, a single Explanatory Memorandum is acceptable if all the necessary information is conveniently presented. A combined Explanatory Memorandum is only acceptable when all the Bills are short and simple, closely-related and if a single outline and financial statement adequately explains the operation and effect of the Bills in the package.

Explanatory Memoranda accompanying Acts mirror those used as companion documents to Commonwealth legislation in form.

The practice of supplying explanatory statements for each instrument or delegated legislation came into effect on 1 June 1990. Explanatory Memoranda accompanying Acts are housed in the ACT Administration Legal Branch Library.

### **Queensland**

Explanatory Notes accompanying Bills introduced into Parliament contain: a general outline defining the objectives of the legislation, the reasons for the Bill, the estimated cost for government implementation, consultation and notes on clauses.

### **New South Wales**

The only formal information Parliament receives to explain each Bill is the Explanatory Memorandum prepared by the Parliamentary Counsel. The Explanatory Note comprises an overview of the Bill and notes on clauses. Distribution of this document to interest groups and the public depends solely on the individual Minister.

### **South Australia**

When a Minister introduces a Bill into Parliament, a second-reading speech is required. The speech is basically a report on the Bill, setting out in detail its purpose and effect, relevant history or background information. The instructing agency is responsible for preparing this report and sending it to Parliamentary Counsel, once the Bill is ready. Parliamentary Counsel prepares an explanation of the effect of each clause of the Bill and attaches it to the report prepared by the instructing agency.

### **Tasmania**

Although there is no provision in Standing Orders for supporting documents for Bills, background information is sometimes provided to Members by the Leader for the Government prior to debate, especially for contentious or controversial Bills. However, most Bills have a Fact Sheet attached and if Members require more information, the Leader provides it. Occasionally the Leader suspends the Parliamentary sitting for Members to attend a briefing by

agency officers. A Member can request a briefing from an organisation or persons who are opposing the legislation.

**Victoria**

Explanatory Memoranda are used to communicate complicated and technical explanations which would otherwise have been incorporated in the second-reading speeches of Ministers and to assist Members and others in their understanding of the proposed legislation. Explanatory Memoranda comprise clause notes and are attached to the front of a Bill. There are no policy guidelines or formal requirements to have Explanatory Memoranda. In nearly all cases Explanatory Memoranda are attached to Government Bills. The very few Private Member's Bills that are introduced do not include Memoranda. Explanatory Memoranda contain an outline and clause notes.

The instructing agency is responsible for writing Explanatory Memoranda and Parliamentary Counsel for coordinating it.

**CONCLUSION**

Explanatory Memoranda are useful not only as guides to Members of the legislature, but also for consideration by courts when interpreting legislation as well as general references to the legal profession and members of the public.

It is imperative that the quality and standard of Explanatory memoranda be high, as well as accurate, impartial and complete.

## BIBLIOGRAPHY

- Attorney-General's Department (1982). *Extrinsic Aids to Statutory Interpretation*. Canberra: AGPS.
- Australian Capital Territory (1992). *Legislation Handbook*. Canberra: Chief Minister's Department.
- Delegated Legislation and Scrutiny of Bills Conference (1995). Conference Proceedings of Delegated Legislation and Scrutiny of Bills Conference, Darwin, 5-7 July, 1995.
- Department of the Premier and Cabinet (1994). *Cabinet Handbook*. Adelaide: Department of the Premier and Cabinet.
- Department of the Prime Minister and Cabinet (1988). *Legislation Handbook*. Canberra: AGPS.
- MacGregor, Anne (1991). *Report on Explanatory Memoranda*. Canberra: Australian Capital Territory Attorney-General's Department.
- Parliament of the Commonwealth of Australia (1993). *Clearer Commonwealth Law*. House of Representatives Standing Committee on Legal and Constitutional Affairs. Canberra: AGPS.
- Queensland Legislative Assembly (1991). *Parliamentary Committee for Electoral and Administrative Review*. Brisbane: Office of the Parliamentary Counsel.
- Refshauge, A.J. (1995). "Address to Regulatory Reform Conference: From Red Tape to Results", Darling Harbour Convention Centre by the Acting Premier, Minister for Health and Minister for Aboriginal Affairs.

ATTACHMENT A - EXTRACTS FROM

THE *LEGISLATIVE HANDBOOK*

OF THE COMMONWEALTH

## **PREPARATION OF SUPPORT MATERIAL — EXPLANATORY MEMORANDUM; SECOND READING SPEECH**

### **Explanatory memorandum**

#### **The purpose of an explanatory memorandum**

7.1 An explanatory memorandum is a companion document to a bill to assist members of Parliament and the public understand the objectives and detailed operation of the clauses of the bill. The *Acts Interpretation Act* (section 15AB) allows an explanatory memorandum 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; or
- (b) determine the meaning of a provision which is ambiguous or obscure or when the ordinary meaning would lead to a result that, in the context of the legislation, is manifestly absurd or unreasonable.

#### **When an explanatory memorandum is required**

7.2 An explanatory memorandum is usually provided for every bill introduced in Parliament. The Minister presents the memorandum at the end of his or her second reading speech (see paragraph 7.32). To meet the requirements of the *Evidence Act* and the *Acts Interpretation Act*, the explanatory memorandum must be printed by the Government Printer and presented to the House or the Senate.

7.3 Preparation and printing of the explanatory memorandum are the responsibility of the instructing department. The memorandum must be available for consideration by Legislation Committee at the same time as the bill is finalised. (See chapter 8 for Legislation Committee requirements.)

#### **The form of an explanatory memorandum**

7.4 An explanatory memorandum must have —

- (a) a cover sheet (see paragraph 7.7 and Appendixes B-F and I) with the year, a heading 'The Parliament of the Commonwealth of Australia', the name of the House in which the bill is first introduced ('the first House'), the title of the bill and a statement that the bill is circulated by the authority of the portfolio Minister;
- (b) a general outline (see paragraphs 7.8–12); and
- (c) notes on clauses (see paragraphs 7.13–15).

7.5 An explanatory memorandum is *circulated by authority of the portfolio Minister*, irrespective of whether he or she is a Minister in the House in which the bill is to be introduced. The memorandum should be approved by the portfolio Minister at the same time as the text of the bill is approved for submission by the Minister to Legislation Committee.

7.6 The explanatory memorandum must not contain confidential material nor should it indicate that it has been considered by Cabinet or Legislation Committee.

### **Cover sheet**

7.7 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 B);
- (b) a supplement to a memorandum (paragraphs 7.21–25 and Appendix C);
- (c) a replacement for a memorandum (Appendix D);
- (d) a correction to a memorandum (Appendix E); or
- (e) a memorandum relating to more than one bill (paragraph 7.31 and Appendix F).

### **General outline**

7.8 The general outline should be kept to one page, if possible, and have —

- (a) the title of the bill across the top of the page;
- (b) a brief description of the purpose of the bill and the effect of the substantive provisions; and
- (c) a financial impact statement (see paragraphs 7.11–12).

7.9 The general outline is included as page 1 of an explanatory memorandum. A sample general outline is at Appendix G.

7.10 Ninety-five additional copies of the general outline, including the financial impact statement, must be provided to the Legislation Secretariat with the explanatory memorandum. These copies are for the Minister to circulate to Caucus and release to the press. These copies of the outline —

- (a) should not have a cover sheet;
- (b) should not be page numbered unless the outline is more than one page; and
- (c) must have the title of the bill at the top of the first page.

### **Financial impact statement**

7.11 A financial impact statement (see Appendix G) describes both the direct and indirect costs of the proposed bill including any savings, costs and revenue losses or gains from the proposal. The statement follows immediately on from, and forms part of, the outline. If it is not possible to provide precise figures, an estimate of costs or revenue or a statement of the variable factors and difficulties in estimating the costs must be included. If it is not possible to provide even an estimate, the statement should include a broad outline of the expected financial impact and a statement of why it is not possible to provide figures.

7.12 Where the bill provides for taxation concessions, the 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 noted, even though that impact may be indirect and not easily quantifiable.

## **Notes on clauses**

7.13 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.

7.14 Where notes on clauses do not adequately explain their operation and purposes, the explanatory memorandum will not be accepted for consideration by Legislation Committee.

7.15 Notes on clauses commence on a new page, serially numbered, immediately following the general outline and financial impact statement. The notes should have internal paragraph numbers and a centred 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. Sample notes on clauses are at Appendix H.

## **Printing an explanatory memorandum**

7.16 An explanatory memorandum must be printed in international B5 size for presentation to Parliament. For Legislation Committee, the explanatory memorandum must be a typed A4 manuscript.

7.17 The instructing department should arrange printing of the memorandum with AGPS after the memorandum has been approved by Legislation Committee. AGPS should be supplied with an original 'camera ready' copy of the memorandum for printing in international B5 size.

7.18 If it is necessary to arrange printing of the memorandum in advance of consideration of the bill by Legislation Committee, departments should contact the Legislation Secretariat to discuss whether there are likely to be any changes required before arranging printing.

## **Distributing an explanatory memorandum**

7.19 The following copies are required —

- (a) 35 copies in typed A4 manuscript to the Legislation Secretariat for the Legislation Committee Memorandum (see paragraphs 8.4–7) and delivery to the Minister's office for distribution to Caucus.
  - 95 additional copies of the general outline only (see paragraph 7.10) to be supplied to the Legislation Secretariat at the same time;
- (b) 225 copies of the explanatory memorandum for the House of Representatives to be delivered, *at least one day before introduction of the bill in the House of Representatives*, to the Senior Parliamentary Officer, House of Representatives Bills and Papers Office;
- (c) 120 copies of the explanatory memorandum for the Senate to be delivered to the Clerk Assistant, Senate Table Office —
  - on the day on which the bill is introduced in the House of Representatives; or

- if the bill is to be first introduced in the Senate, on the day before its introduction or earlier.

7.20 Departments can order additional copies of explanatory memoranda through the Bills Officer of the House in which the bill is first introduced (the first House). The cost is charged by AGPS to the Department. AGPS will arrange printing of copies for sale at AGPS bookshops. Departments should advise AGPS if there is likely to be a significant demand for any particular bills or Acts.

### **Supplementary explanatory memorandum**

7.21 A supplementary explanatory memorandum must be prepared for Government amendments to be made in the Parliament, except when the amendments are very simple or are purely technical (correcting spelling or punctuation errors).

7.22 A supplementary explanatory memorandum should follow the same form as an explanatory memorandum with —

- (a) a cover sheet showing the title of the bill and stating that the document is a supplementary memorandum (see Appendix C);
- (b) an outline of the purposes of the amendments including a statement of the financial impact of the proposed amendments; and
- (c) notes on the clauses of the amendments.

7.23 A single page supplementary explanatory memorandum, without a separate cover sheet, may be used where —

- (a) the notes on clauses are brief and less than one page;
- (b) the amendments are too brief to require an outline; and
- (c) the amendments have no separate financial impact.

7.24 The supplementary memorandum must be printed by the Government Printer and presented by the Minister at the time the amendments are moved.

7.25 Copies of the supplementary memorandum should be provided to the Clerk Assistant, Senate Table Office, or the Senior Parliamentary Officer, House of Representatives Bills and Papers Office as soon as the amendments have been approved by Legislation Committee and Caucus for introduction. A Minister or authorised person in the Minister's Office or the Department must provide written authority to the Senior Parliamentary Officer or the Clerk Assistant to circulate proposed amendments to members and senators when they have been cleared for introduction.

### **Reprinting an explanatory memorandum to take account of amendments to a bill**

7.26 If amendments to a bill are agreed in the first House, the explanatory memorandum must be amended and reprinted by the Government Printer before the bill is introduced in the second House. The explanatory memorandum must also be amended and reprinted for introduction of the bill in the second House when opposition or private member amendments are successfully

moved in the first House. It is necessary to reprint only the number of copies normally provided for the second House (see paragraph 7.19) plus copies for sale by AGPS Bookshops.

7.27 The cover sheet of an explanatory memorandum reprinted for introduction in the second House, to take account of amendments to the bill by the first House, must indicate that it has been so reprinted. A sample cover sheet is at Appendix I.

7.28 It is necessary to prepare a further supplementary explanatory memorandum if Government amendments are to be moved in the second House unless the amendments are very simple or purely technical (see paragraphs 11.35–39).

7.29 The explanatory memorandum does not need to be reprinted —

- (a) when a Schedule of amendments agreed by the second House is referred to the first House for consideration; or
- (b) for presentation of a bill for royal assent.

### **Replacement explanatory memorandum/Correction to a memorandum**

7.30 A sample cover sheet for a replacement explanatory memorandum and an example of a correction to a memorandum are at Appendixes D and E.

### **Combined explanatory memorandum**

7.31 A separate explanatory memorandum is normally required for every bill. However, in those rare cases where a number of closely related bills are introduced at the same time, a single document incorporating explanatory memorandums for all the bills may be used if this is the most convenient way to present the information. A combined explanatory memorandum would be appropriate only where all the bills are short and simple, closely related and 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 F.

### **Second reading speech**

7.32 A second reading speech, explaining the purpose of a bill, is made by a Minister on the second reading of a bill in both Houses. In the House of Representatives the speech must be read out. In the Senate the speech is normally incorporated in Hansard for a bill which has been passed by the House of Representatives. Under the Acts Interpretation Act (section 15AB) the second reading speech may be considered by a court interpreting the legislation to which it relates.

#### **Required for EVERY bill**

7.33 A second reading speech is required for every bill, whether or not it is a companion or complementary measure to other bills being introduced at the same time. Where a number of related bills are introduced together, the purpose of the whole package may be outlined in the second reading speech for the major bill, which is introduced first. The speeches relating to the complementary bills can be brief and simply outline how each fits into the package.

### **Short speeches**

7.34 Second reading speeches should be as brief as possible. With the exception of the Budget speech, the maximum time allowed is 30 minutes in either chamber (House of Representatives Standing Order 91 and Senate Standing Order 407A). Shorter time limits (10–15 minutes) are often set by Parliamentary Business Committee.

### **Formal words to include in all second reading speeches**

7.35 The following words must be included in all second reading speeches —

- (a) at the beginning of the speech 'I move — That this bill be now read a second time.'
- (b) at the end of the speech — 'I present the explanatory memorandum to this Bill' (if a memorandum is to be presented).

7.36 The second reading speech for the House of Representatives should indicate which Minister is responsible and the capacity in which he or she is taking responsibility for the bill (that is, as Minister for ... or as Minister Representing the Minister for ... as the case may be). The second reading speech for the Senate should not refer to a particular Minister (see paragraph 7.39).

### **Financial impact statement**

7.37 Every second reading speech must include a statement detailing the financial impact of the bill. Details included in the statement should be the same as those included in the explanatory memorandum (see paragraphs 7.11–12). An example of a financial impact statement is at Appendix G.

### **Second reading speech for the second House**

7.38 A second reading speech must be prepared for the Minister handling the bill in the second House. It may be the same speech as that read in the first House. If so, references to the Speaker, President, House or Senate and the Minister will need to be altered. If the bill is amended in the first House, the speech may also need to be amended.

7.39 The heading of speeches for bills introduced in the Senate should not name a particular Minister as the speech is often delivered by the duty Minister.

### **Printing and distribution of second reading speeches**

7.40 The Department should arrange the printing of the speech and provide the following copies —

- (a) 200 copies to the Senior Parliamentary Officer, House of Representatives Bills and Papers Office on the day before introduction of the bill in the House of Representatives;
- (b) 120 copies to the Clerk Assistant, Senate Table Office —
  - on the day on which the bill is introduced in the House of Representatives; or
  - if the bill is to be first introduced in the Senate, on the day before its introduction or earlier;
- (c) 4 copies of the speech for the relevant House to the Parliamentary Liaison Officer for that House.

APPENDIX B

---

**Cover sheet for an explanatory memorandum for a bill  
introduced for the first time in the House of Representatives or  
the Senate**

---

1988

THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

HOUSE OF REPRESENTATIVES/SENATE\*

**DAIRY PRODUCE AMENDMENT BILL 1988**

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Minister for Primary Industries and Energy,  
the Honourable John Kerin MP)

(\* Depending on which House the Bill is to be first introduced)

**Cover sheet for a supplementary explanatory memorandum for  
government amendments to a bill already before the House of  
Representatives or the Senate**

---

1988

THE PARLIAMENT OF THE COMMONWEALTH OF  
AUSTRALIA

HOUSE OF REPRESENTATIVES/SENATE\*

**CUSTOMS AND EXCISE LEGISLATION  
AMENDMENT BILL (No.1) 1988**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of  
the Government

(Circulated by authority of the  
Minister for Industry, Technology and Commerce,  
Senator the Hon. John N. Button)

\* Depending on which House the amendments are to be introduced

APPENDIX D

---

Cover sheet for a replacement explanatory memorandum

---

1988

THE PARLIAMENT OF THE COMMONWEALTH OF  
AUSTRALIA

HOUSE OF REPRESENTATIVES

PROCEEDS OF CRIME (MISCELLANEOUS  
AMENDMENTS) BILL 1988

REPLACEMENT EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Hon. Lionel Bowen MP, Attorney-General)

THIS MEMORANDUM REPLACES THE EXPLANATORY  
MEMORANDUM PRESENTED TO THE HOUSE OF REPRESENTATIVES  
ON 30 APRIL 1988

**Correction of an explanatory memorandum**

---

CORRECTION

**OCCUPATIONAL SUPERANNUATION  
STANDARDS BILL 1988**

EXPLANATORY MEMORANDUM

CLAUSE 20 DELEGATION

*Fourth line* — omit 'section 30', substitute 'section 21' to correct a typographical error in the Explanatory Memorandum.

(Circulated by authority of the  
Treasurer, the Hon P.J. Keating, MP)

APPENDIX F

---

**Cover sheet for a combined explanatory memorandum**

---

1988

THE PARLIAMENT OF THE COMMONWEALTH OF  
AUSTRALIA

HOUSE OF REPRESENTATIVES

**EXPORT INSPECTION (ESTABLISHMENT REGISTRATION CHARGES)  
(AMENDMENT) BILL 1988**

**EXPORT INSPECTION CHARGES COLLECTION (AMENDMENT) BILL  
1988**

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Minister for Primary Industries and Energy,  
the Hon. John Kerin, MP)

**Sample general outline and financial impact statement  
in an explanatory memorandum**

---

ADMINISTRATIVE ARRANGEMENTS BILL 1987

**OUTLINE**

This Bill gives effect to aspects of the major changes to the structure of Commonwealth administration announced by the Prime Minister on 14 July 1987. The Bill amends the *Acts Interpretation Act 1901* and the *Public Service Act 1922*.

**Amendments to the Acts Interpretation Act**

The amendments to the *Acts Interpretation Act* are intended to clarify and put beyond doubt the scope of certain provisions of that Act in their application to the new ministerial arrangements. The amendments expressly recognise for the purposes of the Act the situations where a Minister administers two or more Departments or where a single Department is administered by two or more Ministers.

**Amendments to the Public Service Act**

The amendments to the *Public Service Act* give effect to the decision recommended in the Report of the Efficiency Scrutiny Unit to abolish the Public Service Board and to replace it by a Public Service Commissioner who will have independent statutory responsibility for the policy aspects of recruitment, promotion, mobility, discipline and retirement.

The Bill replaces the provisions constituting the Public Service Board with provisions establishing an office of Public Service Commissioner and provisions for the appointment, tenure, remuneration etc of the Commissioner. It also includes an interim provision so that all references to the Board in legislation and other instruments are to be read as references to the Commissioner. Further legislation will be required to effect the detailed distribution of the Board's powers and functions to the Public Service Commissioner, the Departments of Industrial Relations and Finance and to departments generally.

**FINANCIAL IMPACT STATEMENT**

Abolition of the Public Service Board, allocation of responsibility for its functions elsewhere and establishment of a Public Service Commissioner will eliminate duplication of functions while ensuring resource savings over time.

The Department of Finance estimates that the abolition of the Board will save the Commonwealth approximately \$8 million in 1987/88 and \$16.5 million in 1988/89.

## APPENDIX H

---

### **SAMPLE NOTES ON CLAUSES IN AN EXPLANATORY MEMORANDUM**

#### **Part I — PRELIMINARY**

##### **Clause 1 — Short Title**

1. Provides for the Act to be cited as the *Administrative Arrangements Act 1987*.

##### **Clause 2 — Commencement**

2. Provides that the Act shall come into operation on the day it receives the royal assent.

#### **PART II — AMENDMENT OF ACTS INTERPRETATION ACT 1901**

##### **Clause 3 — Principal Act**

3. Formal.

##### **Clause 4 — Constitutional and official definitions**

4. This clause repeals the definition of 'The Minister' in paragraph 17(i) and the definition of 'The Department' in paragraph 17(ia) of the Act. Revised definitions are substituted by clause 5.

##### **Clause 5 — References to Ministers and Departments**

5. This clause inserts a new section 19A. It substitutes for the definitions of 'The Minister' and 'The Department' in paragraphs 17(i) and (ia) definitions which expressly refer to the various administrative arrangements which can be made for the ministerial administration of legislation and departments. The intention of the amendments is not to break new ground but to make it clear that references to 'The Minister' in relation to the administration of a provision of an Act refer, where that provision is administered by 2 or more Ministers in the same respect, to any one of those Ministers.

##### **Clause 6 — Reference to Minister, Department where no longer any such Minister or Department abolished**

##### **Clause 7 — Reference to Minister, Department inconsistent with changed administrative arrangements**

6. Clauses 6 and 7 amend subsections 19B(1) and 19BA(1) of the Act. These provisions permit the Governor-General to make orders converting outdated references to a particular Minister of State into references consistent with the current Ministerial nomenclature and administrative arrangements. The amendments will ensure that the Governor-General may make orders under sections 19B and 19BA converting references to a particular Minister into references to 2 or more Ministers where 2 or more Ministers administer the provision in which the outdated reference appears.

---

NOTES ON CLAUSES CONTINUE UNTIL ALL CLAUSES ARE COVERED

## BIBLIOGRAPHY

- Attorney-General's Department (1982). *Extrinsic Aids to Statutory Interpretation*. Canberra: AGPS.
- Australian Capital Territory (1992). *Legislation Handbook*. Canberra: Chief Minister's Department.
- Delegated Legislation and Scrutiny of Bills Conference (1995). Conference Proceedings of Delegated Legislation and Scrutiny of Bills Conference, Darwin, 5-7 July, 1995.
- Department of the Premier and Cabinet (1994). *Cabinet Handbook*. Adelaide: Department of the Premier and Cabinet.
- Department of the Prime Minister and Cabinet (1988). *Legislation Handbook*. Canberra: AGPS.
- MacGregor, Anne (1991). *Report on Explanatory Memoranda*. Canberra: Australian Capital Territory Attorney-General's Department.
- Parliament of the Commonwealth of Australia (1993). *Clearer Commonwealth Law*. House of Representatives Standing Committee on Legal and Constitutional Affairs. Canberra: AGPS.
- Queensland Legislative Assembly (1991). *Parliamentary Committee for Electoral and Administrative Review*. Brisbane: Office of the Parliamentary Counsel.
- Refshauge, A.J. (1995). "Address to Regulatory Reform Conference: From Red Tape to Results", Darling Harbour Convention Centre by the Acting Premier, Minister for Health and Minister for Aboriginal Affairs.

# **APPENDIX B**

Extract from Conference on Delegated Legislation and Scrutiny of Bills,  
Darwin - July 1995.

## SUPPORT MATERIAL FOR THE PRESENTATION OF LEGISLATION

**Introduction: Hon. Rick Setter MLA, chairman, Subordinate Legislation and Tabled Papers Committee, NT.**

Chair: Sen. Barney Cooney.

**Mr SETTER:** This may surprise some of you. The member for MacDonnell, Mr Neil Bell, moved the following motion in the NT Legislative Assembly on Wednesday 22 February 1995:

That this Assembly,

- (1) noting that this Assembly is a unicameral parliament, and that there is an obligation that a unicameral parliament should have in place adequate procedures for the review and scrutiny of legislation presented to it for consideration, and
- (2) noting that the NT Legislative Assembly does not have a committee for the scrutiny of bills, and does not provide a mechanism for bills to be accompanied by supporting documentation, such as explanatory memoranda or notes on clauses,
- (3) refer the following matter to the Standing Orders Committee for inquiry and report:  
  
the current standing orders and procedures for the presentation and introduction of legislation, with particular regard to:
  - (a) the requirement for preparation of support material to be presented with proposed laws; and
  - (b) the current practice in other Australian parliaments in this matter; and
- (4) empower the Standing Orders Committee to send for and examine persons, papers and records, to sit in public or in private session, notwithstanding any adjournment of the Assembly, and to adjourn from place to place.

Mr Bell went on to say: 'It is important for debate in parliaments to be as informed as possible. There is a widely expressed view that the balance of powers between executives, parliaments and the courts can be sustained only when there is a relatively equal flow of information to each of the 3 arms of government'. It was Mr Bell's opinion that the parliament and the constitutional development of the Northern Territory could only be enhanced by inquiring into the positive aspects of this proposal.

As a result, Mr Speaker conceded that this conference would be a good forum for discussion of the proposal. Those chairpersons and staff who were at the Melbourne conference will recall that I raised the matter and through our committee circulated Mr Speaker's letter to all of you. I am pleased that attending committees have agreed to canvass this issue this afternoon.

The Subordinate Legislation and Tabled Papers Committee of the Northern Territory some years ago commenced a campaign for seeking better-quality explanatory memoranda attached to regulations and by-laws. However, while our committee does receive - more or less - that information, it is not presented to the parliament when the bills are tabled. We receive it with regard to regulation, of course. But what Mr Bell is talking about is supporting documentation to be presented to the parliament with the bills.

In this regard, the committee has generally been successful. It is hoped that this forum will be able to provide the Standing Orders Committee with background information and samples of the various documents provided. Your cooperation in this regard will be greatly appreciated. What I am hoping you will be able to do, committee by committee this afternoon, is perhaps advise the conference on how you handle supporting documentation for legislation within your parliaments - whether in fact supporting memoranda do accompany bills when they are tabled in parliament, or whichever other way members are able to obtain detailed information on the content and the intent of the various bills.

**Mr PERTON (Vic):** What our committee has written time and time again, and the Legal and Constitutional Committee before it, is mooting the prospect of a legislative impact statement. I know a number of people here - and I see Barney nodding - suggest that that might be the way to travel. I do not think we are very different from any of the other parliaments here. As a matter of course, legislation is accompanied by an explanatory memorandum. Second-reading speeches in the Victorian parliament are traditionally quite detailed. Our committee, when it examines legislation, normally has available to it advisers from the government who are generally prepared to appear in public hearing, if we hold a public hearing. That material is public. The opposition is generally given access to all materials relating to the bill. Obviously they are not obliged to keep it secret, so that material is available as well. I do not think I can convey any more information. I think it is all pretty standard.

The only thing that is different about the Victorian parliament is as a result of a quirk in our constitution which entrenches not the Supreme Court, but the jurisdiction of the Supreme Court. We are required to have a minister make an explanatory statement when the legislation may actually alter legal rights. In those instances, the minister has to make an explicit statement to the parliament, setting out the reasons why that sort of legislative change is being made. Our committee then has a policy role. I think we are unique among the committees here, in that our statutory charter includes a policy decision that we have to make - that is, that a piece of legislation that alters or amends the jurisdiction of the Supreme Court is reasonable in all of the circumstances. I think we have not had a split on party lines on that question. Issues can range from the very serious - for instance, the *Grand Prix Bill*, which actually took away property rights - to

the quite trivial, such as the *Emerald Tourist Railway Bill*, which merely gave that railway protection from suit for negligence, because it was unfenced. Otherwise, I suppose we are pretty much like every other parliament here.

**Mr DONALDSON (WA):** Our pathway is that first of all the principles and the explanation are given to a parliamentary committee. In the case of the government it is a coalition committee consisting of backbenchers. They view the legislation - not necessarily the printed bill. Then, of course, it goes to Cabinet and Cabinet gives the authorisation to print. It is then introduced to the party room. The minister makes a further explanation to the party room. Then the process relies very heavily on the chairman of the particular coalition parliamentary committee to get up in the party room and explain how the committee views that legislation. If there are some questions, or some people in the party room who are not happy with the legislation, it is debated. It is not introduced to parliament for second reading until such time as the party room has given authorisation. At odd times we see legislation disappear altogether, but most times there are some accommodating changes by the minister and the government. Generally that is the pattern of the introduction of bills.

**Mr REIBELING (WA):** I give the WA opposition's point of view. There is not, in fact, any memorandum that accompanies bills. We have a system where the minister gives a second-reading speech. Sometimes that is quite detailed. The only other way an opposition member can get information about a bill is by requesting a briefing. More information about the bill then comes forward. But for the opposition, there is no great opportunity to have an involvement in the bill before it is introduced into parliament. There is not a set process for a memorandum to accompany the bill.

**WA delegate:** I would not like anybody here to get the impression that the committees that our chairman was talking about - they are backbench Liberal committees or coalition committees - are resourced in any way. It is merely the members meeting. So there is no detailed scrutiny.

**Mr BENNEWORTH (Tas):** We operate a similar system to that just mentioned by the Western Australians. Bills come via Cabinet to the party room, where they are discussed at length. At that stage, the opposition members certainly would not have any awareness of those bills. When they hit the House - I am talking now of important bills, not your everyday, run-of-the-mill bills that do not need a lot of work - we provide the opposition with a copy of the second-reading speech and a copy of the clause notes, and I guess they take them back to their party room for discussion. Obviously, the bill sits on the table for 48 hours after presentation, so that gives the opposition some time to go through the bill, basically clause by clause. I have brought a sample of a big one that has just gone through the House of Assembly and upper House in Tasmania, the *Government Enterprises Bill*. That is the whole package as presented to the opposition.

In the upper House, it is a little bit different. Our upper House is basically non-party-political, as we know it. There are 19 independent members, although I must admit there are now 3 endorsed Labor members and there might be more.

**Delegate:** One Liberal.

**Mr BENNEWORTH:** That is right, 3 Labor and 1 Liberal endorsed members in our 19-man upper House. Notwithstanding that, background information is provided to all members of the upper House in detail. That is provided by the leader of the government prior to debate. I have in front of me a package of the current *Workers' Rehabilitation and Compensation Reform Bill*, which has just gone through the upper House. That includes a fact sheet and other background information given to all members. If members require further briefings, they can have them. In some cases, the leader suspends the sitting for members to attend briefings from agency officers. Also, a member can request a brief from an organisation or persons who are opposing the legislation or have problems with it. On this *Workers' Compensation Bill*, that certainly occurred. The leader of the government arranged, for all members, briefings by 2 officers on behalf of the government; by Tasmanian Trades and Labour Council representatives, by service providers including chiropodists, occupational therapists etc, by the Insurance Council of Australia, the Law Society of Tasmania, and the Tasmanian Chamber of Commerce and Industry. They were very thorough briefings, taking a total of more than 24 hours.

There is no provision in our standing orders for supportive documents for bills. However, successive leaders in the upper House have provided as much background material as possible, because theoretically the upper House is independent and has no research facility available to it. I will table those 2 documents for your information.

**Mr DAVISON (Tas):** We have for some time within the parliament of Tasmania tried to get the ministers, while going through the clauses at the committee stage, to read the intent of the bill into Hansard. At this stage I have failed because it is a time-consuming affair, as we know. But often, the legal problems that occur within our system arise because what the minister means at the time is not read into the clause notes of the bill. It is something I would like this group to consider in terms of saving a lot of legal time and trouble in the future

**Mr PEGRAM (SA):** Procedures in South Australia are much the same as those described for Western Australia. We do have a convention that the opposition is not called upon to debate any measure introduced for at least 1 week after it is provided with the bill, the explanatory notes and the second-reading speech at that stage. Invariably, there is more consultation. We are finding that ministers these days seem to consult with outside industry and interest groups - often ahead of the party, frankly - by distributing proposals to groups for comment. Of course, that public process means that the opposition receives information which will enable it to debate the measure successfully.

In the upper House, which is not under government control, there does tend to be somewhat more consultation, by reason of political imperatives, before legislation is introduced. But by and large, the formal procedures are as elsewhere.

**Mr CRAWFORD (Senate):** We have a number of documents to table. The standing orders of the Senate, the standing orders of the House of Representatives, and the Commonwealth Legislation Handbook. I do not know whether your interpretation acts have the same provision as 15(A)(b) of the *Commonwealth Interpretation Act*,

which provides that the interpretation of a provision of an act can be taken from, among other things, a second-reading speech - not only from the words of the act. That is something that you could possibly be working towards.

With regard to explanatory memoranda, I suppose there are some that are not helpful, and there are others that are extremely helpful. We have certain examples of the extremely helpful ones here. The department that I came from, Social Security, had a format of doing an explanatory memorandum that went through a bill not only clause by clause but also subject by subject. Related points, arising in 4 or 5 or 8 or 10 clauses throughout a bill, are gathered together on 1 page. A recent bill which is now an act, I think, changed the family payment legislation. It broke down into sub-categories what happened to the income test. The explanatory memorandum goes through a set process: a summary of the changes on this particular point; the background explaining why; the clauses involved in those changes, leaping from clause 21 to clause 68 to clause 103; and then an explanation of the changes clause by clause.

**Sen. COONEY:** Our Legislative Handbook, published in 1988, talks about how legislation is to be guided through the system. It gives a big mention, on a couple of occasions, to the scrutiny of bills. It just shows you - we do have some impact.

**Ms COLLINS (Qld):** In Queensland, when a bill is introduced into the House, it comes with the second-reading speech, which is used for interpretation purposes and for the information of all members, as they all receive a copy; as well as an explanatory note and supporting materials. Members can have quite a deal of things to refer to when they are looking to participate in the debates and things that follow on from that. As Peter mentioned, we have instances where you have extremely good explanatory notes that can be extremely helpful, or ones which just gloss over the surface and do not seem to be much help at all.

With regard to subordinate legislation, explanatory notes are not automatically given to members to look at for the purposes of interpretation or whatever. The committee itself requests them, and follows up with departments to obtain copies. These, like the explanatory notes for bills, can either be extremely good or they can be half a page. This is quite a good one, except that the committee found that there was quite a significant infringement of the FLP regarding reversal of onus of proof. In the explanatory memoranda, we require that such infringements are justifiable and in the public interest. In this explanatory memorandum, 1 sentence was dedicated, basically saying, 'Yes, there is a reversal of onus of proof', and that was about it. I can leave copies of all of these things for you to look at.

**Mr NORTHEY (NZ):** I will table some of the documents involved in our process. In the process within the executive leading up to the Cabinet, the departmental drafting, they are required, on the face of either a bill or a regulation, to provide evidence of compliance with the principles of the Treaty of Waitangi and the New Zealand Bill of Rights, the principles and guidelines of the *Privacy Act*, relevant international standards and obligations, and guidelines of the Legislation Advisory Committee report. Our Legislation Advisory Committee is a committee of elders - former senior public servants

and professors of constitutional law and the like - that is available to the government and select committees to advise on issues.

Once those matters have been met, the process is generally that the opposition parties are informed that a bill is to be introduced and a briefing is available. It is often quite a crowded room. When I left New Zealand there were 8 parties - it may have changed since then! It gives them the opportunity to meet the public servants who are involved and to ask questions about the issues, before introduction.

In our parliament there is a tabling of the minister's first-reading speech, for which up to an hour is allowed, to set out the details of the bill itself. The first part of the bill is in fact an explanatory note drafted by the parliamentary draftsman. It is part of the bill at that first-reading stage, explaining the clauses. As others have said, this is of varying quality, but it does attempt in plain language to set out the intent of each clause. After that first-reading debate, the matter is referred to a subject select committee, of which we have 15. Our parliamentary committees spend more than half their time on consideration of the bills in the departmental areas they are concerned with - commerce, finance, local government, internal affairs, foreign affairs, defence and so on. Any bill goes before the relevant select committee for public hearings. The public and organisations make submissions and the bill is invariably amended by the select committee as a result of that process. It comes back into the parliament for debate, at the second-reading stage, already amended by parliamentary scrutiny and public input. There is a further opportunity of amendment at the committee stage of parliament, after second reading.

In terms of the particular questions, there is a requirement, as set out in the Cabinet Office Manual and the like, to meet certain conditions. There is the briefing, which may be of varying length and usefulness. There is the explanatory note, which is part of the bill at first-reading stage and ought to explain for the lay reader what each of the clauses means, and which will accompany any copy of the bill. It is an integral part of it at that stage. Once the bill is reported back to parliament at second reading stage, it is just the amended bill. But by that stage, all the concerned organisations have made their submissions on it, and by the time you get to the committee stage of the House, you are debating those matters which remain controversial.

**Mr ANDERSON (NZ):** There is no way one of our ministers would have a second-reading speech written at the time of introduction of the bill. We have improved our process in recent years - and there is still room for further improvement - so that when a bill is introduced, a copy should always be given as early as possible to the opposition, and a briefing provided. That way, at introduction, you get a sensible debate. If the opposition does not get a copy of the bill until the last minute and has not had a briefing, you just get a rubbish debate and grandstanding. You do not get a subject-matter debate.

But once the government has decided and the executive and caucus have talked around what is going to be in the bill, its introduction in our parliament is not a big deal. It is the government's prerogative to introduce a bill and it does. Backbenchers and opposition members only really get interested in the bill either in the select committee

period or when it is reported back from the select committee. Once a bill has been referred to a select committee, there is a minimum of 3 weeks' notice - often 4 weeks - for public submissions to be made. Then the committee may hear evidence and consider a bill for 6 months. So it can often be 6 months, a year, 18 months before you actually come to the second-reading stage of a bill.

I think I can say without reservation that every bill that goes to a select committee is changed for the better. There are always changes. And I think it is something that we still have to give a bit more emphasis to. To me, the most important stage of our process of legislation is the report-back version from the select committee, with all the changes. And I think that either we have to give that debate more time when the bill comes back, or the report back from the committee has to be tabled in parliament a week before the debate, so that all members can read the report-back version and understand what the [inaudible] looks like and why the changes have been made. In fact, our Standing Orders Committee is currently considering changes to cope with the new parliament. It has agreed that when a bill is reported back from the select committee and there is no controversy, we will skip the committee stages in the House, move from second reading to third reading, and the rest is history. So the select committee process and the debate on the report back are becoming the core of the legislative procedure. Apart from the germination of an idea which led to legislation being drafted, the next most important phase now is the select committee process. So yes, our system is different.

**Tasmanian delegate:** About 9 months ago, we introduced new sessional orders along similar lines. We are finding now, with the more straightforward bills, that we are skipping the committee stages but often having the clause notes read into Hansard. We find this is working well indeed. It does cut a lot of the unnecessary debate out of bills. I think we will adopt ...

**Mr Harrison:** Even a government supplementary order paper can be read in, if agreed, without the committee having to debate it.

**Tasmanian delegate:** That is correct. Often the opposition spokesman will simply say, 'Please note that we would like the clause notes read into the Hansard', and that is it - that is the second-reading committee gone. I think it is a wonderful idea, and I believe we got it from New Zealand.

**Mr RYAN (NSW):** I am a member of the upper House in NSW, representing the Liberal Party. My silent vice-chairman, Jill Hall, has laryngitis - a terrible problem for politicians. NSW's recent history has been such that the exposition of various explanatory memoranda has expanded monumentally, far more than we were used to, perhaps, in the 1970s and 80s. It is largely because the lower House, from 1991, was not controlled by the government. The balance of power was held by 3 independents. The government supplied them with additional research staff to assist them to digest bills, and at the request of those independents additional research staff was also provided to our Parliamentary Library. So other members also benefited.

In my former life I was a ministerial adviser. I remember preparing a folder about this thick for the minister on any particular bill, with incredible amounts of explanation - the impacts of the bill, the financial impacts of the bill, an annotated version of the current act with the bill, and so on. What I used to produce for the backbenchers, who were usually the most ignored people in the whole process, was most often a couple of pages in really big print. I suspect that backbenchers of government parties have greater difficulty in the NSW parliament, whichever side is in power. That was certainly the case under the previous government, and I suspect that the difficulty will increase under the current government.

The staff of our Regulation Review Committee put together a memorandum that the Premier recently issued to ministers, on how they are to brief one another. I presume that members of the back bench in the Labor Party will get some expurgated version of that. But the opposition members have had extensive briefings from departments. We have recently introduced plain-English explanatory memoranda, which are usually quite extensive and tabled with the bill. The time for debating bills is not especially generous, but for our particular system it has worked reasonably well until now. I expect, however, that we will introduce changes in the upper House, in line with current practice in the Senate.

To summarise the present process, what generally happens is that a bill is introduced by the minister and then given 5 clear days, which essentially means a little over a week, for the opposition to digest the printed bill and the explanatory memorandum. That also touches off the Parliamentary Library, which is becoming a new component of the process by producing digests of bills. Unfortunately we do not have one of those to table, because we forgot about them until just now. They are very useful for members of parliament in that they are in totally plain English and they usually give a good run to controversial elements of the bill, in bold type. The names of people to whom members on either side may want to speak are usually in that bill digest. The fact that it is produced by the parliament gives it a level of objectivity that may not be shown by the government initiating the bill. The one unfortunate problem is that bills can be debated in the House after 5 days, and it usually takes roughly 5 days for the library to produce the digest. It is not unusual for the opposition, and the government members for that matter, to receive the bill digest after the bill has been discussed in the party room, usually on the day it is due to come into the House.

Bills, once they have been debated in one House, can go through in a single day in the other House. I expect that the Legislative Council, now that it is not controlled by the government, will introduce standing orders similar to those of the Commonwealth Senate, whereby there is a requirement for the bill to have been in existence for a certain period of time in the other place, or in our House for 4 or 5 days at least, before debate starts.

Apparently the Premier has introduced a requirement that Cabinet minutes on any regulatory matter, whether legislative or subordinate, must have a cost-benefit analysis incorporated, at least for circulation to Cabinet. Of course, one of the problems with Cabinet documents is they have a level of confidentiality associated with them which makes them usually not accessible to members. I expect that over time that part of the

bill documentation will be circulated to members as well, but that is looking into the future.

We have material to circulate. With regard to the cost-benefit analysis, Jill - if she has her voice back tomorrow - will be speaking on that subject and may give you some more detail.

**Mr HIRD (ACT):** An explanatory memorandum assists members of the ACT legislature, and the public in general, to understand the objectives and the detailed operations of the clauses of a bill. Courts and the public may also use the explanatory memorandum to help in interpretation of the bill once it has become law. The practice of presenting bills to the parliament accompanied by explanatory memoranda commenced at the beginning of self-government in May 1989. The only exceptions are made for some private members' bills. These explanatory memoranda are available to all members when the bill is presented, as well as being on sale to interested citizens through the ACT government shop. An explanatory memorandum is circulated by the authority of the responsible minister, who approves it at the same time as he or she approves the text of the bill for introduction into the legislature. The memorandum consists of a cover sheet, a general outline, a financial impact statement and notes on individual cases.

It is also customary for significant amendments to bills by the government to be accompanied by a supplementary explanatory memorandum, setting out in detail the effect of the proposed amendments. Since 1 June 1990, the ACT government has adopted the practice of supplying an explanatory statement for each instrument of subordinate legislation, both to members and to the general public. The Standing Committee on Scrutiny of Bills and Subordinate Legislation has, as one of its terms of reference, whether the explanatory statement meets the technical or stylistic standards expected by the committee. It often comments when the statement is not clear or contains possible inaccuracies. Explanatory memoranda accompanying ACT acts largely mirror big brother, the Commonwealth, following companion documents of the Commonwealth legislature.

I table a number of documents, including good examples of explanatory memoranda. Recently the Minister for Urban Services, Mr Tony Dedomenico, introduced legislation for the corporatisation of a public utility, setting up the Electricity and Water Corporations. The bill amends 4 acts. I have the explanatory memorandum, as well as the bill. I have another example, *Determination of Proposals for Business Franchises, Liquor Act 1993*. I table that, as well as a document entitled *A Report on Explanatory Memoranda*. Also I will give you, for good measure, a code of conduct for ministers.

**Sen. COONEY:** For the OTMs - other than members - does Hilary Penfold, the parliamentary draftsman, want a say about this? You do not have to. Is your legislation all so perfect that it does not need explanatory memoranda?

**Ms PENFOLD (Commonwealth):** Of course! But leaving that aside, you are putting me on the spot a bit, because the Office of Parliamentary Counsel does not take any responsibility for the bits of paper that accompany our legislation. They are handled

entirely by departments. But my understanding is that as well as a second-reading speech, which may be quite extensive, all government bills introduced into the Commonwealth parliament are accompanied by an explanatory memorandum which includes a financial impact statement. The explanatory memorandum ranges from being a mere paraphrase of the legislative provisions, which is obviously not very useful, to sometimes a fairly detailed explanation of what the provisions are intended to achieve, including explanations of the purpose and perhaps the origins of the legislative provisions. I am not sure there is anything else I can usefully say about those.

**Sen. COONEY:** So you produce the legislation, and the explanatory memorandum and the second-reading speech are prepared elsewhere?

**Ms PENFOLD:** They are produced by the sponsoring department. Indeed, we rarely see those documents. Sometimes, when we see them after the event, we get a bit of a shock to see what our legislation is put forward as doing.

**Mr REIBELING (WA):** The problem of our Uniform Legislation Committee in WA, really striking at the heart of what everyone is mentioning here, is the information that is given to parliament when legislation is introduced. The creation of our committee came about because of Queensland legislation, the *Non-Bank Financial Institutions Bill*. We were asked in parliament in 1992 to pass uniform legislation without even having the bill. We were told that the Queensland legislation was all things wonderful, so we should copy it, but we were not even to see it. I might add that to our dismay we passed it without seeing it.

With that experience in mind, WA has gone about trying to set up a process so that any piece of uniform legislation is scrutinised before it is passed. We found that there are some 69 areas of uniform legislation being considered right now, and that if all go through, quite a deal of what the states are doing now will be irrelevant. It is vital for parliaments to gain the ability to scrutinise this uniform legislation, and put in place a process so that proper scrutiny can take place. At present, if we are asked to adopt some other legislation, quite often there is no scrutiny of those bills at all. I do not know how other states handle those. I am convinced that a scrutiny should occur, apart from the scrutiny that occurs in the parliament that is chosen as the host parliament. It concerns our committee that very little, if any, scrutiny takes place.

**Mr NORTHEY:** Briefly responding to Hilary's comments about explanatory notes, I stress that in the NZ case, the explanatory notes which form part of the bill on introduction are written by the same parliamentary counsel who wrote the rest of the bill. So they are essentially politically neutral in that sense. There is a lot of variability in their quality. We had a private member's bill which David Caygill, whom many of you will remember, introduced to clarify the law relating to parliamentary privilege. The explanatory note that he and Geoffrey Palmer had written was 4 times as long as the bill, and went into the principles of it very coherently. Among other cases, the *Local Government Law Reform Bill* on introduction had an explanatory note of only a page because I, as opposition spokesperson, had agreed that it was urgent that it be introduced. But by the time the bill was available for public distribution, there were the normal 10 pages that the counsel had then had time to write, explaining it. Many of the

points which people here would be concerned about, the financial and other implications, are not of course included in such explanatory material. That depends on stuff that comes out of government departments and the minister's office, separately.

**Mr SETTER:** The NT situation is probably similar to that in WA. The minister introduces a bill by way of his second-reading speech, which is generally a fairly detailed summary of the bill, but there is no accompanying documentation whatsoever. The bill then sits on the table for at least 28 days. Because we sit for only 33 days per year, there is quite a time between some of the parliamentary sessions. Members on either side can seek, via the minister, a briefing on whatever subjects concern them, and briefings are readily provided. Members of the opposition certainly do have access to departmental officials for briefings. However, they do not have any explanatory memoranda or any other supporting documentation. Hence Mr Bell's motion, because he was concerned that while he could seek briefings, he was not getting sufficient documentation at the time of the tabling of the bill. I think he was coming from the angle that if he did receive that information at the time, it may not be necessary in many cases for him to seek further briefings.

Thank you very much for your contributions here this afternoon. Thank you also for providing us with all of this documentation, which our committee will summarise. We will report back to Mr Speaker and his Standing Orders Committee, and no doubt that committee will report back to the parliament in due course. I think it has been a meaningful exercise and once again, I thank you for participating in it.

---

Before we close, I advise you that Phillip Pental, from WA, has regrettably had to return because of a sudden illness in his family. I am sure the best wishes of all of us go with Phillip, and hope that the problem will be resolved as quickly as possible.

## APPENDIX C

### BACKGROUND PAPER - SUMMARY OF REASONS FOR AND AGAINST EXPLANATORY MEMORANDA

#### 1. REASONS FOR THE USE OF EXPLANATORY MEMORANDA

- The purpose of Explanatory Memoranda is to assist Members of Parliament understand the objectives and detailed operations of the clauses of a Bill.
- Members should have available to them adequate, relevant and background information relating to Bills to improve the quality of their understanding and interpretation of legislation, especially technical and complex legislation.
- Explanatory Memoranda could lead to improvement in the standard of debates and decision-making relating to Bills as both Government Members and the Opposition would be more knowledgeable about the legislative intent of the Bill, the purposes and provisions of the Bill, and the financial impact of the Bill.
- The use of Explanatory Memoranda could lead to time being saved during Parliamentary sittings as both Government and Opposition Members would have had access to the same materials and be better prepared to debate the Bill, therefore reducing the amount of time spent in the Committee stage of complex Bills.
- Where such documents may be used by the courts in the interpretation of legislation, Explanatory Memoranda could serve:
  - (a) to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision; or
  - (b) determine the meaning of a provision which is ambiguous or obscure or when the ordinary meaning would lead to result that, in the context of the legislation, is manifestly absurd or unreasonable.
- If Explanatory Memoranda are companion documents to Bills, they could be tabled in the Assembly and, as public documents, would be available for access by the general public and assist the public to understand legislation.
- The use of Explanatory Memoranda would increase the levels of consultation relating to legislation (eg, Government and Opposition Members, Parliamentary Counsel, agencies and the public).
- Explanatory Memoranda of some form or the other are currently being used by the majority of the state jurisdictions (Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria) the Commonwealth Government as well as New Zealand.

## 2. REASONS AGAINST THE USE OF EXPLANATORY MEMORANDA

- Members of Parliament (and others) should not have to search three documents (namely, a Bill, a second-reading speech and an Explanatory Memorandum) to discover the meaning of a Bill — the Bill itself should be self-contained and self-explanatory.
- Members should become familiar and understand the Bill itself, not the Explanatory Memorandum, to avoid the risk of adopting a simplistic understanding of complex issues.
- Members require additional time to read and digest Explanatory Memoranda provided with Bills.
- There has been a trend in most jurisdictions to draft Bills in simple, plain English so that Bills are easier to understand and interpret. If all Bills were drafted accordingly, Explanatory Memoranda could be unnecessary.
- Additional resources are required to produce Explanatory Memoranda. Additional time would be required for preparatory and consultative work between the instructing agency, Parliamentary Counsel and the Legislative Assembly. Agencies formulating Bills may need appropriately trained staff to draft Explanatory Memoranda. Parliamentary Counsel would probably also need additional, qualified staff as well as time to review and amend the Explanatory Memoranda provided by agencies.
- The additional time required to formulate Explanatory Memoranda could lead to delays in presenting urgent Bills in the Legislative Assembly.
- As most second-reading speeches provide an outline of a Bill, its purposes and an explanatory statement, Explanatory Memoranda in many cases would be a duplication of the contents of Ministers' second-reading speeches.
- For Explanatory Memoranda to work effectively, strict policy and procedural guidelines are required to ensure that the informative material it contains does not simply paraphrase the contents of the Bill it is supposed to be aiding.
- As each instructing agency would be responsible for undertaking the initial drafting of these documents, the quality of these documents could vary from Bill to Bill because of the different technical and stylistic standards of instructing agencies.
- Bills are passed by Parliament to become proposed law, but Explanatory Memoranda are not.

2339  
29/2/06



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

---

*STANDING ORDERS COMMITTEE*

**PROCEDURES FOR THE PRESENTATION  
AND  
PREPARATION OF SUPPORT MATERIALS  
TO  
ACCOMPANY PROPOSED LAWS**

---

Presented and  
Ordered to be Printed  
by the Legislative  
Assembly of the  
Northern Territory on  
29 February 1996



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Third Report of the Standing Orders Committee  
for the Seventh Assembly

PROCEDURES FOR THE PRESENTATION  
AND  
PREPARATION OF SUPPORT MATERIALS  
TO  
ACCOMPANY PROPOSED LAWS

February 1996

## TABLE OF CONTENTS

	Page
<b>Report of the Committee</b>	1
<b>Appendix A</b> –Review of Standing Orders and procedures for the Presentation and Introduction of Legislation – Background Paper.	7
<b>Appendix B</b> –Extract from Conference on Delegated Legislation and Scrutiny of Bills, Darwin – July 1995.	12
<b>Appendix C</b> –Background Paper – Summary of reasons for and against Explanatory Memorandum.	22
<b>Appendix D</b> –Bibliography.	24

**Third Report of the Standing Orders Committee  
for the Seventh Assembly**

**PROCEDURES FOR THE PRESENTATION AND PREPARATION OF  
SUPPORT MATERIALS TO ACCOMPANY PROPOSED LAWS**

The Standing Orders Committee has the honour to present its Report to the Legislative Assembly.

**Membership:** On 27 June 1994, the Assembly appointed the following Members to ~~be~~ the ~~Committee of Privileges:~~ *Standing Orders Committee* :

Mr N R Bell, MLA  
Mrs M A Hickey, MLA  
The Honourable T R McCarthy, MLA  
The Honourable D W Manzie, MLA  
Mr R A Setter, MLA.

At the first meeting of the Committee, on 1 September 1994, the Honourable T R McCarthy, MLA, was elected as Chairman of the Committee.

On 15 August 1995, the Assembly discharged the Honourable D W Manzie, MLA, and Mr N R Bell, MLA, from further attendance upon the Committee and appointed in their stead as Members of the Committee, the Honourable B F Coulter, MLA, and Ms C M Martin, MLA.

**Reference:** On Wednesday 22 February 1995, the Member for Macdonnell, Mr Bell, moved that a reference relating to the presentation and introduction of legislation be referred to the Standing Orders Committee for inquiry and report.

Following consideration of this motion, a resolution was passed by the Legislative Assembly, the terms of which are:

“This Assembly:

- (1) noting that this Assembly is a uni-cameral Parliament and there is an obligation that a uni-cameral Parliament should have in place adequate procedures for the review and scrutiny of legislation presented to it for consideration;
- (2) noting that Northern Territory Legislative Assembly does not have a Committee for the scrutiny of Bills and does not provide a mechanism for Bills to be accompanied by supporting documentation such as explanatory memoranda or notes on clauses;
- (3) refers the following matter to the Standing Orders Committee for inquiry and report:

the current Standing Orders and procedures for the presentation and introduction of legislation, with particular regard to:

- (a) the requirement for preparation of support material to be presented with proposed laws; and
  - (b) the current practice in other Australian Parliaments in this matter; and
- (4) empowers the Standing Orders Committee to send for and examine persons, papers and records, to sit in public or in private session, notwithstanding any adjournment of the Assembly and to adjourn from place to place.”.

---

In conducting its inquiry and preparing its Report, your Committee has met on four occasions.

**Methodology:** The matter referred to the Standing Orders Committee was reported at its meeting on 2 March 1995.

At that time, the Secretary reported that he had sought from all Australian Parliaments a brief description of the relevant practice relating to the provision of support materials presented with proposed laws, together with samples of those documents and any guidelines for their preparation.

The Committee also resolved to write to all Ministers requesting that they, or officers from their Departments, provide information relating to supporting materials that are presently made available by them and inviting written submissions on any matters which may be relevant to the inquiry.

It was further resolved that the Committee write to the Chairman of the Standing Committee on Subordinate Legislation and Tabled Papers (Mr R A Setter, MLA) in his role as convenor of the Conference on Delegated Legislation and Scrutiny of Bills, held in Darwin in July 1995. Mr Setter was requested to make the necessary arrangements for delegates to the Conference to provide relevant information and documentation and, if possible, to initiate discussion on the subject of this Committee's Terms of Reference.

During its initial consideration of the Reference, the Secretary reported general discussion that he had conducted with Parliamentary Counsel (Mr Jim Dorling) on the subject of support materials.

The main elements of this background discussion were as follows:

- There are several possible ways of preparing and distributing support materials, depending on how formal the materials should be, or what the proposed legal effect is going to be. For instance, in most jurisdictions where explanatory memoranda are distributed, there is a provision in their “interpretation legislation” which enables the memoranda to be used in a Court as an extrinsic aid to statutory interpretation. In such cases, it would be necessary to incorporate the text of the explanatory memoranda as part of the *Parliamentary Record*. The effect of this would be to make the document fairly formal and cautiously prepared, rather than a free-flowing and possibly speculative explanation of the impact of the amendments.

- However, it is not necessary to be that formal if it is intended that the documents are to have a more ephemeral effect. The documents could, for instance, be merely distributed at the time of, or after, the introduction of the Bill, but only for the informal information of the Members and not as part of the formal record.
- Adopting the formal approach would put an extra workload, in checking content, on the existing limited resources of the Office of the Parliamentary Counsel. The "less formal" approach would allow the checking to be carried out by the instructing Agencies. Further, it would also not be a constraint on the finalising (and the timing of programming) of the Bills themselves. This approach might serve better than the practice in most States and could evolve and be reviewed over time.

**Responses:** Responses to the Secretary's request for details and materials were received from most Australian Parliaments. Where written responses were not received directly, oral advice was requested.

A summary of practice and procedures in other Parliaments was incorporated in a background paper which was prepared for the Committee (Appendix A).

At the Conference of Delegated Legislation and Scrutiny of Bills held in Darwin from 5 to 7 July 1995, a Conference session was held on "Support Materials for the Presentation of Legislation", chaired by Mr R A Setter, MLA. Delegates also took the opportunity to present relevant documents for the use of the Committee.

Discussion ranged over the type of materials used in the various legislatures - Explanatory Memoranda, legislative impact statements, clause notes, fact sheets, annotated Bills, together with a description of Committee proceedings and arrangements for formal briefings. The relevant extract from the Conference Transcript is at Appendix B.

The materials provided by delegates and other Parliaments have been used in providing this Committee's response to paragraph 3(b) of the Terms of Reference, which is contained in Appendix A - a summary of procedures and legislation and current practice in other Australian Parliaments.

A summary of the main arguments for and against the use of Explanatory Memoranda was prepared for the Committee from the above responses and discussions. (Appendix C).

The various documents provided have been indexed and are tabled with this Report for the purposes of providing a future reference and a permanent record.

**Government Responses:** The request to Ministers elicited some individual responses. The Committee also received a letter from the Chief Minister, dated 15 August 1995, which read as follows:

“15 August 1995

The Hon T R McCarthy, MLA  
Chairman  
Standing Orders Committee  
GPO Box 3721  
DARWIN NT 0801

Dear Mr McCarthy

Thank you for your letter of 29 May 1995 requesting details of supporting materials presently supplied by Ministers and Departments when presenting legislation in the Legislative Assembly. I am responding on behalf of the Government.

There is no practice of supplying any such material in the Assembly and the Government would not support a proposal to introduce such a practice.

When a technically difficult Bill is to be introduced, the responsible Minister has, on occasions, given advance copies of certain support material to and arranged a formal briefing for the Opposition spokesperson. This approach has always been well received and has assisted the Opposition in understanding the content of the particular Bill.

Yours faithfully,

Shane L. Stone  
Chief Minister”.

Concern was expressed by some Members of the Committee that the practice outlined in the Chief Minister’s letter made it difficult for Opposition Members (and Government backbenchers) to gain adequate background information on proposed legislation.

Having regard to the content of the Chief Minister’s letter, the Committee resolved that there would be no further benefit in continuing its inquiry, pursuant to paragraph 3 of its Terms of Reference, and that the Committee report its findings to date.

**Conclusion:**

- The Committee considers that the Government should continue to consider the preparation and issue of Explanatory Memoranda where such documents would assist

Members of the Legislative Assembly in the consideration of Bills and amendment schedules of a complex or technical nature.

- During its consideration of the reference, the committee received an assurance that briefings by Ministers and officials would be made more accessible.

It is understood that the current practice is for briefings to be given at the discretion of Ministers.

Your Committee is of the opinion that detailed briefings are of significant benefit in facilitating informed consideration and debate and notes the undertaking given by the Leader of Government Business.

- Your Committee also sees merit in the range of background documentation and reference material currently provided by the officers of the Northern Territory Library on a trial basis and recommends that the current practice in this matter be expanded.

TERRY McCARTHY  
Chairman

February 1996



## REVIEW OF STANDING ORDERS AND PROCEDURES FOR THE PRESENTATION AND INTRODUCTION OF LEGISLATION – BACKGROUND PAPER

### Introduction

Before a review of current Standing Orders and procedures for the presentation and introduction of legislation is undertaken, it is appropriate to examine the purpose and contents of Explanatory Memoranda.

### Purpose and Content of Explanatory Memoranda

An Explanatory Memorandum is a companion document to a Bill to assist members of Parliament and the public understand the objectives and detailed operations of the clauses of a Bill. Explanatory Memoranda are designed to assist members of a legislature and the public to understand the objectives and detailed operation of the clauses of a Bill. The information contained in Explanatory Memoranda may also be useful for the courts and the public to help them in the interpretation of a Bill after it has become law.

### Content of Explanatory Memoranda

Explanatory Memoranda may contain a general outline of a Bill, a financial impact statement, a detailed explanation of the Bill and commencement clauses.

- (a) the requirement for preparation of support material to be presented with proposed laws; ~~and~~

#### Commonwealth

Section 15(A)(B) of the *Acts Interpretation Act* (Cth) allows an Explanatory Memorandum 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; or
- (b) determine the meaning of a provision which is ambiguous or obscure or when the ordinary meaning would lead to a result that, in the context of the legislation, is manifestly absurd or unreasonable.

#### Australian Capital Territory

As set out in the *ACT Legislation Handbook*, an Explanatory Memorandum accompanies every Bill introduced into the Assembly. The Minister presents the Explanatory Memorandum to the Legislative Assembly after making the presentation speech.

The provisions of the Interpretation Act  
1967 (ACT) section 11B has provisions  
virtually identical to section 15AB  
of the Commonwealth

Similar legislation to the Commonwealth's section 15(A)(B) is provided in section 11B of the *Interpretation Act 1967* (NSW). ①

### Northern Territory

There is no similar provision for the use of extrinsic material in the interpretation of an Act in terms of section 15(A)(B) of the Commonwealth Act. Common law rules apply as to how parliamentary and executive materials can be used in the interpretation of statutes.

### New South Wales

8/ Similar legislation to the Commonwealth's section 15(A)(B) is provided in the *Interpretation Act 1967* (NSW), section 11B. Although Explanatory Memoranda are prepared, they are only distributed to all members of Parliament and are only used by the Minister handling a particular Bill. 34

With relation to the procedure for preparation and introduction of Public Bills, Standing Order Number 198 (8) states that the "bill shall be printed, with an explanatory note, without question put".

### Queensland

Similar legislation to the Commonwealth's section 15(A)(B) is provided in the *Acts Interpretation Act 1954* (Qld). However, sections 14A-14D in the *Acts Interpretation Amendment Act 1991* (Qld) allows the endorsement of a purposive approach to statutory interpretation, allowing the use of extrinsic material to assist in interpretation and to facilitate the implementation of a plain English style of legislative drafting.

### South Australia

There is no provision for the use of extrinsic material in the interpretation of an Act in their legislation equivalent to section 15(A)(B) of the Commonwealth Act. ~~They~~ rely on <sup>the</sup> common law for rules as to how parliamentary and executive materials can be used in the interpretation of statutes. South Australian courts

### Tasmania

Tasmanian their <sup>legislation</sup> ~~legislation~~ equivalent to section 15(A)(B) of the Commonwealth Act. ~~They~~ rely on <sup>the</sup> common law for rules as to how parliamentary and executive materials can be used in the interpretation of statutes. Although Explanatory Memoranda are not produced, Tasmanian courts

"A)"  
is provided in the IA 1974  
5.19 No provision is made  
has a restricted dist-  
limited members of  
parliament

"Clause Notes" accompany a Bill, and these are widely distributed. There is no provision in Standing Orders for supporting documents for Bills.

### Victoria

The *Interpretation of Legislation Act 1984* (Vic), section 35, provides that in the interpretation of a provision consideration may be given to any matter or document that is relevant and specifically includes Explanatory Memoranda. There is no reference of Explanatory Memoranda in Standing Orders.

### Western Australia

Similar legislation to the Commonwealth's section 15(A)(B) is provided in the *Interpretation Act 1967* (NSW), section 11B.

## (b) current Practice in other Australian Parliaments in this Matter

### Australian Capital Territory

As set out in the ACT *Legislation Handbook*, an Explanatory Memorandum accompanies every Bill introduced into the Assembly. The Minister presents the Explanatory Memorandum to the Legislative Assembly after making the presentation speech.

An Explanatory Memorandum is circulated by the authority of the responsible Minister, who approves it at the same time as ~~when~~ the text of a Bill for introduction into the legislature ~~is provided~~.

These Memoranda comprise a coversheet, a general outline, a financial impact statement and notes on individual clauses.

If any Government amendments are moved, with the exception of simple or technical amendments, a Supplementary Explanatory Memorandum is prepared.

Each Bill must have its own Explanatory Memorandum. However, when a number of closely-related Bills are introduced at the same time, a single Explanatory Memorandum is acceptable if all the necessary information is conveniently presented. A combined Explanatory Memorandum is only acceptable when all the Bills are short and simple, closely-related and if a single outline and financial statement adequately explains the operation and effect of the Bills in the package.

Explanatory Memoranda accompanying Acts mirror those used as companion documents to Commonwealth legislation in form.

The practice of supplying explanatory statements for each instrument or delegated legislation came into effect on 1 June 1990. Explanatory Memoranda accompanying Acts are housed in the ACT Administration Legal Branch Library.

SA

There is no formal procedure for EM  
to be presented or tabled in  
the Cabinet Handbook Q. 105

## **Queensland**

Explanatory Notes accompanying Bills introduced into Parliament contain: a general outline defining the objectives of the legislation, the reasons for the Bill, the estimated cost for government implementation, consultation and notes on clauses.

## **New South Wales**

The only formal information Parliament receives to explain each Bill is the Explanatory Memorandum prepared by the Parliamentary Counsel. The Explanatory Note comprises an overview of the Bill and notes on clauses. Distribution of this document to interest groups and the public depends solely on the individual Minister.

## **South Australia**

When a Minister introduces a Bill into Parliament, a second-reading speech is required. The speech is basically a report on the Bill, setting out in detail its purpose and effect, relevant history or background information. The instructing agency is responsible for preparing this report and sending it to Parliamentary Counsel, once the Bill is ready. Parliamentary Counsel prepares an explanation of the effect of each clause of the Bill and attaches it to the report prepared by the instructing agency.

## **Tasmania**

Although there is no provision in Standing Orders for supporting documents for Bills, background information is sometimes provided to Members by the Leader for the Government prior to debate, especially for contentious or controversial Bills. However, most Bills have a Fact Sheet attached and if Members require more information, the Leader provides it. Occasionally the Leader suspends the Parliamentary sitting for Members to attend a briefing by agency officers. A Member can request a briefing from an organisation or persons who are opposing the legislation.

## **Victoria**

Explanatory Memoranda are used to communicate complicated and technical explanations which would otherwise have been incorporated in the second-reading speeches of Ministers and to assist Members and others in their understanding of the proposed legislation. Explanatory Memoranda comprise clause notes and are attached to the front of a Bill. There are no policy guidelines or formal requirements to have Explanatory Memoranda. In nearly all cases Explanatory Memoranda are attached to Government Bills. The very few Private Member's Bills that are introduced do not include Memoranda. Explanatory Memoranda contain an outline and clause notes.

The instructing agency is responsible for writing Explanatory Memoranda and Parliamentary Counsel for coordinating it.

#### NSW

- Use "Explanatory Notes" relating to Bills when introduced into Parliament. The explanatory Note outlines the object of the Bill, the provisions of the Bill, lists the amendments to existing Acts, and a brief description on the contents of each clause and schedule.

#### ACT

- Have used "Explanatory Memoranda" since inception in 1989 to cover all Government Bills and some Private Member's Bills. The Explanatory Memoranda are separate documents written in plain English by the instructing agency, outlining the legislative intent of Bills and contains the general purposes of Bills, notes explaining the provisions of each clause and financial implications.

#### Tasmania

- Do not use Explanatory Memoranda or notes during any stage during introduction or debate of Bills in either House. There has been a practice adopted in recent years of Ministers circulating to Opposition spokespersons second reading speech notes prior to the second reading debate taking place. In addition, if there is no debate on Bills in Committee, clause notes are incorporated in *Hansard*.

### CONCLUSION

Explanatory Memoranda are useful not only as guides to Members of the legislature, but also for consideration by courts when interpreting legislation as well as general references to the legal profession and members of the public.

It is imperative that the quality and standard of Explanatory memoranda be high, as well as accurate, impartial and complete.

copy

**APPENDIX B**

*Extract from Conference on Delegated Legislation and Scrutiny of Bills, Darwin - July 1995.*

**SUPPORT MATERIAL FOR THE PRESENTATION  
OF LEGISLATION**

**Introduction: Rick Setter MLA, Chairman, Subordinate Legislation and Tabled Papers Committee, NT.**

Chair: Sen. Barney Cooney.

**Mr SETTER:** This may surprise some of you. The member for MacDonnell, Mr Neil Bell, moved the following motion in the NT Legislative Assembly on Wednesday 22 February 1995:

That this Assembly,

- (1) noting that this Assembly is a unicameral parliament, and that there is an obligation that a unicameral parliament should have in place adequate procedures for the review and scrutiny of legislation presented to it for consideration, and
- (2) noting that the NT Legislative Assembly does not have a committee for the scrutiny of bills, and does not provide a mechanism for bills to be accompanied by supporting documentation, such as explanatory memoranda or notes on clauses,
- (3) refer the following matter to the Standing Orders Committee for inquiry and report:

the current standing orders and procedures for the presentation and introduction of legislation, with particular regard to:

- (a) the requirement for preparation of support material to be presented with proposed laws; and
  - (b) the current practice in other Australian parliaments in this matter; and
- (4) empower the Standing Orders Committee to send for and examine persons, papers and records, to sit in public or in private session, notwithstanding any adjournment of the Assembly, and to adjourn from place to place.

Mr Bell went on to say: 'It is important for debate in parliaments to be as informed as possible. There is a widely expressed view that the balance of powers between executives, parliaments and the courts can be sustained only when there is a relatively equal flow of information to each of the 3 arms of government'. It was Mr Bell's opinion that the parliament and the constitutional development of the Northern Territory could only be enhanced by inquiring into the positive aspects of this proposal.

As a result, Mr Speaker conceded that this conference would be a good forum for discussion of the proposal. Those chairpersons and staff who were at the Melbourne conference will recall that I raised the matter and through our committee circulated Mr Speaker's letter to all of you. I am pleased that attending committees have agreed to canvass this issue this afternoon.

The Subordinate Legislation and Tabled Papers Committee of the Northern Territory some years ago commenced a campaign for seeking better-quality explanatory memoranda attached to regulations and by-laws. However, while our committee does receive - more or less - that information, it is not presented to the parliament when the bills are tabled. We receive it with regard to regulation, of course. But what Mr Bell is talking about is supporting documentation to be presented to the parliament with the bills.

In this regard, the committee has generally been successful. It is hoped that this forum will be able to provide the Standing Orders Committee with background information and samples of the various documents provided. Your cooperation in this regard will be greatly appreciated. What I am hoping you will be able to do, committee by committee this afternoon, is perhaps advise the conference on how you handle supporting documentation for legislation within your parliaments - whether in fact supporting memoranda do accompany bills when they are tabled in parliament, or whichever other way members are able to obtain detailed information on the content and the intent of the various bills.

**Mr PERTON (Vic):** What our committee has written time and time again, and the Legal and Constitutional Committee before it, is mooting the prospect of a legislative impact statement. I know a number of people here - and I see Barney nodding - suggest that that might be the way to travel. I do not think we are very different from any of the other parliaments here. As a matter of course, legislation is accompanied by an explanatory memorandum. Second-reading speeches in the Victorian parliament are traditionally quite detailed. Our committee, when it examines legislation, normally has available to it advisers from the government who are generally prepared to appear in public hearing, if we hold a public hearing. That material is public. The opposition is generally given access to all materials relating to the bill. Obviously they are not obliged to keep it secret, so that material is available as well. I do not think I can convey any more information. I think it is all pretty standard.

The only thing that is different about the Victorian parliament is as a result of a quirk in our constitution which entrenches not the Supreme Court, but the jurisdiction of the Supreme Court. We are required to have a minister make an explanatory statement when the legislation may actually alter legal rights. In those instances, the minister has to make an explicit statement to the parliament, setting out the reasons why that sort of legislative change is being made. Our committee then has a policy role. I think we are unique among the committees here, in that our statutory charter includes a policy decision that we have to make - that is, that a piece of legislation that alters or amends the jurisdiction of the Supreme Court is reasonable in all of the circumstances. I think we have not had a split on party lines on that question. Issues can range from the very serious - for instance, the *Grand Prix Bill*, which actually took away property rights - to the quite trivial, such as the *Emerald Tourist Railway Bill*, which merely gave that railway protection from suit for negligence, because it was unfenced. Otherwise, I suppose we are pretty much like every other parliament here.

**Mr DONALDSON (WA):** Our pathway is that first of all the principles and the explanation are given to a parliamentary committee. In the case of the government it is a coalition committee consisting of backbenchers. They view the legislation - not necessarily the printed bill. Then, of course, it goes to Cabinet and Cabinet gives the authorisation to print. It is then introduced to the party room. The minister makes a further explanation to the party room. Then the process relies very heavily on the chairman of the particular coalition parliamentary committee to get up in the party room and explain how the committee views that legislation. If there are some questions, or some people in the party room who are not happy with the legislation, it is debated. It is not introduced to parliament for second reading until such time as the party room has given authorisation. At odd times we see legislation disappear altogether, but most times there are some accommodating changes by the minister and the government. Generally that is the pattern of the introduction of bills.

**Mr REIBELING (WA):** I give the WA opposition's point of view. There is not, in fact, any memorandum that accompanies bills. We have a system where the minister gives a second-reading speech. Sometimes that is quite detailed. The only other way an opposition member can get information about a bill is by requesting a briefing. More information about the bill then comes forward. But for the opposition, there is no great opportunity to have an involvement in the bill before it is introduced into parliament. There is not a set process for a memorandum to accompany the bill.

**WA delegate:** I would not like anybody here to get the impression that the committees that our chairman was talking about - they are backbench Liberal committees or coalition committees - are resourced in any way. It is merely the members meeting. So there is no detailed scrutiny.

**Mr BENNEWORTH (Tas):** We operate a similar system to that just mentioned by the Western Australians. Bills come via Cabinet to the party room, where they are discussed at length. At that stage, the opposition members certainly would not have any awareness of those bills. When they hit the House - I am talking now of important bills, not your everyday, run-of-the-mill bills that do not need a lot of work - we provide the opposition with a copy of the second-reading speech and a copy of the clause notes, and I guess they take them back to their party room for discussion. Obviously, the bill sits on the table for 48 hours after presentation, so that gives the opposition some time to go through the bill, basically clause by clause. I have brought a sample of a big one that has just gone through the House of Assembly and upper House in Tasmania, the *Government Enterprises Bill*. That is the whole package as presented to the opposition.

In the upper House, it is a little bit different. Our upper House is basically non-party-political, as we know it, although I must admit there are now 3 endorsed Labor members and 1 Liberal-endorsed member in our 19-man upper House. Notwithstanding that, background information is provided to all members of the upper House in detail. That is provided by the leader of the government prior to debate. I have in front of me a package of the current *Workers' Rehabilitation and Compensation Reform Bill*, which has just gone through the upper House. That includes a fact sheet and other background information given to all members. If members require further briefings, they can have them. In some cases, the leader suspends the sitting for members to attend briefings from agency officers. Also, a member can request a brief from an organisation or persons who are opposing the legislation

or have problems with it. On this *Workers' Compensation Bill*, that certainly occurred. The leader of the government arranged, for all members, briefings by 2 officers on behalf of the government; by Tasmanian Trades and Labour Council representatives, by service providers including chiropractors, occupational therapists etc, by the Insurance Council of Australia, the Law Society of Tasmania, and the Tasmanian Chamber of Commerce and Industry. They were very thorough briefings, taking a total of more than 24 hours.

There is no provision in our standing orders for supportive documents for bills. However, successive leaders in the upper House have provided as much background material as possible, because theoretically the upper House is independent and has no research facility available to it. I will table those 2 documents for your information.

**Mr DAVISON (Tas):** We have for some time within the parliament of Tasmania tried to get the ministers, while going through the clauses at the committee stage, to read the intent of the bill into Hansard. At this stage I have failed because it is a time-consuming affair, as we know. But often, the legal problems that occur within our system arise because what the minister means at the time is not read into the clause notes of the bill. It is something I would like this group to consider in terms of saving a lot of legal time and trouble in the future

**Mr PEGRAM (SA):** Procedures in South Australia are much the same as those described for Western Australia. We do have a convention that the opposition is not called upon to debate any measure introduced for at least 1 week after it is provided with the bill, the explanatory notes and the second-reading speech at that stage. Invariably, there is more consultation. We are finding that ministers these days seem to consult with outside industry and interest groups - often ahead of the party, frankly - by distributing proposals to groups for comment. Of course, that public process means that the opposition receives information which will enable it to debate the measure successfully.

In the upper House, which is not under government control, there does tend to be somewhat more consultation, by reason of political imperatives, before legislation is introduced. But by and large, the formal procedures are as elsewhere.

**Mr CRAWFORD (Senate):** We have a number of documents to table. The standing orders of the Senate, the standing orders of the House of Representatives, and the Commonwealth Legislation Handbook. I do not know whether your interpretation acts have the same provision as 15(A)(b) of the *Commonwealth Interpretation Act*, which provides that the interpretation of a provision of an act can be taken from, among other things, a second-reading speech - not only from the words of the act. That is something that you could possibly be working towards.

With regard to explanatory memoranda, I suppose there are some that are not helpful, and there are others that are extremely helpful. We have certain examples of the extremely helpful ones here. The department that I came from, Social Security, had a format of doing an explanatory memorandum that went through a bill not only clause by clause but also subject by subject. Related points, arising in 4 or 5 or 8 or 10 clauses throughout a bill, are gathered together on 1 page. A recent bill which is now an act, I think, changed the family payment legislation. It broke down into sub-categories what happened to the income test. The explanatory memorandum goes through a set process: a summary of the changes on this particular point; the background explaining why; the clauses involved in those changes,

leaping from clause 21 to clause 68 to clause 103; and then an explanation of the changes clause by clause.

**Sen. COONEY:** Our Legislative Handbook, published in 1988, talks about how legislation is to be guided through the system. It gives a big mention, on a couple of occasions, to the scrutiny of bills. It just shows you - we do have some impact.

**Ms COLLINS (Qld):** In Queensland, when a bill is introduced into the House, it comes with the second-reading speech, which is used for interpretation purposes and for the information of all members, as they all receive a copy; as well as an explanatory note and supporting materials. Members can have quite a deal of things to refer to when they are looking to participate in the debates and things that follow on from that. As Peter mentioned, we have instances where you have extremely good explanatory notes that can be extremely helpful, or ones which just gloss over the surface and do not seem to be much help at all.

With regard to subordinate legislation, explanatory notes are not automatically given to members to look at for the purposes of interpretation or whatever. The committee itself requests them, and follows up with departments to obtain copies. These, like the explanatory notes for bills, can either be extremely good or they can be half a page. This is quite a good one, except that the committee found that there was quite a significant infringement of the FLP regarding reversal of onus of proof. In the explanatory memoranda, we require that such infringements are justifiable and in the public interest. In this explanatory memorandum, 1 sentence was dedicated, basically saying, 'Yes, there is a reversal of onus of proof', and that was about it. I can leave copies of all of these things for you to look at.

**Mr NORTHEY (NZ):** I will table some of the documents involved in our process. In the process within the executive leading up to the Cabinet, the departmental drafting, they are required, on the face of either a bill or a regulation, to provide evidence of compliance with the principles of the Treaty of Waitangi and the New Zealand Bill of Rights, the principles and guidelines of the *Privacy Act*, relevant international standards and obligations, and guidelines of the Legislation Advisory Committee report. Our Legislation Advisory Committee is a committee of elders - former senior public servants and professors of constitutional law and the like - that is available to the government and select committees to advise on issues.

Once those matters have been met, the process is generally that the opposition parties are informed that a bill is to be introduced and a briefing is available. It is often quite a crowded room. When I left New Zealand there were 8 parties - it may have changed since then! It gives them the opportunity to meet the public servants who are involved and to ask questions about the issues, before introduction.

In our parliament there is a tabling of the minister's first-reading speech, for which up to an hour is allowed, to set out the details of the bill itself. The first part of the bill is in fact an explanatory note drafted by the parliamentary draftsman. It is part of the bill at that first-reading stage, explaining the clauses. As others have said, this is of varying quality, but it does attempt in plain language to set out the intent of each clause. After that first-reading debate, the matter is referred to a subject select committee, of which we have 15. Our parliamentary committees spend more than half their time on consideration of the bills in the departmental areas they are concerned with - commerce, finance, local government, internal

affairs, foreign affairs, defence and so on. Any bill goes before the relevant select committee for public hearings. The public and organisations make submissions and the bill is invariably amended by the select committee as a result of that process. It comes back into the parliament for debate, at the second-reading stage, already amended by parliamentary scrutiny and public input. There is a further opportunity of amendment at the committee stage of parliament, after second reading.

In terms of the particular questions, there is a requirement, as set out in the Cabinet Office Manual and the like, to meet certain conditions. There is the briefing, which may be of varying length and usefulness. There is the explanatory note, which is part of the bill at first-reading stage and ought to explain for the lay reader what each of the clauses means, and which will accompany any copy of the bill. It is an integral part of it at that stage. Once the bill is reported back to parliament at second-reading stage, it is just the amended bill. But by that stage, all the concerned organisations have made their submissions on it, and by the time you get to the committee stage of the House, you are debating those matters which remain controversial.

**Mr ANDERSON (NZ):** There is no way one of our ministers would have a second-reading speech written at the time of introduction of the bill. We have improved our process in recent years - and there is still room for further improvement - so that when a bill is introduced, a copy should always be given as early as possible to the opposition, and a briefing provided. That way, at introduction, you get a sensible debate. If the opposition does not get a copy of the bill until the last minute and has not had a briefing, you just get a rubbish debate and grandstanding. You do not get a subject-matter debate.

But once the government has decided and the executive and caucus have talked around what is going to be in the bill, its introduction in our parliament is not a big deal. It is the government's prerogative to introduce a bill and it does. Backbenchers and opposition members only really get interested in the bill either in the select committee period or when it is reported back from the select committee. Once a bill has been referred to a select committee, there is a minimum of 3 weeks' notice - often 4 weeks - for public submissions to be made. Then the committee may hear evidence and consider a bill for 6 months. So it can often be 6 months, a year, 18 months before you actually come to the second-reading stage of a bill.

I think I can say without reservation that every bill that goes to a select committee is changed for the better. There are always changes. And I think it is something that we still have to give a bit more emphasis to. To me, the most important stage of our process of legislation is the report-back version from the select committee, with all the changes. And I think that either we have to give that debate more time when the bill comes back, or the report back from the committee has to be tabled in parliament a week before the debate, so that all members can read the report-back version and understand what the [inaudible] looks like and why the changes have been made. In fact, our Standing Orders Committee is currently considering changes to cope with the new parliament. It has agreed that when a bill is reported back from the select committee and there is no controversy, we will skip the committee stages in the House, move from second reading to third reading, and the rest is history. So the select committee process and the debate on the report back are becoming the core of the legislative procedure. Apart from the germination of an idea which led to

legislation being drafted, the next most important phase now is the select committee process. So yes, our system is different.

**Tasmanian delegate:** About 9 months ago, we introduced new sessional orders along similar lines. We are finding now, with the more straightforward bills, that we are skipping the committee stages but often having the clause notes read into Hansard. We find this is working well indeed. It does cut a lot of the unnecessary debate out of bills. I think we will adopt ...

**Mr Harrison:** Even a government supplementary order paper can be read in, if agreed, without the committee having to debate it.

**Tasmanian delegate:** That is correct. Often the opposition spokesman will simply say, 'Please note that we would like the clause notes read into the Hansard', and that is it - that is the second-reading committee gone. I think it is a wonderful idea, and I believe we got it from New Zealand.

**Mr RYAN (NSW):** I am a member of the upper House in NSW, representing the Liberal Party. My silent vice-chairman, Jill Hall, has laryngitis - a terrible problem for politicians. NSW's recent history has been such that the exposition of various explanatory memoranda has expanded monumentally, far more than we were used to, perhaps, in the 1970s and 80s. It is largely because the lower House, from 1991, was not controlled by the government. The balance of power was held by 3 independents. The government supplied them with additional research staff to assist them to digest bills, and at the request of those independents additional research staff was also provided to our Parliamentary Library. So other members also benefited.

In my former life I was a ministerial adviser. I remember preparing a folder about this thick for the minister on any particular bill, with incredible amounts of explanation - the impacts of the bill, the financial impacts of the bill, an annotated version of the current act with the bill, and so on. What I used to produce for the backbenchers, who were usually the most ignored people in the whole process, was most often a couple of pages in really big print. I suspect that backbenchers of government parties have greater difficulty in the NSW parliament, whichever side is in power. That was certainly the case under the previous government, and I suspect that the difficulty will increase under the current government.

The staff of our Regulation Review Committee put together a memorandum that the Premier recently issued to ministers, on how they are to brief one another. I presume that members of the back bench in the Labor Party will get some expurgated version of that. But the opposition members have had extensive briefings from departments. We have recently introduced plain-English explanatory memoranda, which are usually quite extensive and tabled with the bill. The time for debating bills is not especially generous, but for our particular system it has worked reasonably well until now. I expect, however, that we will introduce changes in the upper House, in line with current practice in the Senate.

To summarise the present process, what generally happens is that a bill is introduced by the minister and then given 5 clear days, which essentially means a little over a week, for the opposition to digest the printed bill and the explanatory memorandum. That also touches off the Parliamentary Library, which is becoming a new component of the process by producing

digests of bills. Unfortunately we do not have one of those to table, because we forgot about them until just now. They are very useful for members of parliament in that they are in totally plain English and they usually give a good run to controversial elements of the bill, in bold type. The names of people to whom members on either side may want to speak are usually in that bill digest. The fact that it is produced by the parliament gives it a level of objectivity that may not be shown by the government initiating the bill. The one unfortunate problem is that bills can be debated in the House after 5 days, and it usually takes roughly 5 days for the library to produce the digest. It is not unusual for the opposition, and the government members for that matter, to receive the bill digest after the bill has been discussed in the party room, usually on the day it is due to come into the House.

Bills, once they have been debated in one House, can go through in a single day in the other House. I expect that the Legislative Council, now that it is not controlled by the government, will introduce standing orders similar to those of the Commonwealth Senate, whereby there is a requirement for the bill to have been in existence for a certain period of time in the other place, or in our House for 4 or 5 days at least, before debate starts.

Apparently the Premier has introduced a requirement that Cabinet minutes on any regulatory matter, whether legislative or subordinate, must have a cost-benefit analysis incorporated, at least for circulation to Cabinet. Of course, one of the problems with Cabinet documents is they have a level of confidentiality associated with them which makes them usually not accessible to members. I expect that over time that part of the bill documentation will be circulated to members as well, but that is looking into the future.

We have material to circulate. With regard to the cost-benefit analysis, Jill - if she has her voice back tomorrow - will be speaking on that subject and may give you some more detail.

**Mr HIRD (ACT):** An explanatory memorandum assists members of the ACT legislature, and the public in general, to understand the objectives and the detailed operations of the clauses of a bill. Courts and the public may also use the explanatory memorandum to help in interpretation of the bill once it has become law. The practice of presenting bills to the parliament accompanied by explanatory memoranda commenced at the beginning of self-government in May 1989. The only exceptions are made for some private members' bills. These explanatory memoranda are available to all members when the bill is presented, as well as being on sale to interested citizens through the ACT government shop. An explanatory memorandum is circulated by the authority of the responsible minister, who approves it at the same time as he or she approves the text of the bill for introduction into the legislature. The memorandum consists of a cover sheet, a general outline, a financial impact statement and notes on individual cases.

It is also customary for significant amendments to bills by the government to be accompanied by a supplementary explanatory memorandum, setting out in detail the effect of the proposed amendments. Since 1 June 1990, the ACT government has adopted the practice of supplying an explanatory statement for each instrument of subordinate legislation, both to members and to the general public. The Standing Committee on Scrutiny of Bills and Subordinate Legislation has, as one of its terms of reference, whether the explanatory statement meets the technical or stylistic standards expected by the committee. It often comments when the statement is not clear or contains possible inaccuracies. Explanatory

memoranda accompanying ACT acts largely mirror big brother, the Commonwealth, following companion documents of the Commonwealth legislature.

I table a number of documents, including good examples of explanatory memoranda. Recently the Minister for Urban Services, Mr Tony Dedomenico, introduced legislation for the corporatisation of a public utility, setting up the Electricity and Water Corporations. The bill amends 4 acts. I have the explanatory memorandum, as well as the bill. I have another example, *Determination of Proposals for Business Franchises, Liquor Act 1993*. I table that, as well as a document entitled *A Report on Explanatory Memoranda*. Also I will give you, for good measure, a code of conduct for ministers.

**Sen. COONEY:** For the OTMs - other than members - does Hilary Penfold, the parliamentary draftsman, want a say about this? You do not have to. Is your legislation all so perfect that it does not need explanatory memoranda?

**Ms PENFOLD (Commonwealth):** Of course! But leaving that aside, you are putting me on the spot a bit, because the Office of Parliamentary Counsel does not take any responsibility for the bits of paper that accompany our legislation. They are handled entirely by departments. But my understanding is that as well as a second-reading speech, which may be quite extensive, all government bills introduced into the Commonwealth parliament are accompanied by an explanatory memorandum which includes a financial impact statement. The explanatory memorandum ranges from being a mere paraphrase of the legislative provisions, which is obviously not very useful, to sometimes a fairly detailed explanation of what the provisions are intended to achieve, including explanations of the purpose and perhaps the origins of the legislative provisions. I am not sure there is anything else I can usefully say about those.

**Sen. COONEY:** So you produce the legislation, and the explanatory memorandum and the second-reading speech are prepared elsewhere?

**Ms PENFOLD:** They are produced by the sponsoring department. Indeed, we rarely see those documents. Sometimes, when we see them after the event, we get a bit of a shock to see what our legislation is put forward as doing.

**Mr REIBELING (WA):** The problem of our Uniform Legislation Committee in WA, really striking at the heart of what everyone is mentioning here, is the information that is given to parliament when legislation is introduced. The creation of our committee came about because of Queensland legislation, the *Non-Bank Financial Institutions Bill*. We were asked in parliament in 1992 to pass uniform legislation without even having the bill. We were told that the Queensland legislation was all things wonderful, so we should copy it, but we were not even to see it. I might add that to our dismay we passed it without seeing it.

With that experience in mind, WA has gone about trying to set up a process so that any piece of uniform legislation is scrutinised before it is passed. We found that there are some 69 areas of uniform legislation being considered right now, and that if all go through, quite a deal of what the states are doing now will be irrelevant. It is vital for parliaments to gain the ability to scrutinise this uniform legislation, and put in place a process so that proper scrutiny can take place. At present, if we are asked to adopt some other legislation, quite often there is no scrutiny of those bills at all. I do not know how other states handle those. I am convinced

that a scrutiny should occur, apart from the scrutiny that occurs in the parliament that is chosen as the host parliament. It concerns our committee that very little, if any, scrutiny takes place.

**Mr NORTHEY:** Briefly responding to Hilary's comments about explanatory notes, I stress that in the NZ case, the explanatory notes which form part of the bill on introduction are written by the same parliamentary counsel who wrote the rest of the bill. So they are essentially politically neutral in that sense. There is a lot of variability in their quality. We had a private member's bill which David Caygill, whom many of you will remember, introduced to clarify the law relating to parliamentary privilege. The explanatory note that he and Geoffrey Palmer had written was 4 times as long as the bill, and went into the principles of it very coherently. Among other cases, the *Local Government Law Reform Bill* on introduction had an explanatory note of only a page because I, as opposition spokesperson, had agreed that it was urgent that it be introduced. But by the time the bill was available for public distribution, there were the normal 10 pages that the counsel had then had time to write, explaining it. Many of the points which people here would be concerned about, the financial and other implications, are not of course included in such explanatory material. That depends on stuff that comes out of government departments and the minister's office, separately.

**Mr SETTER:** The NT situation is probably similar to that in WA. The minister introduces a bill by way of his second-reading speech, which is generally a fairly detailed summary of the bill, but there is no accompanying documentation whatsoever. The bill then sits on the table for at least 28 days. Because we sit for only 33 days per year, there is quite a time between some of the parliamentary sessions. Members on either side can seek, via the minister, a briefing on whatever subjects concern them, and briefings are readily provided. Members of the opposition certainly do have access to departmental officials for briefings. However, they do not have any explanatory memoranda or any other supporting documentation. Hence Mr Bell's motion, because he was concerned that while he could seek briefings, he was not getting sufficient documentation at the time of the tabling of the bill. I think he was coming from the angle that if he did receive that information at the time, it may not be necessary in many cases for him to seek further briefings.

Thank you very much for your contributions here this afternoon. Thank you also for providing us with all of this documentation, which our committee will summarise. We will report back to Mr Speaker and his Standing Orders Committee, and no doubt that committee will report back to the parliament in due course. I think it has been a meaningful exercise and once again, I thank you for participating in it.

**APPENDIX C**

**BACKGROUND PAPER – SUMMARY OF REASONS FOR AND AGAINST EXPLANATORY MEMORANDA**

**1. REASONS FOR THE USE OF EXPLANATORY MEMORANDA**

- The purpose of Explanatory Memoranda is to assist Members of Parliament understand the objectives and detailed operations of the clauses of a Bill.
- Members should have available to them adequate, relevant and background information relating to Bills to improve the quality of their understanding and interpretation of legislation, especially technical and complex legislation.
- Explanatory Memoranda could lead to improvement in the standard of debates and decision-making relating to Bills as both Government Members and the Opposition would be more knowledgeable about the legislative intent of the Bill, the purposes and provisions of the Bill, and the financial impact of the Bill.
- The use of Explanatory Memoranda could lead to time being saved during Parliamentary sittings as both Government and Opposition Members would have had access to the same materials and be better prepared to debate the Bill, therefore reducing the amount of time spent in the Committee stage of complex Bills.
- Where such documents may be used by the courts in the interpretation of legislation, Explanatory Memoranda could serve:
  - (a) to confirm that the meaning of a provision is the ordinary meaning conveyed by the text of the provision; or
  - (b) determine the meaning of a provision which is ambiguous or obscure or when the ordinary meaning would lead to result that, in the context of the legislation, is manifestly absurd or unreasonable.
- If Explanatory Memoranda are companion documents to Bills, they could be tabled in the Assembly and, as public documents, would be available for access by the general public and assist the public to understand legislation.
- The use of Explanatory Memoranda would increase the levels of consultation relating to legislation (eg, Government and Opposition Members, Parliamentary Counsel, agencies and the public).
- Explanatory Memoranda of some form or the other are currently being used by the majority of the state jurisdictions (Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria) the Commonwealth Government as well as New Zealand.

## **2. REASONS AGAINST THE USE OF EXPLANATORY MEMORANDA**

- Members of Parliament (and others) should not have to search three documents (namely, a Bill, a second-reading speech and an Explanatory Memorandum) to discover the meaning of a Bill — the Bill itself should be self-contained and self-explanatory.
- Members should become familiar and understand the Bill itself, not the Explanatory Memorandum, to avoid the risk of adopting a simplistic understanding of complex issues.
- Members require additional time to read and digest Explanatory Memoranda provided with Bills.
- There has been a trend in most jurisdictions to draft Bills in simple, plain English so that Bills are easier to understand and interpret. If all Bills were drafted accordingly, Explanatory Memoranda could be unnecessary.
- Additional resources are required to produce Explanatory Memoranda. Additional time would be required for preparatory and consultative work between the instructing agency, Parliamentary Counsel and the Legislative Assembly. Agencies formulating Bills may need appropriately trained staff to draft Explanatory Memoranda. Parliamentary Counsel would probably also need additional, qualified staff as well as time to review and amend the Explanatory Memoranda provided by agencies.
- The additional time required to formulate Explanatory Memoranda could lead to delays in presenting urgent Bills in the Legislative Assembly.
- As most second-reading speeches provide an outline of a Bill, its purposes and an explanatory statement, Explanatory Memoranda in many cases would be a duplication of the contents of Ministers' second-reading speeches.
- For Explanatory Memoranda to work effectively, strict policy and procedural guidelines are required to ensure that the informative material it contains does not simply paraphrase the contents of the Bill it is supposed to be aiding.
- As each instructing agency would be responsible for undertaking the initial drafting of these documents, the quality of these documents could vary from Bill to Bill because of the different technical and stylistic standards of instructing agencies.
- Bills are passed by Parliament to become proposed law, but Explanatory Memoranda are not.

## BIBLIOGRAPHY

Attorney-General's Department (1982). *Extrinsic Aids to Statutory Interpretation*. Canberra: AGPS.

Australian Capital Territory (1992). *Legislation Handbook*. Canberra: Chief Minister's Department.

Delegated Legislation and Scrutiny of Bills Conference (1995). *Conference Proceedings of Delegated Legislation and Scrutiny of Bills Conference, Darwin, 5-7 July, 1995*.

Department of the Premier and Cabinet (1994). *Cabinet Handbook*. Adelaide: Department of the Premier and Cabinet.

Department of the Prime Minister and Cabinet (1988). *Legislation Handbook*. Canberra: AGPS.

MacGregor, Anne (1991). *Report on Explanatory Memoranda*. Canberra: Australian Capital Territory Attorney-General's Department.

Parliament of the Commonwealth of Australia (1993). *Clearer Commonwealth Law*. House of Representatives Standing Committee on Legal and Constitutional Affairs. Canberra: AGPS.

Queensland Legislative Assembly (1991). *Parliamentary Committee for Electoral and Administrative Review*. Brisbane: Office of the Parliamentary Counsel.

Refshauge, A.J. (1995). "Address to Regulatory Reform Conference: From Red Tape to Results", Darling Harbour Convention Centre by the Acting Premier, Minister for Health and Minister for Aboriginal Affairs.