



**AUSTRALIA-NEW ZEALAND SCRUTINY OF LEGISLATION CONFERENCE  
MELBOURNE, AUSTRALIA**

**3 – 5 DECEMBER 2024**

**EXPLANATORY MEMORANDUMS FOR PROPOSED LEGISLATION IN  
AUSTRALIA: ARE THEY FULFILLING THEIR PURPOSE? – A REVISITATION**

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## Introduction

Explanatory memorandums (EMs) help ensure that Parliament and its committees have all the information on proposed legislation they require to scrutinise the Executive. If EMs lack quality, the accountability of the Executive to Parliament can be undermined.

There are varied audiences for EMs, including stakeholders, academia and, on occasions, the judiciary. However, the primary audience is the Parliament and, more specifically, a parliamentary committee when scrutinising legislation.

Considering the well accepted constitutional law principle of parliamentary supremacy and the accountability of the Executive to the Parliament, one might expect that all EMs sufficiently 'explain' the legislation to the Parliament. Full disclosure of all information relevant to parliamentary scrutiny should be assumed.

Unfortunately, this expectation does not always reflect reality. Some EMs merely paraphrase the legislation and highlight its benefits, avoiding addressing issues which are left to the Parliament to raise. This is inefficient, potentially wasting parliamentary time. Further, a lack of Executive proactivity in discussing all issues with legislation (of which the relevant agency would be aware) may be self-defeating in missing an opportunity to fully engage in the parliamentary process. This is just one aspect of the power imbalance between the Executive and the Parliament that has been explored by other commentators.<sup>1</sup>

Consequently, there has been a significant amount of criticism levelled at the failure of some EMs to comply with various requirements aimed at ensuring they adequately explain proposed legislation.

This paper and the presentation based upon it explores the proposition that "Explanatory Memorandums for proposed legislation submitted to parliamentary committees in Australia fail to meet the objective of enhancing committee scrutiny of the Executive" (the Proposition). It does this by charting some of this criticism, discussing possible reasons why some EMs have not been of sufficient quality and suggesting reform. These reforms are designed to assist in ensuring EMs more often meet the expectations of Parliament and its committees and that agencies routinely fulfill their obligation, as delegates of the Parliament, of full disclosure.

This exploration first occurred 10 years ago when the author published a version of this paper in 2014 in the *Australasian Parliamentary Review*.<sup>2</sup> To assist, the author conducted a survey of parliamentary staff of legislative scrutiny committees in Australia and some other Westminster jurisdictions to ascertain their views on the quality of EMs.

This paper includes results of a further survey of parliamentary staff to assist in examining whether there have been any improvements in the quality of EMs in the last 10 years.

## What is an Explanatory Memorandum?

The terms 'Explanatory Statement', 'Explanatory Memoranda', 'Explanatory Notes' and 'Explanatory Memorandum', in a parliamentary context, are often used interchangeably in available literature. Some definitions of these follows.

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<sup>1</sup> J. Seal-Pollard, [Addressing the Balance: The Executive and the Parliament](#), a paper presented at the Australasian Study of Parliament Group conference, 5 – 7 October 2016, Adelaide, Australia.

<sup>2</sup> A. Hickman, ['Explanatory Memorandums for proposed legislation in Australia: Are they fulfilling their purpose?'](#), *Australasian Parliamentary Review* Spring/ Summer 2014, Vol 29.2(2).

### **The Senate Standing Committee for the Scrutiny of Bills**

An explanatory memorandum is a companion document to a bill. It is required to provide a statement of the purpose of the legislation, an outline of why it is required, the effect of the principal provisions, an explanation of the policy background and notes on the clauses of the bill. The information provided in this document should be of such quality that the committee, members of Parliament, the courts and the public are able to understand the overall objective and operation of the bill.<sup>3</sup>

### **Patrick O'Neill, Commonwealth Parliamentary Library**

Documents that assist members of Parliament, officials and the public to understand the objectives and detailed operation of the clauses of a bill.<sup>4</sup>

### **Charles Walker MP, Chair of the Procedure Committee of the United Kingdom House of Commons**

Explanatory statements enhance our ability to scrutinize legislation, unpacking complex or technical amendments and so opening up the legislative process to the wider public, as well as providing greater focus for Members' arguments during debates.<sup>5</sup>

### **New Zealand Parliament**

An explanatory note is an attempt to set out in non-legal or less formal terms the purport of the bill that has been presented to the House. It is regarded as a very important indicator of the meaning of the language used in the bill and the subsequent Act.<sup>6</sup>

These definitions demonstrate what is expected from EMs, especially parliamentary committee expectations. Arguably, anything that falls short of these expectations is open to criticism. This is because agencies are not adequately informing Parliament about legislation it is being asked to consider and pass.

While EMs are now more commonplace as part of the legislation making process in Australian and other Westminster parliaments, this was not always the case. Indeed, it was only after 1980 that EMs began to be consistently produced for every Commonwealth Government bill.<sup>7</sup> Before 1980, EMs were only prepared for complex bills.<sup>8</sup> The gradual introduction of EMs since then has enabled parliaments to have a better understanding of the purpose and operation of proposed legislation.

Other sources of information available to Parliament and its committees on proposed legislation include the second reading speech, ministerial briefings and committee hearings with Ministers and departmental staff. Nevertheless, with the extensive demands on parliamentarians' time and the ever increasing complexity of legislation, EMs are a vital source of information.

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<sup>3</sup> Commonwealth of Australia, Senate, Standing Committee for the Scrutiny of Bills, [The Quality of Explanatory Memoranda Accompanying Bills](#), Third Report of 2004, 24 March 2004, p 73.

<sup>4</sup> O'Neill, Patrick, '[Was there an EM? – Explanatory memoranda in the Commonwealth Parliament 1901-82](#)', Australian Law Librarian, Volume 13, No.1, Autumn 2005, p 7.

<sup>5</sup> United Kingdom, House of Commons, Procedure Committee, [Explanatory Statements on Amendments](#), Fourth Special Report, 25 February 2013. This definition was offered following the release of that committee's Fourth Special Report on explanatory statements on amendments.

<sup>6</sup> McGee, [Parliamentary Practice in New Zealand, Chapter 24: Classification and Form of Legislation](#), 4<sup>th</sup> edition, 9 January 2017, p 369-70.

<sup>7</sup> O'Neill, Patrick, '[Was there an EM? – Explanatory memoranda in the Commonwealth Parliament 1901-82](#)', Australian Law Librarian, Volume 13, No.1, Autumn 2005, p7.

<sup>8</sup> Commonwealth of Australia, House of Representatives, Standing Committee on Procedure, [Maintenance of the Standing and Sessional Orders](#), First Report, p 10.

If prepared with a parliamentary audience in mind, an EM will expedite an understanding of proposed legislation. This also assists others, such as courts, interested organisations, the media and the general public.<sup>9</sup> In the author's opinion, when they comply with best practice form and content requirements, EMs provide the type of information necessary to enable Parliament and its committees to consider the merits of proposed legislation.<sup>10</sup>

## **The role of Parliament and Explanatory Memorandums**

One of the primary roles of Parliament and its committees is to scrutinise the operations of the Executive and any other bodies to whom it delegates the role of making legislation. The Executive is accountable to the Parliament as the law-making body in the Westminster system of government. Essential to achieving this accountability is fulfilling its duty to Parliament of full, pro-active disclosure on legislation, thereby ensuring it is fully briefed. A quality EM will assist the Executive in fulfilling this duty.

If a deficient EM does not give a full and accurate account of why the Executive is proposing the legislation by not disclosing all material information to Parliament and its committees (whether by oversight or other reasons), there is diminished accountability. Depending on the nature of the deficiency, negative consequences, including the following, can occur:

- Parliament not being fully informed of the operation and impact of proposed legislation
- the information contained in the EM may be inaccurate and give the reader a distorted view of the legislation
- the ability of the general public to understand laws passed by Parliament may be impeded
- the quality of the resulting legislation may suffer.

A deficient EM may require a committee to seek additional information from agencies about the proposed legislation. This delays the scrutiny process, which is unwelcome given the tight timeframes under which committees often operate when reporting to Parliament.<sup>11</sup>

Importantly, Hon Barry House, a former President of the Western Australian Legislative Council ruled:

The accuracy of the explanatory memorandum is fundamental to a supporting document to a bill.<sup>12</sup>

## **Judicial commentary on the role of Explanatory Memorandums**

The 2014 paper did not include any judicial commentary on EMs. Accordingly, commentary in 2 recent decisions of the United Kingdom Supreme Court (UKSC) and the Australian High Court follows.

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<sup>9</sup> This applies to EMs made publicly available. In some jurisdictions, such as Western Australia, some EMs are provided only for the information of the parliamentary committee. This is the case with the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament, which has the power to make them public.

<sup>10</sup> Relevantly, the President of the Legislative Council of Western Australia, in a statement on the Mental Health Bill 2013, remarked on the length of the Second Reading Speech (21 pages) and stated "*The introduction in standing order 121(3) of the requirement for the member in charge of a bill to table an explanatory memorandum was intentionally designed to provide the clause-by-clause detail that members need to assist them in an understanding of the policy and effect of a bill. I would not like to see the length and detail of the speech given last night to become common practice.*"

<sup>11</sup> Joint Standing Committee on Delegated Legislation, Report 65, [Explanatory Report in relation to the Legal Profession Conduct Amendment Rules 2013](#), Western Australia, Legislative Council, 24 October 2013, p 3. See also European Affairs Committee, 5<sup>th</sup> Report of Session 2021-22, [Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/ Northern Ireland](#), United Kingdom, House of Lords, 22 March 2022, p 24-28.

<sup>12</sup> Legislative Council, [Debates](#), 19 November 2013, p 6061.

In a judgement given on 2 February 2022 the UKSC made some observations on the role EMs play as statutory interpretation aids. Chief amongst these is that the clear meaning of the legislation itself takes precedence over the secondary role played by explanatory material:

External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions.

But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.<sup>13</sup>

In 2020, Justice Stephen Gageler in the High Court made similar observations, emphasising that EMs do not supplant or displace the meaning of statutory text. He also recognised that their quality can sometimes be wanting:

Notoriously, explanatory memoranda sometimes get the law wrong. The potential for error in examples of the contemplated operation of provisions set out in explanatory memoranda is highlighted by the acknowledgement of the Parliament in [s 15AD\(b\)](#) of the [Acts Interpretation Act](#) that even an enacted example of the operation of a provision might get the legal operation of the provision wrong: "if the example is inconsistent with the provision, the provision prevails".

The quality and extent of the assistance extrinsic materials provide in fixing the meaning of statutory text is not uniform. The quality and extent of the assistance varies in practice in ways unable to be fully appreciated without regard to the provenance and conditions of creation of the extrinsic materials.<sup>14</sup>

## Sources for the preparation of Explanatory Memorandums

Interpretation legislation in most Australian jurisdictions refer to EMs as an interpretation aid. For example, section 19(2) of the *Interpretation Act 1984* (WA) states:

### 19. Extrinsic material, use of in interpretation

- (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes —
- (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted.

However, the requirements for the preparation of EMs for primary and subsidiary legislation vary across jurisdictions. They are contained in different sources, such as legislation, standing orders,

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<sup>13</sup> [R \(on the application of O \(a minor, by her litigation friend AO\)\) \(Appellant\) v Secretary of State for the Home Department \(Respondent\) R \(on the application of The Project for the Registration of Children as British Citizens\) \(Appellant\) v Secretary of State for the Home Department \(Respondent\)](#) [2022] UKSC 3, page 10, paragraph 30 (Lord Hodge, with whom Lord Briggs, Lord Stephens and Lady Rose agreed). The other external aids Lord Hodge refers to are Law Commission reports, reports of Royal Commissions and Government White Papers.

<sup>14</sup> [Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union; Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union](#), 2020 [HCA] 29 (13 August 2020).

legislation handbooks, committee practice notes and Premier's Circulars. This is demonstrated in Appendix 1. Some sources merely require there to be an EM. Others contain detailed form and content requirements.

### Negative feedback on Explanatory Memorandums

Some historical (contained in the 2014 paper) and more recent criticism of EMs is summarised in the table below.

A common criticism is that the EM merely paraphrases the proposed legislation and does not assist the reader in understanding why it is being made.<sup>15</sup> A leading source of guidance on the preparation of EMs in Australia, the Department of Prime Minister and Cabinet Legislation Handbook (Legislation Handbook), states (emphasis added):

Notes on clauses or amendments in an explanatory memorandum are intended to be a companion explanation to the clauses of, or amendments to, a bill and are to be drafted in a way that makes them accessible to, and understood by, both expert and non-expert users of the legislation. Notes are also to take into account those matters considered by the Senate Committee for the Scrutiny of Bills set out at paragraphs 7.26 to 7.29. **The notes must avoid repeating the words of the bill or amendments or restating them in alternative language.**<sup>16</sup>

Criticisms of EMs	
Source	Criticism
The Australian and New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011 <sup>17</sup>	<b>Victoria</b> The standard of explanatory memoranda and statements of compatibility vary greatly and the Committee engages in robust correspondence with Ministers reminding them of the Committee's expectations. <sup>18</sup>
	<b>Western Australia</b> An issue is that the Explanatory Memoranda (EM) paraphrases, rather than explains, the bill and its provisions. They can also contain ambiguous information and despite this having been drawn to attention of Parliament on numerous occasions, it remains an ongoing problem. A statement in an EM that merely paraphrases clauses of the bill adds nothing and does not provide a rationale for and practical effect of the terms of a bill. <sup>19</sup>

<sup>15</sup> See, for example, Sainsbury, Maree, '[Context or Chaos: Statutory Interpretation and the Australian Copyright Act](#)', Statute Law Review, Volume 32(1), p 64; Pearce, Dennis, '[Legislative Scrutiny: Are the Anzacs still the leaders?](#)', a paper presented to the Australia-New Zealand Scrutiny of Legislation Conference held in Canberra, July 2009 and Standing Committee on Uniform Legislation and Statutes Review, [2011 Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report](#), April 2011, p 5.

<sup>16</sup> Department of the Prime Minister and Cabinet, Canberra, [Legislation Handbook](#), February 2017, p 41.

<sup>17</sup> Participating committees were invited, in their reports on their activities since the previous conference in 2009, to provide feedback on the quality and usefulness of explanatory material in the committee's jurisdiction.

<sup>18</sup> Victoria, Scrutiny of Acts and Regulations Committee, [2011 Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report](#), p 3.

<sup>19</sup> Standing Committee on Uniform Legislation and Statutes Review, [2011 Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report](#), Western Australia, Legislative Council, April 2011, p 5.

	<p><b>Senate</b></p> <p>The committee often has a need to seek information from ministers that should have been included in the original explanatory memoranda.<sup>20</sup></p>
<p><b>The report of the Senate Standing Committee for the Scrutiny of Bills (2004)<sup>21</sup></b></p>	<ul style="list-style-type: none"> <li>• An EM should contain an explanation for any provision within a bill that appears to infringe its terms of reference and provide reasons or justifications for this.</li> <li>• There have been a number of instances where EMs have not complied with the Legislation Handbook, Legislation Circulars and Office of Parliamentary Counsel, which contain guidance for the drafting of EMs. For example, despite paragraph 8.18 of the Legislation Handbook stating notes on clauses should not simply repeat the words of the bill or restate them in simpler language but explain their purpose, some EMs submitted did just that by either failing to explain all the clauses in the bill or provide an explanation for a schedule to the bill.</li> <li>• The Legislation Handbook does not contain any guidance for a departmental officer to determine whether provisions in a bill may infringe the Senate Committee's terms of reference. A list of such matters is set out in the report.</li> <li>• The need to write to the responsible Minister seeking information on proposed legislation could be avoided and time saved if this information had been contained in the EM.</li> <li>• Departmental officers should be encouraged to note concerns raised in past committee reports.</li> <li>• Quality control checks of EMs within departments are inadequate and ineffective and the following suggestions may assist in addressing the issue: <ul style="list-style-type: none"> <li>(i) The Amendment of the Legislation Handbook to provide further guidance on the matters the Senate Committee considers should be addressed in EMs (i.e. those matters that may infringe its terms of reference).</li> <li>(ii) The development of a course to train departmental officers in the preparation of EMs.</li> <li>(iii) Before a bill is introduced into Parliament, an appropriately qualified person should check the EM to ensure it explains fully the effect and operation of the proposed legislation and complies with the requirements in the Legislation Handbook.</li> </ul> </li> </ul>
<p><b>Parliamentary Joint Committee on Human Rights<sup>22</sup></b></p>	<p>This committee recently considered the quality of Statements of Compatibility (SOCs)<sup>23</sup> in its inquiry into Australia's human rights framework. Regarding the quality of SOC's, the committee observed:</p> <p style="text-align: center;"><i>Although the quality of statements of compatibility has generally improved</i></p>

<sup>20</sup> Standing Committee for the Scrutiny of Bills, 2011 [Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report](#), Commonwealth of Australia, Senate, April 2011, p 4.

<sup>21</sup> Commonwealth of Australia, Senate, Standing Committee for the Scrutiny of Bills, [The Quality of Explanatory Memoranda Accompanying Bills](#), Third Report of 2004, 24 March 2004, p 73. This was probably the most comprehensive review of EMs conducted by a parliamentary committee in Australia. The committee undertook an in-depth review of the standard of EMs for proposed primary legislation it has scrutinised. The committee also set out its expectations of what an EM should address. The fact that the committee devoted an entire report focussing on this issue is telling about the concerns held over the quality of EMs. The Legislation Handbook, referred to in Appendix 2, has been updated since this report, including detailing concerns expressed by parliamentary committees on the quality of EMs.

<sup>22</sup> Parliament of Australia, [Parliamentary Joint Committee on Human Rights](#).

<sup>23</sup> Sections 8 and 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011* require that a bill and legislative instrument (subject to disallowance) must include a 'statement of compatibility' (SOC) which assesses whether

	<p>over time, the quality of individual statements nevertheless can vary dramatically. In 2018, this committee identified that several common issues in the drafting of statements of compatibility made the committee's task of analysing human rights compatibility more difficult, including:</p> <ul style="list-style-type: none"> <li>- failure to identify any or all human rights engaged by a measure;</li> <li>- setting out insufficient information about the operation of the legislation and the objectives supporting it to enable the committee to determine whether measures in the legislation engage and limit or promote human rights;</li> <li>- identifying that a right is engaged, but not sufficiently explaining how; and</li> <li>- not assessing whether any limitations on the human rights identified in the statement of compatibility are permissible (by reference to the committee's analytical framework).<sup>24</sup></li> </ul>
<p><b>Joint Standing Committee on Delegated Legislation of the Western Australian Parliament</b></p>	<p>EMs for the Legal Profession Conduct Amendment Rules 2013 and the Supreme Court Rules 2013 were inadequate in the following respects.</p> <ul style="list-style-type: none"> <li>• Legal Profession Conduct Amendment Rules 2013: The EM failed to contain any rationale for the making of some of the amendment rules, which introduced exemptions to the prohibition on legal practitioners borrowing from a client or former client. It was only after exchanging 4 letters with the agency that the Committee's concerns with the instrument were satisfied.<sup>25</sup></li> <li>• Supreme Court Rules 2013: Details of consultations undertaken specified in the EM were inadequate and did not comply with the <i>Premier's Circular 2007/14</i>,<sup>26</sup> and unlike as stated in the EM, the amendments were both unusual and contentious.<sup>27</sup></li> </ul>
<p><b>Standing Committee on Uniform Legislation and Statutes Review of the Western Australian Parliament</b></p>	<p>This committee has recently tabled several reports containing commentary on deficient EMs.</p> <p>For instance, in its report on the Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application (Levy) Bill 2020, the committee stated the EM:</p> <p><i>falls short of its purpose of informing the Parliament of Western Australia and the Western Australian public of the need or desirability for, and effect of, a</i></p>

the legislation is compatible with human rights. They are the equivalent to EMs for the purposes of the role of the Parliamentary Joint Committee on Human Rights.

<sup>24</sup> Parliamentary Joint Committee on Human Rights, [Inquiry into Australia's Human Rights Framework](#), Commonwealth of Australia, May 2024, p 240.

<sup>25</sup> Joint Standing Committee on Delegated Legislation, [Explanatory Report in relation to the Legal Profession Conduct Amendment Rules 2013](#), Western Australia, Legislative Council, 24 October 2013; Joint Standing Committee on Delegated Legislation; [Supreme Court Amendment Rules 2013](#), Western Australia, Legislative Council, 24 October 2013.

<sup>26</sup> This contains the requirements for an EM for subsidiary legislation submitted to the Delegated Legislation Committee for scrutiny. The current version is [Premier Circular 2023/01](#).

<sup>27</sup> See Joint Standing Committee on Delegated Legislation, [Supreme Court Amendment Rules 2013](#), 24 October 2013, p 6-7, where the committee cites a passage from the judgment of Gibbs CJ in the leading case of *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, paragraph 13. This confirmed it is for the legislature and not the courts to implement changes to the common law. This underlined the committee's concern with the EM stating the amendments were neither unusual or contentious.



	<p><i>significant regulation-making power.</i></p> <p>It recommended the second reading speech or EM for a bill should identify any Henry VIII clause in that bill, provide a rationale for it and explain its practical effect.<sup>28</sup></p>
<p><b>House of Lords European Scrutiny and European Affairs Committees</b></p>	<p>The European Scrutiny Committee noted in its 2012-2013 Annual Report that: <i>Regrettably, the Committee has noted an overall decline in the quality of EMs during the 2012–13 Session, which has made its work more challenging. The Committee wrote to the Minister for Europe on 13 February 2013 highlighting this as an issue, alongside delays in EMs being provided.</i><sup>29</sup></p> <p>In its 5<sup>th</sup> report of session 2021-22, the European Affairs Committee drew attention to: <i>the inconsistent and at times poor quality of Government Explanatory Memoranda and ministerial correspondence on EU legislative proposals applying to Northern Ireland under the Protocol.</i><sup>30</sup></p>
<p><b>House of Lords Secondary Legislation Committee</b></p>	<p>Some recent examples of poor quality EMs for statutory instruments that this committee has highlighted include:</p> <ul style="list-style-type: none"> <li>• <b>Infected Blood Compensation Scheme Regulations 2024:</b> <i>The compensation scheme is complex, and we found the EM to be of poor quality, using overly technical language and lacking basic information about the policy.</i><sup>31</sup></li> <li>• <b>Education (Student Fees, Awards and Support) (Amendment) Regulations 2024:</b> <i>We were disappointed by the information DfE provided to facilitate parliamentary scrutiny and public understanding of these Regulations. The EM was lacking basic information on why the policy was chosen, and a key piece of supporting material, the Equality Impact Assessment (EIA), which contained some criticisms of the policy, was not laid at the same time as the instrument. Even when published, the EIA was not made easy to access. We reiterate that an EM should include an explanation of the “why” as well as the “what” of the policy and should address any known concerns.</i><sup>32</sup></li> </ul>
<p><b>The Constitutional Affairs Committee of the Welsh</b></p>	<p>In its report on an inquiry into the Drafting of Welsh Government Measures, this committee stated: <i>There have been a number of criticisms made by Assembly Committees about EMs for Assembly Measures. Committees have on a number of</i></p>

<sup>28</sup> Standing Committee on Uniform Legislation and Statutes Review, [Legal Profession Uniform Law Application Bill 2020 and Legal Profession Uniform Law Application \(Levy\) Bill 2020](#), Report 129, 15 September 2020 Western Australia, Legislative Council, p 33. See also Standing Committee on Uniform Legislation and Statutes Review, [Health Practitioner Regulation National Law Application Bill 2023](#), Report 145, Western Australia, Legislative Council, 27 February 2024, p 8-9.

<sup>29</sup> House of Lords, European Union Committee, [Report on 2012-2013](#), United Kingdom, 14 June 2013, p 17, paragraph 58.

<sup>30</sup> European Affairs Committee, 5<sup>th</sup> Report of Session 2021-22, [Scrutiny of EU legislative proposals within the scope of the Protocol on Ireland/ Northern Ireland](#), United Kingdom, House of Lords, 22 March 2022, p 24-28.

<sup>31</sup> House of Lords, Secondary Legislation Committee, [2<sup>nd</sup> report of Session 2024-25](#), 5 September 2024, p 9.

<sup>32</sup> House of Lords, Secondary Legislation Committee, [12<sup>th</sup> Report of Session 2023-24](#), 8 February 2024, p 17.

<p><b>Parliament (Senedd)</b><sup>33</sup></p>	<p><i>occasions complained that EMs contained insufficient information to allow a balanced judgement to be made of the policy a Measure was trying to implement or of whether the Measure achieves its policy aim.</i></p> <p><i>During our inquiry we again heard a number of criticisms of EMs including that they can sometimes obfuscate rather than explain, that they can be overly long and that they often simply paraphrase the relevant section of a Measure.</i><sup>34</sup></p>
<p><b>The Commerce Committee of the New Zealand Parliament</b></p>	<p>In its interim report on the Regulatory Standards Bill, the Commerce Committee of the New Zealand Parliament recorded advice it had received from the Regulations Review Committee on this bill.<sup>35</sup> In the advice this committee:</p> <ul style="list-style-type: none"> <li>• made reference to its participation in the Scrutiny of Legislation Conference mentioned above, including its report remarks on EMs;</li> <li>• noted the requirements of the <i>Cabguide</i> regarding the preparation of EMs;<sup>36</sup></li> <li>• remarked upon: <ul style="list-style-type: none"> <li>(i) instances where the requirements of the <i>Cabguide</i> were not complied with; and</li> <li>(ii) other instances where EMs did not contain sufficient detail on legislative proposals and had been drafted too quickly.<sup>37</sup></li> </ul> </li> </ul>
<p><b>Australian Capital Territory Standing Committee on Justice and Community Safety</b></p>	<p>In its Scrutiny Report 44, the committee requested a revised explanatory statement for a private member's bill that includes information necessary for it to perform its scrutiny role. This included information on why any limitation to the right to freedom of movement is proportionate or justified or otherwise considered reasonable using the framework set out in section 28 of the <i>Human Rights Act 2004</i>.<sup>38</sup></p>

The reasons for poor quality EMs are varied. Dr Jacinta Dharmananda has pointed to 'variations in resources, experience, skill and knowledge between federal departments' as one reason for the lack of uniformity in the quality of EMs in the Federal sphere.<sup>39</sup> This is certainly a factor that must be considered. Presumably, existing guidance on the form and content of EMs in some jurisdictions might assist in overcoming this practical issue? Despite this, the author's research in 2014 suggested this guidance had not provided sufficient incentives to achieve consistent best practice. This led to making a case for various reforms to improve the quality of EMs, including better quality and control by agencies. These reforms are reiterated below, along with an additional suggestion to legislatively mandate tabling revised EMs that correct shortcomings identified by a parliamentary committee.

<sup>33</sup> Now the Legislation, Justice and Constitution Committee (since 26 May 2021).

<sup>34</sup> Welsh Assembly, Constitutional Affairs Committee, [Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years](#), United Kingdom, February 2011, p 28.

<sup>35</sup> New Zealand Parliament, Commerce Committee, Interim report on the Regulatory Standards Bill, 30 September 2011.

<sup>36</sup> The Cabguide is a New Zealand Government website containing advice to public servants on the procedures and operation of the New Zealand Cabinet, Cabinet committees and Executive Council.

<sup>37</sup> From 29 July 2013, New Zealand introduced the legislative disclosure statement, which accompanies most Government Bills and Supplementary Order Papers setting out proposed amendments to a Bill.

<sup>38</sup> Standing Committee on Justice and Community Safety (Legislative Scrutiny Role), [Scrutiny Report 44](#), Legislative Assembly, Australian Capital Territory, August 2024, p 3-4.

<sup>39</sup> J. Dharmananda, [Using Parliamentary Materials in Interpretation: Insights from Parliamentary Process](#) [2018] UNSWLawJl 2; (2018) 41 University of New South Wales Law Journal p 4.

## Survey of different jurisdictions

### Views of Parliamentary staff – 2014 paper

#### *Introduction*

As stated above, as part of the research for the 2014 paper, the author conducted a survey of parliamentary staff for committees in Australian and some Westminster jurisdictions. These included the United Kingdom, Canada and New Zealand. This compared views and practices between Westminster systems that undertake the scrutiny of legislation, which involve considering EMs. The purpose of this survey was to gather empirical evidence to assist in determining the validity of the Proposition the subject of the paper. The questions posed appear in Appendix 2. Sixteen responses were received from 14 jurisdictions, 12 of which gave their view on the Proposition.

#### *Analysis of feedback*

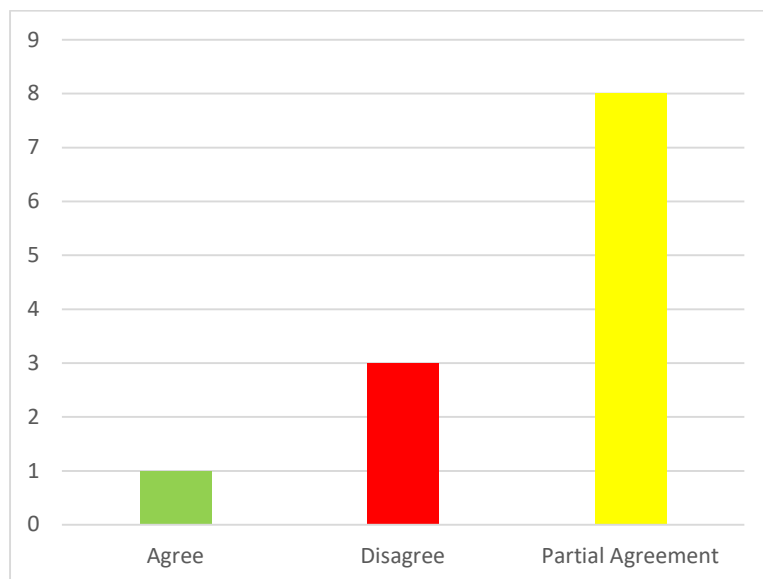
The tool used to analyse the results of the survey and determine whether the Proposition was supported by the feedback was a simple ‘traffic light’ system. This graded responses, as recorded in the graph below, as follows:

Left column: Fully agree with the proposition.

Right column: Partial agreement – the quality of EMs varies too much to decide one way or the other.

Middle column: Disagree with the proposition.

For the Proposition to be valid, in the opinion of the author, at least a majority of participants would need to fully agree with the Proposition.



**Note: the number of responses is per committee, not jurisdiction.**

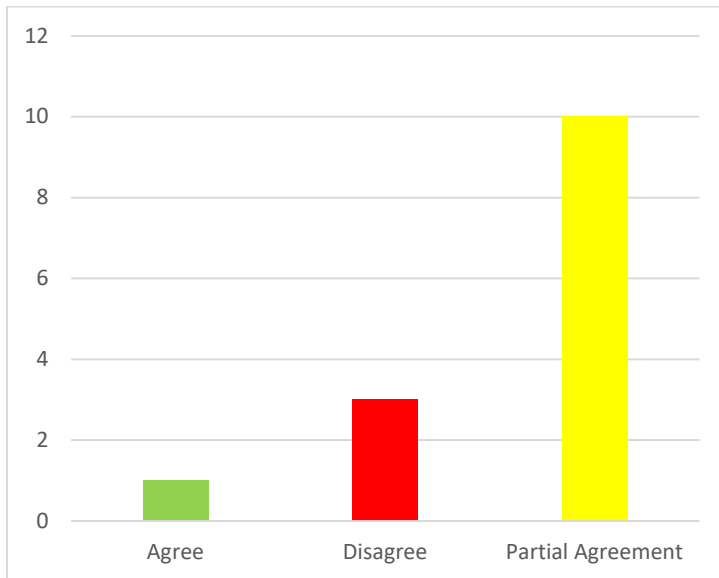
Despite ample literature drawing attention to poor quality EMs, the survey results suggested there was not a degree of widespread systemic failure sufficient to support the Proposition.

However, the weight of this literature and the instances of partial agreement with the Proposition warranted a serious consideration of reform proposals.

### Views of Parliamentary staff – 2024

In August 2024 the author again posed the same questions to parliamentary staff to assess whether there have been any improvements in the quality of EMs. The same tool was used to analyse results. In most cases, unsurprisingly, the staff that responded were different to those in 2014. This must be considered when analysing the results, as views amongst parliamentary staff will inevitably differ.

Fifteen responses were received from 11 jurisdictions, 13 of which gave their view on the Proposition, recorded in the graph below.



The graph demonstrates that little has changed in terms of the numbers agreeing, disagreeing or partially agreeing with the Proposition. The author was, again, given many examples of poor quality EMs that committees have drawn attention to in their reports. However, this feedback was not universal, with plenty of good quality EMs referred to that assisted committees in their work. Some responders were also of the view there had been improvement in the quality of EMs over time and there had been a willingness of government to take on board committee feedback and improve EM quality.

### Examples of best practice

Although offering no guarantee of ensuring consistently better quality EMs, clear and comprehensive form and content requirements can assist. Some jurisdictions surveyed have these requirements, including Queensland, which are mandated by legislation.<sup>40</sup> The “*Guidelines for the preparation of explanatory notes*”,<sup>41</sup> issued by the Department of Premier and Cabinet in Queensland contains detailed guidance on what is expected to be contained in EMs for Bills and subsidiary legislation. The inclusion of template EMs is a helpful way of attempting to achieve a consistent level of quality. Also, these guidelines focus the drafter’s mind on the type of issues that attract the interest of the relevant portfolio scrutiny committee. It is for this reason that the author continues to regard this as a best practice approach.

<sup>40</sup> *Legislative Standards Act 1992*, s 23. See also Appendix 1.

<sup>41</sup> See Appendix 1.

## **The case for reform**

### **Generally**

From the weight of the material considered in this paper, some jurisdictions that have the most comprehensive and clear guidance continue, somewhat ironically, to attract the most criticism. Accordingly, the lack of quality of some EMs is not necessarily due to an absence of guidance but the failure of some agencies to follow this guidance.

The matters considered by parliamentary committees in their scrutiny of proposed legislation are clearly set out in their terms of reference and in reports tabled in Parliament. By not routinely drawing attention to any possible infringement of terms of reference and providing justification for this, one is left to wonder about some agencies' commitment to and appreciation of the parliamentary scrutiny process. Indeed, some literature has hinted that there may be more underlying reasons why there has been a failure to prepare satisfactory EMs in some instances and why directions in documentation such as the Cabinet Handbook are not always being complied with. It is clearly in the interests of the Executive to place legislation it wishes the Parliament to pass in a positive light. It is also arguable that there is a dissonance between what some agencies and parliamentary committees believe constitutes problematic legislation.

It is concerning that a failure to comply with form and content requirements for EMs does not affect the validity, operation or enforcement of primary or subsidiary legislation, as referred to in Appendix 1. A similar lack of repercussions pervades the other non-statutory requirements for EMs. The failure of these requirements in having any real, practical teeth reduces the prospect of there being sufficient incentives to achieve best practice in the preparation of EMs.

These observations suggest there is a clear need for reform to ensure EMs meet the expectations of Parliaments and that agencies fulfil their obligation as delegates of the Parliament, to full disclosure.

### **Suggestions for reform**

There have been several suggestions for reform seeking to improve the quality of EMs. These include:

- better quality control by agencies to ensure:
  - (a) that the content of draft EMs are checked by staff with appropriate experience and qualifications (as recommend in the Senate Scrutiny of Bills' third report, described above)
  - (b) EMs comply with the relevant requirements and fully disclose all potential issues that may be of interest to those scrutinising the proposed legislation,
- appropriate training for those preparing EMs.

Another practice that may assist in improving the quality is for someone, other than the instructing officer for the legislation in the agency, to be responsible for preparing the EM. This person(s) would be more independent of the policy making process. This could assist in ensuring a more dispassionate and objective approach.

Reforms which entrench better practices to ensure a more consistent level of adherence to form and content requirements, rather than leaving this up to the discretion and practice of individual agencies, have merit.

### *National uniformity?*

Each Australian Parliament has exclusive cognisance over the processes that are followed in the making of legislation applying in its jurisdiction. However, the author questions why there is not some uniformity across Australia in the approach to EMs to ensure better consistency. Parliament and its

committees need to have a detailed explanation of legislation the Executive is asking it to consider and pass. Such a requirement transcends jurisdictional borders. It is arguable that baseline form and content requirements for EMs for primary and delegated legislation should be recorded in a single, authoritative source and not the current plethora of documents. Requirements over and above those contained in such a document could always be catered for in additional documentation specific to the relevant jurisdiction.

Accordingly, one possible reform measure could be the introduction of a uniform legislation model setting out clear and detailed form and content requirements for EMs for proposed primary and subsidiary legislation. Similar requirements are in place for some legislation in the Commonwealth, Victoria and Queensland (as detailed in Appendix 1). However, under the proposed model, the validity and enforceability of the proposed legislation would be conditional upon all such requirements being satisfactorily fulfilled by the relevant agency.

This inevitably raises the question about which body would be responsible for making the decision about whether these requirements have been fulfilled and the impact on the legislative making process (including its timing)? For instance, in most Australian jurisdictions, subsidiary legislation is subject to the disallowance procedure, not an affirmative resolution procedure.<sup>42</sup>

A helpful example with respect to subsidiary legislation is the process by which the United Kingdom House of Lords Secondary Legislation Committee scrutinises instruments. Those instruments subject to the affirmative resolution procedure cannot proceed to parliamentary debate until this committee has completed its scrutiny process. This will be delayed until the committee is satisfied with the quality of the EM. This provides a strong incentive to ensure that this committee is satisfied with the EM.

#### *Additional initiatives*

Other initiatives could include:

- setting up a specific committee to assess the adequacy of explanatory material;
- engaging the Clerk/other parliamentary staff to undertake this assessment and make recommendations to the Presiding Officer. This would feed into the parliamentary process for making legislation and could result in preventing proposed legislation from proceeding until all shortcomings have been addressed.

A final suggestion is to legislatively mandate that the relevant Minister table a revised EM that addresses concerns of the relevant scrutiny committee, if that committee deems it necessary. It is noteworthy there have been some recent instances where governments have tabled revised and improved EMs to address scrutiny committee concerns.<sup>43</sup> While this does not prevent a deficient EM from being initially tabled, it may improve their quality over time to reduce the risk of the relevant Minister having to table a revised EM.

For any reform measure to succeed, it is essential that all participants in the parliamentary process recognise the important role played by EMs and the need for complete openness and transparency by the Executive towards the Parliament regarding information on legislative proposals.

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<sup>42</sup> See the observations made by Mr Stephen Argument in his paper [Leaving it to the Regs – The pros and cons of dealing with issues in subordinate legislation](#), paper for Australia-New Zealand Scrutiny of Legislation Conference, Brisbane, 26-28 July 2011, p 19.

<sup>43</sup> House of Lords, Secondary Legislation Scrutiny Committee, 56<sup>th</sup> Report of Session 2022-23, [Work of the Committee in Session 2022-23](#), p 6-7.

## **Conclusion**

A parliamentary committee has the right to expect assistance with its scrutiny function by a fit for purpose EM. It should not have to consistently draw detailed shortcomings to the attention of the relevant agency which possesses expert knowledge of the proposed legislation. The number of criticisms levelled at the quality of EMs in all jurisdictions considered by the author suggests this expectation is still not being routinely met. Consequently, EMs are continuing to not fulfill their purpose as often as they should.

The surveyed evidence in 2014 suggested that EMs produced by agencies do, in many instances, enhance scrutiny of proposed legislation. 10 years later, feedback from parliamentary staff suggests this remains the case. Indeed, some jurisdictions reported improvements in the quality of EMs. However, the evidence also suggests there are enough instances of poor quality EMs to support a strong case for reforms.

The author continues to argue for the establishment of a legislative provision in every Australian jurisdiction setting out detailed content requirements for all EMs, like in Queensland and the Commonwealth. However, if the failure to comply with the requirements does not affect the validity or enforceability of the legislation, this significantly undermines the effectiveness of this type of provision. If any legislative requirement is to have real teeth, there needs to be a compulsory process that checks EMs compliance with the legislative requirement. If they fail to comply, a power to halt the legislative making process until improvements are made deserves consideration. A legislative requirement to table a revised EM could assist in achieving this.

## Appendix 1

### Sources of requirements for EMs

Jurisdiction	Source	Requirements	Sanction for non-compliance? <sup>44</sup>
Commonwealth of Australia	<p>Primary legislation:  <a href="#">Department of Prime Minister and Cabinet Legislation Handbook</a>.</p> <p><a href="#">Department of Prime Minister and Cabinet Tabling Guidelines</a>.</p> <p><a href="#">Office of Parliamentary Counsel Drafting Directions</a>.</p> <p><a href="#">Senate Standing Committee for the Scrutiny of Bills Guidelines 2<sup>nd</sup> Edition July 2022</a></p> <p>Subsidiary legislation:  <a href="#">Legislation Act 2003</a>.</p> <p><a href="#">Senate Standing Committee for the Scrutiny of Delegated Legislation</a></p>	<p>Contains detailed information on when an EM is required and its form and content.</p> <p>Sets out the committee's expectations in relation to its technical scrutiny principles and what should be included in EMs.</p> <p>Section 15J contains a list of what the EM must contain. This includes a 'statement of compatibility' with rights and freedoms recognised in the international human rights treaties to which Australia is a party.</p> <p>Sets out the committee's expectations in relation to information to be included in EMs to address scrutiny principles.</p>	<p>Section 15K(2) states that a failure to comply with the requirements does not affect the validity or enforceability of the instrument.</p>
New South Wales	<p>Primary legislation:  <a href="#">Manual for the preparation of legislation (Parliamentary Counsel's Office, August 2000)</a>.</p> <p>Subsidiary legislation:                      As above.                      The <a href="#">Subordinate</a></p>	<p>No form and content requirements.</p> <p>Section 5 requires a regulatory impact statement for each</p>	

<sup>44</sup> This does not include committee initiated sanctions (i.e. correspondence with the Minister and reports to Parliament highlighting issues with EMs).



	<p><a href="#">Legislation Act 1989</a>, while not referring to EMs, requires the preparation of regulatory impact statements and accompanying submissions.</p>	<p>statutory rule to be prepared.</p> <p>Schedule 2 contains detailed content requirements for regulatory impact statements.</p> <p>Section 9 states that the failure to comply with the requirements of the Part does not affect the validity of the statutory rule.</p>	<p>Section 9 states that the failure to comply with the requirements of the Part does not affect the validity of the statutory rule.</p> <p>The requirement is subject to the rider 'as far as is reasonably practical' and there are a list of matters set out in Schedule 3 that do not require a regulatory impact statement.</p>
Victoria	<p>Primary legislation: <a href="#">Charter of Human Rights and Responsibilities Act 2006</a></p> <p><a href="#">Practice Note</a> issued 21 June 2016 by the Scrutiny of Acts and Regulations Committee</p> <p><a href="#">Office of the Chief Parliamentary Counsel Guide to preparing an Explanatory Memorandum and</a></p>	<p>Section 28 requires a statement of compatibility to accompany any bill (akin to what an EM may be required to contain).</p> <p>Sets out the expectations of the committee about what should be contained in explanatory material and gives a summary of the type of provisions frequently of concern to the committee.</p> <p>Assists instructors and drafters to prepare and settle the explanatory memorandum to a Bill.</p>	<p>Section 29 states that a failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.</p>

	<p><a href="#">template</a></p> <p>Subsidiary legislation: Scrutiny of Acts and Regulations Committee <a href="#">Practice Note</a>.</p>		
Queensland	<p>Primary legislation: <a href="#">Legislative Standards Act 1992</a></p> <p><a href="#">Queensland Cabinet Handbook</a></p> <p><a href="#">Guidelines for the preparation of explanatory notes</a></p> <p><a href="#">Explanatory Notes – Handy Hints</a></p> <p>Subsidiary legislation: As above</p>	<p>Section 23 sets out the content of what an EM must contain.</p> <p>Reasons for the non-inclusion of required information must be explained.</p> <p>Refers to the requirements contained in the <i>Legislative Standards Act 1992</i> as well as the <i>Guidelines to the preparation of explanatory notes</i> and the Queensland Legislation Handbook. It also includes requirements for statements of compatibility under the <i>Human Rights Act 2019</i>. See sections 8.3.5 and 8.3.6.</p> <p>These are publications of the Queensland Premier's Department and contains prescriptive information on requirements for EMs in order to comply with the <i>Legislative Standards Act 1992</i>. The guidelines include a template EM.</p> <p>As above (<i>Legislative Standards Act 1992</i>).</p>	Section 25 states that a failure to comply with the requirements does not affect the validity of the legislation.
South Australia	<p>Primary legislation: <a href="#">Legislation Interpretation Act 2021</a></p>	<p>Section 16 of the provides for the use of extrinsic material in interpretation.</p> <p>16(2)(e) provides that 'any explanatory memorandum relating to the Bill for the Act' can</p>	

	<p>Subsidiary legislation:  <a href="#">Legislative Instruments Act 1978</a> and 2011 Cabinet Guide – Guide to Executive Council Processes</p> <p>Legislative Review Information Guide (published 1 July 2020).</p> <p><a href="#">Premier and Cabinet Circular PCO34</a></p>	<p>be considered in its interpretation.<sup>45</sup></p> <p>While this legislation contains no EM or similar document requirements, a supporting report (akin to an EM) to accompany a regulation tabled in Parliament is required by the Cabinet Guide.</p> <p>Explains the information accompanying regulations the committee seeks (see paragraphs 3.2(g) and 3.3(8)).</p> <p>See also paragraphs 3.4 and 3.5 and Part 4 regarding ‘supporting report’ requirements.</p> <p>Largely mirrors the Information Guide requirements.</p>	
Tasmania	<p>Primary legislation: None</p> <p>Subsidiary legislation: The <a href="#">Subordinate Legislation Act 1992</a>, while not referring to EMs, requires the preparation of regulatory impact statements and accompanying submissions.</p> <p>Various departmental guidelines referring to the relevant scrutiny committee’s requirements.</p>	<p>Section 5 requires a regulatory impact statement for each statutory rule to be prepared.</p> <p>Section 10 states that a failure to comply with the requirements of the Part does not affect the validity of the subordinate legislation.</p> <p>Schedule 2 contains detailed content requirements for regulatory impact statements.</p>	<p>There are a list of matters set out in Schedule 3 that do not require a regulatory impact statement.</p>
Western Australia	<p>Primary legislation:</p>		

<sup>45</sup> This is despite no legal requirement in South Australia for an EM to be prepared for a Bill.

	<p>Legislative Assembly: <a href="#">Standing Order 162(2)</a></p> <p>Legislative Council: <a href="#">Standing Order 121(3)</a> (no form or content requirements).</p> <p><a href="#">Government Parliamentary Procedures Guide</a>, page 51</p> <p>Subsidiary legislation:</p> <p>For government departments and agencies: <a href="#">Premier's Circular 2023/01: Subsidiary Legislation – Explanatory Memoranda</a>.</p> <p>For local governments: <a href="#">Local Laws Explanatory Memoranda Directions 2010 Statutory Procedures Checklist</a></p>	<p>No form or content requirements.</p> <p>No form or content requirements.</p> <p>No form or specific content requirements, though some commentary on the importance of a well drafted EM.</p> <p>Contains form and content requirements.</p>	
Australian Capital Territory	<p>Primary legislation: None</p> <p>Subsidiary legislation: <a href="#">Guide to writing an explanatory statement</a> (a publication of the Standing Committee on Justice and Community Safety (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee))</p>	<p>Detailed requirements on form and content of an EM.</p>	
Northern Territory	<p>Primary legislation: <a href="#">Standing Order 146</a> requires that when a member concludes their second reading speech, they will table a signed Explanatory Statement.</p> <p><i>The Northern Territory Government Legislation</i></p>	<p>Notes that the Explanatory Statement</p>	

	<p><i>Handbook</i> produced by the Cabinet Office within the Department of the Chief Minister</p> <p>Subsidiary legislation: The <i>Northern Territory Government Legislation Handbook</i></p>	<p>explains the general intent of the Bill and describes the purpose of each clause of the Bill and what the effect of the Bill would be if passed.</p> <p>Also notes that particular care should be taken in the drafting of the Explanatory Statement given that it can be used by a court in determining the intent of legislation.</p> <p>Also provides a set template for Explanatory Statements.</p> <p>The responsible agency is required to prepare a 'Tabling Note' to accompany each item of subordinate legislation (regulations, by-laws, rules) which is tabled in the Assembly. The Tabling Note provides a brief summary of the regulations, by-laws or rules and is designed to assist the Assembly to understand the purpose of the legislation.</p> <p>The Cabinet Office provides a set template for Tabling Notes.</p>	
<p>United Kingdom House of Lords</p>	<p>Subsidiary legislation: <a href="#">Guide to preparing Explanatory Memoranda (EMs) to Statutory Instruments</a></p> <p><a href="#">Top Ten Tips for a good EM</a></p> <p><a href="#">Secondary Legislation Committee: Guidance for departments laying instruments</a></p>	<p>Sets out how to approach drafting EMs, and gives advice on what should be included within them and why.</p> <p>Contains hints on producing a quality EM, including that 'a good EM should be capable of being fully understood without the reader having to refer to other documents'.</p> <p>Sets out some of the Committee's concerns about EMs and provides examples of good</p>	

<p>United Kingdom House of Commons</p>	<p>Primary legislation: <a href="#">Cabinet Office Guide to Making Legislation 2022</a></p> <p>Subsidiary legislation: <a href="#">The National Archives Statutory Instrument Practice</a> (especially 3.23.1 to 3.23.18).</p>	<p>practice.</p> <p>General guidance on EMs, including when they are prepared in the legislative making process. Chapter 10 is dedicated to explaining their purpose and other matters including who should draft them and their content/structure.</p> <p>Explains the scope and drafting of EMs.</p>	
<p>Scotland</p>	<p>Primary legislation: <a href="#">Standing Orders of the Scottish Parliament</a> rule 9.3.</p> <p><a href="#">Part 2 of the Guidance on Public Bills</a>, paragraphs 2.14-2.28.</p> <p>Subsidiary legislation: Different accompanying documents accompany different types of secondary legislation (such as Equality Impact Assessments and Child Rights and Wellbeing Impact Assessments).</p>	<p>Subrule 2A provides that a Bill shall be accompanied by Explanatory Notes summarising objectively what each provision does and give other information necessary or expedient to explain the effect of the Bill.</p> <p>Defines and describes the purpose of Explanatory Notes.</p>	
<p>Wales</p>	<p>Primary legislation: <a href="#">Standing Orders of the Welsh Parliament (senedd.wales)</a> (26.6 – see also 26.91A for Member Bills, 26A13-</p>	<p>Detailed form and content requirements.</p>	<p>Not explicitly stated, though requirement states 'must'.</p>

	<p>15 for Private Bill and 26B9.14 for Hybrid Bills<sup>46</sup>).</p> <p><a href="#">Welsh Government Handbook</a> (Chapter 8). Sections 8.56 to 8.63 contains clearance requirements, including by various officials and the Minister.</p> <p>Subsidiary legislation:</p> <p><a href="#">Standing Orders of the Welsh Parliament (senedd.wales)</a> (27.1).</p>	<p>Detailed form and content requirements (contains commentary on the relevant Standing Orders).</p>	<p>As above.</p>
<p>New Zealand</p>	<p>Primary legislation:</p> <p><a href="#">Parliamentary Practice in New Zealand, Chapter 24: Classification and Form of Legislation</a></p>	<p>Contains some general information on Explanatory Notes, including some content guidance.</p>	

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<sup>46</sup>A Hybrid Bill is a Public Bill introduced by a member of the Welsh Government which affects a particular private interest of an individual or body in a manner different to the private interests of other individuals or bodies of the same category or class. See Standing Order 26B.1.

## Appendix 2

### Questions posed to parliamentary staff

1. What are the requirements in your jurisdiction for the preparation of explanatory memorandums for bills and delegated legislation (i.e. Standing Orders, legislation, departmental and parliamentary counsel handbooks/guidelines)?
2. How would you generally describe the quality of explanatory memorandums in your jurisdiction for:
  - bills;
  - delegated legislation.
3. Have there been any incidences where the quality of the explanatory memorandum has been such that the Parliament/its committees have not been able to perform its function of scrutiny of the Executive? Please provide examples and:
  - give reasons, if possible, about why the quality was not acceptable (regarding content of the explanatory memorandum as well as why the drafter failed to provide adequate information);
  - describe how the committee addressed the issue and the outcome.
4. If possible, please identify examples of explanatory memorandum for bills and delegated legislation that you believe are of a sufficient quality to assist Parliament/its committees to properly undertake their scrutiny role and explain why?
5. Do you believe that the requirements in your jurisdiction for the preparation of explanatory memorandums for bills and delegated legislation are sufficient?
6. If so, why?
7. If not, why not and what additional requirements, if any, do you believe would improve the quality of explanatory memorandums?
8. What are your views on the accuracy of the proposition set out above?
9. Please provide any other information you feel would be of assistance to my research (such as references to committee reports that deal with the subject matter).