



Legislative Assembly for the ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
(performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

Guide to writing an explanatory statement

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The purposes of an explanatory statement

1. The form and content of an explanatory statement is dictated by its purposes, which are:

- to inform members of the public – who must be regarded as lacking both legal expertise, and technical expertise in the relevant subject matter - as to what it is proposed the Assembly should do by way of making or amending an Act. The explanatory statement should “help the reader grasp what the bill does, how it does it, and to provide helpful background”,¹ in order that they may (1) participate in the process of law-making,² and, (2) when referring to any Act that results from the bill, to gain some understanding of its purpose and provisions;
- to identify all respects in which provisions of the bill may be fairly regarded as limiting a right stated in the *Human Rights Act 2004* (HRA), and/or any right based on some other source (such as the common law, and binding international treaties), and present a justification for such a limitation in terms that satisfy the requirements of HRA section 28;
- to assist the Scrutiny Committee in its deliberations and its task of presenting a report to the Assembly, and in particular, to identify all respects in which provisions of the bill may be fairly regarded as engaging a Committee term of reference;
- to provide Members with an explanation of the bill that will assist them to make an informed decision as to how to deal with the bill – whether to seek to amend it, or whether to vote for a particular clause, and in the end, whether to vote that the bill be agreed to; and
- to assist a court, or any person called upon to construe the terms on an Act: see *Appendix 1* for further discussion.

The structure of an explanatory statement

The header and disclaimers

2.1 It is recommended that the first part of the explanatory statement should take the following standard form:³

Introduction

This explanatory statement relates to the [name of bill] as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

¹ Cabinet Office of the Government of the United Kingdom: see http://interim.cabinetoffice.gov.uk/making-legislation-guide/explanatory_notes.aspx, para 11.8.

² Noting that paragraph 17(a) of the Human Rights Act provides that “Every citizen has the right, and is to have the opportunity, to - (a) take part in the conduct of public affairs, directly or through freely chosen representatives; ...”.

³ This is based on recommendations by the Cabinet Office of the Government of the United Kingdom: see http://interim.cabinetoffice.gov.uk/making-legislation-guide/explanatory_notes.aspx

The Statement must to be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

2.2 While there are no fixed rules to govern the content of an explanatory statement, it is recommended that it then have at least two major components: (1) an **overview** of the bill, **and** (2) an **outline of the provisions** of the bill, (which may also be called “notes on clauses”). In some cases, however, the usefulness of the document may however be affected adversely if the attempt is made to strictly differentiate these two components. In circumstances, such as with a complex and lengthy bill, it may be desirable that a particular division, a part, or even a clause of the bill should be preceded by elements of an overview.

2.3 For example, where a number of provisions raise the same issue of compatibility with the Human Rights Act, (as frequently occurs where a number of provisions would create an offence of strict liability), the overview might usefully identify those provisions, and in relation to all of them, or groups of them, offer justification(s) for limiting HRA subsection 22(1). In contrast, where an HRA (or some other rights issue) is raised by a single provision, the justification is better offered where the relevant clause of the bill is dealt with in the outline of provisions.

The overview

The overview usually comprises some or all of these topics:

(1) A statement of the purpose of the bill and its intended effect

3.1 The ACT *Legislation Handbook* advises that the outline should describe “the purpose of the bill and the effect of the substantive provisions of the bill/regulation/disallowable instrument”.⁴

3.2 A concise elaboration is found in section 23 of the *Legislative Standards Act 1992* of Queensland, which provides that an explanatory note for a bill must include

- a brief statement of the policy objectives of the bill and the reasons for them;
- a brief statement of the way the policy objectives will be achieved by the bill and why this way of achieving the objectives is reasonable and appropriate;
- if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives and why the alternative was not adopted.

⁴ September 2009, at 60

3.3 This statement should refer to any consultation that was carried out in relation to the bill, and reference to any relevant reports or other documents that would illuminate the purpose of the bill.

(2) A costs and benefits statement

3.4. The *ACT Legislation Handbook* states that the overview should contain a “description of the direct and indirect financial effect of the bill/regulation/disallowable instrument”, and “a brief description of savings, costs, revenue losses or gains from the bill/regulation/disallowable instrument”. If precise figures are unavailable, “an estimate should be included”, and “if an estimate is unavailable, an explanation should be included”.⁵

(3) National scheme bills

3.5 If the bill is substantially uniform or complementary with legislation of the Commonwealth or another State, there should be a statement to that effect, and a brief explanation of the legislative scheme.

3.6 The passage of national co-operative laws is a matter for the Assembly. The explanatory statement to bills creating or enhancing such schemes should fully explain the provisions of any law of another Australian jurisdiction (the model national law) that is adopted as law for the ACT. It should deal with the provisions of the model national law in the same way as it deals with any other bill. The explanatory statement might however refer instead to some source prepared by some Commonwealth, State or Territory body, such as an explanation of the model national law, or, so far as human rights analysis is concerned, a compatibility statement relating to that law.

3.7 In addition, the explanatory statement should

- set out whether, and to what extent, the provisions of the Human Rights Act concerning scrutiny, interpretation, declarations of inconsistent interpretation and obligations of public authorities, will apply to the provisions of the bill and of the adopted model national law; and
- identify all respects in which a provision of the bill and of the adopted model national law affects the normally applicable laws that relate to the powers and procedures for the making, promulgation and interpretation of Territory laws.

(4) A justification for an opinion expressed in a compatibility statement presented to the Assembly by the Attorney-General as to the consistency or otherwise of the bill with human rights

3.8 The currently applicable statement by Department of Justice and Community Safety explains the effect of section 37 of the Human Rights Act and the relationship between a Compatibility Statement and an explanatory statement:

⁵ Ibid.

[T]he Attorney General must prepare a written statement (the Compatibility Statement) for presentation with all government bills. The Compatibility Statement must state whether, in the opinion of the Attorney General, the bill is consistent with human rights. If the bill is not consistent with human rights, the Compatibility Statement must say how it is not consistent with human rights.

The purpose of the Compatibility Statement is to ensure that the government has considered the human rights implications of all new legislation. The Compatibility Statement is a statutory device to institutionalise the human rights framework into government policy, increase transparency and hold government publicly accountable for its policy decisions. In this respect, the Compatibility Statement is a means to an end not an end in itself.

The Compatibility Statement document consists of a simple statement expressing the Attorney General's view on the compatibility of the legislation. Where a proposed bill *raises issues of incompatibility* the Statement will provide a more detailed analysis of those provisions (emphasis added).⁶

3.9 The Human Rights Act is often promoted as embodying a “dialogue model”, and a critical stage of that dialogue should occur between the promoter of a bill and the Assembly. The point of section 38, which requires this Committee to report to the Assembly “about human rights issues raised by”⁷ a bill, is to ensure that when a bill is debated the Assembly appreciates that a provision of the bill impinges on a right protected by the Act. Given that section 37, which requires the Attorney-General to prepare and present a written “compatibility” statement to the Assembly, has been (with very few exceptions) understood to be satisfied by a single line statement of compatibility with the Act,⁸ the explanatory statement must be the vehicle for a Minister to identify the rights issues that are raised by a bill, and to explain either why it is considered that any relevant provision does not derogate from a right, or, if it does, why that derogation is compatible with HRA section 28. The first stage in the dialogue is then the explanatory statement. The next stage is the Scrutiny Committee report, followed by debate in the Assembly.⁹ This process breaks down if the explanatory statement does not address the human rights issues raised by the bill.

3.10 Some general remarks on the application of section 28 may be helpful.¹⁰ It provides:

⁶ Department of Justice and Community Safety, Bill of Rights Unit, *Guide to ACT Departments on Pre Introduction Scrutiny: the Attorney General's Compatibility Statement under the Human Rights Act 2004*.

⁷ The Committee is not concerned narrowly with whether a provision of a bill is incompatible with the HRA. Its concern is to point to human rights issues that are raised.

⁸ Where the Attorney considers that a provision in a bill is not compatible, the obligation to explain why this is so will require more than a single line statement. The Attorney's obligations extend only to bills presented by a Minister.

⁹ The explanatory statement also plays a role in the promotion of dialogue, at this pre-enactment stage, between the promoter of the bill and the public. It also serves to promote knowledge of the rights stated in the Act.

¹⁰ There is a longer analysis in *Scrutiny Report No 25 of the 6th Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006.

- 28 (1) Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
- (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;
 - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

3.11 In very general terms, section 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised. This test can be broken down into more specific questions.

- *Do the limitations on freedom of expression pursue a legitimate objective?*
- *Are the means provided in the bill for the attainment of these objectives “proportionate”?* In general terms, this analysis has three components:
 - is there a rational connection between the means and the objective?;
 - are there, in comparison to the means proposed in the bill, “any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve”?¹¹; and
 - is there is a proportionality between the effects of the measure that limits the right and the law’s objective? “This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?”¹²

3.12 In a recent decision, the Court of Appeal of Victoria spoke of the need for a clear and cogent justification, in terms of a provision such as section 28, of a particular limitation to an HRA-right. In *R v Momcilovic* [2010] VSCA 50, the Court noted that:

143 Counsel for the applicant drew attention to what was said by Dickson CJ in *Oakes*[[1986] 1 SCR 103] about the need for evidence in order to show ‘demonstrable justification’ of a human rights infringement. Under s 1 of the Canadian Charter (on which s 7(2) was modelled), only those infringements of human rights are permitted which can be ‘demonstrably justified’ in a free and democratic society. Dickson CJ said:

¹¹ 17 HRA paragraph 28(2)(e).

¹² *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII) para 45.

Where evidence is required in order to prove the constituent elements of a s 1 enquiry, *and this will generally be the case*, it should be cogent and persuasive and made clear to the Court the consequences of imposing or not imposing the limit ... A Court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions.[Ibid 138 (emphasis added).]

The Victorian Court added a qualification:

There may be circumstances where the justification for interfering with a human right – and for doing so by the particular means chosen – is self-evident, but they are likely to be exceptional. The government party seeking to make good a justification case under s 7(2) will ordinarily be expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).

3.13 The minimum level of what is required is enough analysis to enable a reader of the explanatory statement to assess whether the justification is persuasive.

3.14 A full section 28 analysis would address the application of each of the paragraphs in subsection 28(2); that is, assess how in relation to the or limitation under analysis, the application of those factors pointed one way or another, or were neutral, in justification of the limitation. The Victorian compatibility statements often take this approach; see the example in **Appendix 2**.

3.15 This should not be time-consuming, for scrutiny process takes place within government to assess the compatibility of a bill with the HRA (and other human rights). The explanatory statement should reveal to the Assembly the conclusions reached in process, with a reference to the material considerations taken into account in reaching that conclusion.

3.16 A justification in these terms will have two beneficial effects. Firstly, it will better inform both the Assembly and the public about the bill. Secondly, it will form part of the legislative history and thereby assist the courts when they deal with cases where there is a question of how the Human Rights Act impacts on some provision of the Act that is consequent on the passage of the bill.

(5) A justification for any provision of the bill that cause the Scrutiny Committee to make a report in accordance with one or more of its terms of reference

3.17 Having regard to the Committee's terms of reference, the author of the explanatory statement should ask whether any clause of the bill:

- unduly trespasses on personal rights and liberties;
- makes rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
- inappropriately delegates legislative powers; or
- insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

3.18 If it appears that a clause might have one or more of these effects, then a justification for the relevant provision should be given.

3.19 It must be noted that the Scrutiny Committee is not confined to assessing the human rights compatibility of a provision of a bill in terms of the rights stated in the Human Rights Act. The Committee takes a broad and ambulatory view of what constitutes a personal right and liberty. Because the HRA does not state some rights that are well-accepted in common law, or stated in some law binding on the Territory, or in an international treaty, the Committee often identifies a rights issue that does not involve the HRA.¹³ The author of an explanatory statement should take the same approach. Of course, the concept of “personal rights and liberties” is vague, but some cases are obvious and, if in doubt, the drafter should err on the side of dealing with an issue, rather than not.

The outline of the provisions

4.1 This outline usually amounts to the bulk of an explanatory statement, and it is probably the most difficult to write.

4.2 The author should perhaps start with the notion that the outline should *not* attempt a plain English rendering of all the clauses (except perhaps where the bill is very short). It has been suggested that “[i]t is not necessary or appropriate to explain every single clause. The point is to provide additional information, not to duplicate the legislation or repeat or paraphrase it”.¹⁴

4.3 The author should also “make the proposed legislation accessible to readers who are not legally qualified and do not have specialist knowledge of the subject area”. The key word here is “accessible”. Where a bill (and in particular a bill that amends existing law) relates to a field (such as taxation, or land planning) where complex terminology must be employed, it may not be possible to make its provisions very clear to a lay reader. The outline should of course attempt an explanation that will be clear to readers with expertise in the field, but may not be able to do more than alert the lay reader to the general thrust of a provision (or group of provisions).

4.4 What then is the value to be added by the outline?

¹³ See *Scrutiny Report No 32* of the 7th Assembly, where the right to trial by jury was discussed in the context of the Courts Legislation Amendment Bill 2010.

¹⁴ Quotations in this section are from the UK Cabinet Office document referred to above.

4.5 The ACT *Legislation Handbook* states that the outline should “[d]escribe the intention and purpose of the operative clauses of the bill/regulation/disallowable instrument, i.e. the problem the provision is designed to resolve”, and “[u]se examples if appropriate”.¹⁵

4.6 This is similar to the Commonwealth *Legislation Handbook*, which states that “[o]fficers drafting explanatory memoranda should ensure that notes on clauses clearly and adequately explain their operation and purpose”,¹⁶ although noting that it adds that the *operation* of a clause should be explained. It also states:

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.¹⁷

4.7 The ACT *Legislation Handbook* also requires the drafters of an explanatory statement to “[u]se simple language, plain English; everyday language should be used to explain technical provisions”.¹⁸ This may overstate the matter, for it may be desirable to use the same technical terms that are found in the relevant clause. For example, if a clause regulates certain “contracts”, it would be unwise to change this to “agreements”.

4.8 To summarise, the outline of each group of provisions should explain in as plain a form of English as the circumstances permit:

- the purpose of the provisions – that is, the problem they are intended to overcome;
- the relationship of the provisions to other provisions of the bill where this will not be evident to a person reading the bill in numerical sequence; and
- the way the provisions will operate – that is, their intended effect.

4.9 It is appropriate, and may often be the case, that the outline will address a group of provisions where there is some interrelationship between the provisions. Care should however be taken to ensure that the outline is accurate in what it does say, and that it isolates important provisions. A provision will, for example, be important where it limits an HRA right, or engages a term of reference of the Committee (including of course that it might be seen to trespass on a personal right or liberty). Significant concepts and definitions should also be outlined.

4.10 Matters to be addressed might include, as appropriate:

- how the provisions will operate in the surrounding legal context. Where the provisions amend an existing (and continuing) law, the interrelationship

¹⁵ At 60.

¹⁶ Department of Prime Minister and Cabinet, at para 8.19.

¹⁷ Ibid at para 8.18.

¹⁸ At 60.

between the provisions and that law might be addressed. If it is asserted that another law has a particular effect, the legal basis for the assertion should at least be indicated;

- illustrative examples of how the bill would work in practice, or flow charts or diagrams designed to help the reader grasp the structure of the bill or part of the bill, or a glossary of acronyms or jargon; and
- how any subordinate law-making powers in the bill might be employed.

4.11 At times, some matters might be summarised in an appendix to the explanatory statement.

APPENDIX 1

1. Chapter 14 of the *Legislation Act 2001* states rules relating to the interpretation of Acts and statutory instruments. The basic rule is that “[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation” (subsection 139(1)), “whether or not the Act’s purpose is expressly stated in the Act” (subsection 139(2)). To this end, “material not forming part of the Act may be considered” (subsection 141(1)), and section 142 refers to specific kinds of non-legislative material that relate to an Act or statutory instrument, and this includes “any explanatory statement (however described) for the bill that became the Act” or for the instrument.

2. Recent judicial discussion suggests that the courts will pay attention to any kind of non-legislative material primarily, if not exclusively, to ascertain the purpose of the bill or instrument, and then, in the light of that purpose construe the provisions of the Act or instrument under analysis. The courts are very reluctant to determine the meaning of the words of an Act by reference to what the non-legislative material may say those words should mean. An illustration follows.

3. Section 18 of the *Human Rights Act 2004* states certain rights in relation to the liberty and security of persons, and subsection 18(7) provides: “(7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention”, and there is a similar provision in subsection 23(2).

4. Notwithstanding statements apparently to the contrary made by the Attorney-General in the Second Reading speech, in *Morro, N & Ahadizad v Australian Capital Territory* [2009] ACTSC 118, Gray J held that “the words of s 18(7) and s 23(2) of the ACT Act are apt to declare a remedy by way of compensation in the circumstance predicated in those subsections”. Concerning the non-legislative material, Gray J said, with reference to the Attorney-General’s presentation speech and the explanatory statement, that “the use of these materials is not to be determinative or a substitute for the text of the legislation” (citing *Minister for Immigration and Ethnic Affairs v Tang Jia Xin* [1994] HCA 31 at [11]). He also had regard to observations made in *Harrison v Melhem* [2008] NSWCA 67 where Spigelman CJ said:

12 ... Statements of intention as to the meaning of words by ministers in a Second Reading Speech, let alone other statements in parliamentary speeches are virtually never useful. ...

13 Of course, other statements in the course of a Second Reading Speech by a minister ... will be of use on matters such as the purpose, which used to be referred to as mischief.

14 However, the subjective intention of the Parliament, let alone of Ministers or Parliamentarians, is not relevant. What is involved is the search for an *objective* intention of Parliament, not the subjective intention of Ministers or Parliamentarians. ... [F]requently, indeed almost always in cases of difficulty, the circumstances in which the statute falls to be applied were not actually contemplated by anybody. Even if they were contemplated, a statement of

intention in a Ministerial Second Reading speech will not prevail over the words of the statute.

15 The authoritative determination of the meaning of a statutory provision is an exercise of the judicial power, not of the legislative power, let alone of the executive power. In the Australian system of the separation of powers, it is the courts which determine what the legislative intention when enacting a particular provision was.

16 The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament. The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say. [Citations omitted]¹⁹

Two matters follow from these judicial comments. First, as a help to interpretation, the value of an explanatory statement lies in its statement of the purpose (or, the mischief intended to be addressed) of the bill and of any particular clause of the bill. The explanatory statement should take care to spell out a relevant purpose, at least for the bill as a whole, and perhaps for parts or clauses of it. Secondly, an explanatory statement should not be used to clear up some perceived ambiguity or uncertainty in the words of a provision of a bill. These matters should be fixed up by amendment of the bill in its passage through the Assembly.

¹⁹ Gray J also referred to comments made by Mason P *Harrison v Melhem*, where his Honour referred to *Re Bolton; Ex parte Beane* [(1987) [1987] HCA 12; 162 CLR 514 at 518].

APPENDIX 2

Extract from the statement of compatibility tabled by the Victorian Minister for Consumer Affairs with respect to the Fair Trading Amendment (Australian Consumer Law) Bill 2010.

The following sections of the Australian Consumer Law all place a legal onus on defendants by requiring them to prove, on the balance of probabilities, the relevant defences and exceptions: ...

By placing a burden of proof on a defendant, these provisions limit the right to be presumed innocent in [HRA subsection 22(1)]. However, I consider that the limits upon the right are reasonable and justifiable in a free and democratic society for the purposes of section 7(2) of the charter having regard to the following factors.

(a) The nature of the right being limited

The right to be presumed innocent is an important right that has long been recognised well before the enactment of the charter. However, the courts have held that it may be subject to limits, particularly where, as here, the relevant offences are public welfare offences of a regulatory nature; and the defences and exceptions are enacted for the benefit of defendants so that they can escape liability in certain circumstances.

(b) The importance of the purpose of the limitation

The purpose of imposing a legal burden is to ensure the effectiveness of enforcement and compliance with the Bill by enabling the offences to be effectively prosecuted and to thus operate as an effective deterrent and protection of the public.

The defences and the associated legal burdens reflect a policy of imposing obligations upon persons who engage in consumer activity to ensure compliance with the act. It is intended to make persons responsible for any breaches that occur, not just deliberate breaches.

However, in order to avoid overly harsh consequences, defences are provided to enable persons to escape liability for breaches where they are able to establish that the breach genuinely occurred in circumstances beyond their control, such as where they did not and could not know of the facts or where they took all reasonable steps to prevent a breach.

The defendants seeking to rely on these defences will be persons who engage in trade or commerce, and who are in the business of providing consumer goods or services. Therefore, they should be well aware of the regulatory requirements and, as such, should have processes and systems in place that enable them to effectively meet these requirements, including maintaining proper financial records and associated documents which would enable defendants to prove the elements of the relevant defence, or to access the relevant exception. In addition, most of the

defences relate to states of knowledge or belief that are solely within the knowledge of the accused, or establishing due diligence.

Conversely, it would be difficult and onerous for the Crown to investigate and prove these elements beyond reasonable doubt. Therefore, it is appropriate for the burden to rest with the defendant.

(c) The nature and extent of the limitation

The burden of proof is imposed in respect of defences and exceptions. The prosecution would first have to establish the relevant elements of the offences. Additionally, the offences under chapter 4 of the Australian Consumer Law are not punishable by way of imprisonment -- the maximum penalty for offences under chapter 4 is \$220 000, which is not unduly harsh given that the penalties are imposed for the purposes of protecting consumers.

(d) The relationship between the limitation and its purpose

The imposition of a burden of proof on the defendant is directly related to the purpose of enabling the relevant offence to operate as an effective deterrent while also providing suitable defences and exceptions in circumstances where the contravention was not deliberate. A legal burden is imposed to avoid evidentiary problems that may arise, particularly where the relevant facts are within the knowledge of the accused, and which may lead to a loss of convictions.

(e) Less restrictive means reasonably available to achieve the purpose

Although an evidential onus would be less restrictive upon the right to be presumed innocent, it would not be as effective because it could be too easily discharged by a defendant.

The inclusion of a defence with a burden on the accused to prove the matters on the balance of probabilities achieves an appropriate balance of all interests.