

Explanatory Memorandums for proposed legislation in Australia: Are they fulfilling their purpose?

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Abstract

Explanatory memorandums (EMs) play an important role in ensuring that Parliament and its committees have all the information on proposed legislation they require in order to fulfill their function of scrutinising the Executive. If they are not of sufficient quality, the accountability of the Executive to Parliament can be undermined.

There has been a significant amount of criticism leveled at the failure of some explanatory memorandums to comply with various requirements aimed at ensuring they adequately explain proposed legislation.

This paper 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”. It does this by charting some of this criticism; discussing possible reasons why some explanatory memorandums have not been of sufficient quality and by making some suggestions for reform. The suggestions are designed to ensure explanatory memorandums 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. As part of this exploration, a survey was undertaken of parliamentary staff of legislative scrutiny committees in Australia (as well as some other Westminster jurisdictions) to ascertain their views on the quality of EMs.

Introduction

Explanatory memorandums (EMs) for proposed legislation² play an important role in the Westminster system of parliamentary democracy in Australia. They do this by assisting parliaments and their committees scrutinise the Executive of the day by providing information on the purpose and operation of proposed legislation.

If EMs are not of a sufficient quality to fulfil this role, it is arguable that the effectiveness of the system of checks and balances, which form part of the basis of the separation of powers doctrine in Australia, is significantly undermined.³ This is because Parliament is being deprived of necessary information on proposed legislation to enable it to fulfil its scrutiny role. In some instances, this adversely affects the quality of the legislation that it is being asked to pass.

There has, recently, been criticism levelled at the failure of some EMs to comply with various requirements aimed at ensuring they adequately explain proposed legislation.⁴ This criticism has prompted an exploration in this paper of the following proposition:

Explanatory Memorandums for proposed legislation submitted to parliamentary committees in Australia fail to meet the objective of enhancing committee scrutiny of the Executive.

The principal finding of this paper is that, while EMs enhance committee scrutiny of proposed legislation in a majority of instances, they are not fulfilling this expectation as often as they should and there is a strong case for reform to improve their quality.

This argument will be supported by:

- exploring the role of EMs in the Westminster system;
- recording the different requirements for the preparation of EMs in various jurisdictions;
- summarising the negative feedback that has been made about some EMs;
- surveying and analysing the views on the quality of EMs by parliamentary staff of legislative scrutiny committees in Australia; and
- exploring the case for reform measures to improve the quality of EMs.

To obtain a comparison with other selected Westminster jurisdictions, the views of parliamentary staff of legislative scrutiny committees in New Zealand, the United Kingdom and Canada were also surveyed.⁵

In determining the validity of the above proposition, the following factors need to be borne in mind.

- The benchmarks against which EMs are judged vary considerably.
- It is not possible or practical to review each and every EM to proposed legislation.
- What constitutes an EM that ‘enhances committee scrutiny of proposed legislation’ has an element of subjective judgement.
- EMs submitted to parliamentary committees deal with a very wide variety of subject matters which may affect content requirements.

Nevertheless, as is apparent from the discussion below, there are certain characteristics which a good quality EM should have and about which there is a clear consensus. This is regardless of any subjective judgments. Also, it is possible to assess the accuracy of the proposition by reviewing the available literature and analysing results of a survey of parliamentary staff conducted for this purpose. These appear below in the section entitled ‘Survey of different jurisdictions’.

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. A selection of these follows.

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 principle provisions, an explanation of the policy background and notes on the clauses of the bill. The information provided in this document should be of such quality that the committee, members of Parliament, the courts and the public are able to understand the overall objective and operation of the bill.⁶

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.⁷

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.⁸

Constitutional Affairs Committee of the Welsh Assembly

Explanatory Memorandums (EMs) are the main way in which the provisions of a Measure are explained and are particularly important to aid the understanding of those who are not qualified legal practitioners or do not have a detailed knowledge of the policy background.⁹

With the best of intentions it is highly unlikely that Measures can be drafted in a way that is always entirely clear and transparent to the lay reader. However, it is absolutely essential that what a law is trying to achieve, who it will affect and their rights and duties under that law are well known and understood. It is also essential that Assembly Members as legislators have a clear understanding of a legislative proposal if scrutiny is to be meaningful and effective and the Assembly is not to make bad law. Explanatory Memorandums should assist this process not hinder it.¹⁰

These definitions make clear what is expected from EMs, especially from parliamentary committees. Arguably, anything that falls short of these expectations is open to criticism on the basis that Parliament is not being adequately informed by agencies about legislation it is being asked to consider and pass.

While EMs are now more commonplace as part of the legislation making process in a number of Australian and other Westminster parliaments, this was not always the case. Indeed, it was only relatively recently that EMs began to be consistently produced for every Commonwealth Government bill.¹¹ Before 1980, EMs were only prepared for complex bills.¹² The gradual introduction of quality 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 hearings with Ministers and departmental staff as part of the committee inquiry process. Nevertheless, with the extensive demands on parliamentarians' time and the ever-increasing complexity of legislation, EMs are a vital source of concise information. If prepared with a parliamentary audience in mind, an EM will expedite an understanding of proposed legislation. This also assists other stakeholders, such as courts, organisations that have a general interest in the subject matter of the legislation in question, the media and the general public.¹³ Also, drawing on the definitions of EMs set out above, it is the author's opinion that when they comply with best practice form and content requirements (referred to below), EMs are the document most appropriately suited to providing the type of information necessary to enable Parliament and its committees to consider the merits of proposed legislation.¹⁴

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. The importance of accountability and pro-active disclosure can be underlined by drawing the following two analogies.

Firstly, with accountability, it has been said that judges are subject to what has been referred to as ‘explanatory accountability’. This type of accountability requires individuals to give an account about why they have behaved in a particular way.¹⁵

Secondly, with full disclosure, there is a judicial equivalent in the context of the rules of evidence. In 2003 the Judicial Committee of the House of Lords stated:

Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made.¹⁶

Similarly, 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; and
- the quality of the resulting legislation may suffer.

Deficient EMs means that committees are required to seek additional information from agencies about the proposed legislation. This delays the scrutiny process and could have been avoided had a sufficient EM been provided. This is not an ideal outcome given the tight timeframes under which committees often operate when reporting to Parliament.¹⁷

Importantly, the President of the Western Australian Legislative Council recently stated, as part of a ruling:

The accuracy of the explanatory memorandum is fundamental to a supporting document to a bill.¹⁸

Sources for Explanatory Memorandums

With the exception of South Australia, interpretation legislation in all Australian jurisdictions makes reference to EMs as an interpretation aid.¹⁹ 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 Australia and are contained in a number of different sources, such as legislation, standing orders, legislation handbooks, committee practice notes and Premier's Circulars. The table attached as Appendix 1 demonstrates this variation. Some sources merely record the need for there to be an EM, while others contain detailed requirements on what information the EM should actually contain.

Negative feedback on Explanatory Memorandums

Generally

There has been a significant amount of criticism levelled in academic and parliamentary literature at the deficiency of some EMs. A summary has been set out in the table below.

One of the most commonly levelled criticisms is that the EM merely paraphrases the proposed legislation and does not assist the reader in understanding why it is being made.²⁰ A leading source of guidance on the preparation of EMs in Australia, the Department of Prime Minister and Cabinet Legislation Handbook (Legislation Handbook), 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.²¹

Summary of criticisms of EMs

Source	Criticism
The Australian and New Zealand Scrutiny of Legislation Conference, Brisbane, July 2011 ²²	<p>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.²³</p> <p>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.²⁴</p>
The report of the Senate Standing Committee for	<ul style="list-style-type: none">An EM should contain an explanation for any provision within a bill that appears to infringe its terms of reference and provide

Source

the Scrutiny of Bills²⁵

Criticism

reasons or justifications for this.²⁶

- 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.²⁷
- 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.²⁸
- 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.
- Departmental officers should be encouraged to note concerns raised in past committee reports.²⁹
- Quality control checks of EMs within departments are inadequate and ineffective and the following suggestions may assist in addressing the issue:
 1. 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).
 2. The development of a course to train departmental officers in the preparation of EMs.
 3. 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.³⁰

EMs for the Legal Profession Conduct Amendment Rules 2013 and the Supreme Court Rules 2013 were inadequate in the following respects.

Joint Standing Committee on Delegated Legislation of the Western Australian Parliament³¹

- 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 four letters with the agency that the Committee's concerns with the instrument were satisfied.
- Supreme Court Rules 2013: Details of consultations undertaken specified in the EM were inadequate and did not comply with the Premier's Circular 2007/14,³² and unlike as stated in the EM, the amendments were both unusual and contentious.³³

Standing Committee on Uniform Legislation Its report on the Business Names (Commonwealth Powers) Bill 2011 identified two clauses as being Henry VIII clauses,

Source	Criticism
and Statutes Review of the Western Australian Parliament	<p>whereas the EM for this Bill only identified one.³⁴</p> <p>In its report on the Education and Care Services National Law (WA) Bill 2011, the Uniform Committee identified five Henry VIII clauses, whereas the EM made no mention of any.³⁵ This failure to highlight in the EM issues that were specifically relevant to this committee's terms of reference is another example of a lack of full disclosure. These matters should not be omitted from EMs. It is also an example of how the quality of EMs can vary across agencies. It noted in its 2012–2013 Annual Report that:</p>
The House of Lords European Scrutiny Committee	<p>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.³⁶</p> <p>In its report on an inquiry it conducted into the Drafting of Welsh Government Measures, this committee stated:</p>
The Constitutional Affairs Committee of the National Assembly of Wales	<p>There have been a number of criticisms made by Assembly Committees about EMs for Assembly Measures. Committees have on a number of 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.</p>
The Commerce Committee of the New Zealand Parliament	<p>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.³⁷</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. In the advice this committee:</p> <ul style="list-style-type: none"> • made reference to its participation in the Scrutiny of Legislation Conference mentioned above, including its report remarks on EMs; • noted the requirements of the Cabguide regarding the preparation of EMs;³⁸ and • remarked upon: <ol style="list-style-type: none"> 1. instances where the requirements of the Cabguide were not complied with; and 2. other instances where EMs did not contain sufficient detail on legislative proposals and had been drafted too quickly.³⁹

Survey of different jurisdictions

Views of Parliamentary staff

Introduction

As part of the research for this paper the author conducted a survey of parliamentary staff for committees in Australian jurisdictions, as well as the United Kingdom, Canada and New Zealand. This was done to compare views and practices from some other Westminster systems that undertake functions, such as the scrutiny of legislation, which involve them considering EMs. The purpose of this survey was to gather empirical evidence to assist in determining the validity of the proposition the subject of this paper. A copy of the questions that were posed is attached as Appendix 2.40 A total of 29 questionnaires were sent out (17 in Australia, 1 in New Zealand and 11 to the United Kingdom and Canada) and 16 responses were received, 12 of which gave an explicit view on the Proposition.

To remind the reader, the proposition was that: Explanatory Memorandums for proposed legislation submitted to parliamentary committees in Australia fail to meet the objective of enhancing committee scrutiny of the Executive.

Analysis of feedback

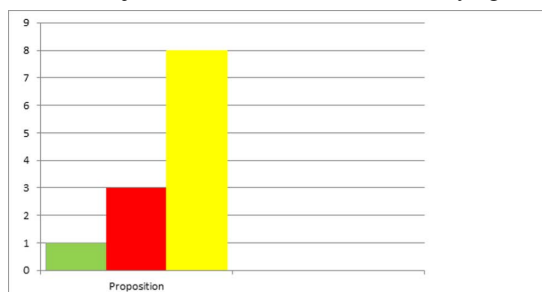
The tool that has been used to analyse the results of the survey and to determine whether the proposition is supported by the feedback is a simple system that grades responses, as recorded in the following graph, as follows.

Left column: Fully agree with the proposition.

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

Middle column: Disagree with the proposition.

In order for the proposition to be valid, in the opinion of the author, at least a majority of participants from all Australian jurisdictions would need to fully agree with the proposition.



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

While there is ample literature drawing attention to instances of poor quality EMs, the overall picture, supported by the results of the survey, suggests there is not a degree of widespread systemic failure sufficient to support the proposition.

That being said, the weight of this literature and the instances of partial agreement with the proposition arising out of the survey demonstrate there are enough instances of EMs failing to meet expectations to warrant a serious consideration of proposals for reform.

Examples of best practice

Although offering no guarantee of ensuring consistently better quality EMs (as pointed out below), it is ideal to have clear and comprehensive form and content requirements in place. A number of the jurisdictions surveyed have such requirements, with one of the most notable being Queensland. The “Guidelines for the preparation of explanatory notes” 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.⁴¹ The inclusion of template EMs is a helpful way of attempting to achieve a consistent level of quality. Also, the document focusses the mind of the drafter on the type of issues that attract the interest of the relevant portfolio scrutiny committee.

The case for reform

Generally

From the weight of the material considered in this paper, it is clear that some jurisdictions that have the most comprehensive and clear guidance have attracted 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 taken into account by parliamentary committees in their consideration 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 the commitment to and appreciation of the parliamentary scrutiny process of some agencies. 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.⁴² 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.

Despite the merits of enshrining in legislation form and content requirements for EMs, as undertaken in some jurisdictions, it is of concern that a failure to comply with these requirements does not affect the validity, operation or enforcement of the 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 its committees and that agencies, as a matter of course, fulfil their obligation as delegates of the Parliament, to full disclosure.

Suggestions for reform

There have been a number of suggestions for reform seeking to improve the quality of EMs, such as:

- better quality control by agencies to ensure:
 1. that the content of draft EMs are checked by staff with appropriate experience and qualifications; and
 2. 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 of those preparing EMs.⁴³

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 and this could assist in ensuring a more dispassionate and objective approach.

It may also be worthwhile considering reform measures 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.

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, particularly bearing in mind their purpose. Parliament and its committees need to have, at their disposal, a detailed explanation of legislation the Executive is asking it to consider and pass. Such a requirement transcends jurisdictional borders. It is at least 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. While similar requirements are in place for some legislation in the Commonwealth, Victoria and Queensland (as detailed in Appendix 1), 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 a number of questions, such as 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.⁴⁴

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

Other initiatives could include:

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

In order 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.

Initiatives seeking to improve the quality of Explanatory Memorandums

Feedback on the quality of information provided to Parliament and its committees has prompted some initiatives to improve its standard. For instance, the Good Law Initiative in UK is being driven by the Office of Parliamentary Counsel (OPC) to deliver law that is necessary, coherent, clear, effective and accessible. Under the hearing ‘What is the OPC doing to produce good law?’ it states:

We are looking at the explanatory material published with Bills and Acts, to see what improvements might be made.⁴⁵

Also in the United Kingdom, the Political and Constitutional Reform Committee of the House of Commons, following criticism about the quality of legislation, conducted an inquiry into legislative standards to assess the need for improvements. As part of its report, this committee made a number of observations about a proposed new model of explanatory notes that would incorporate information required by a finalised Code of Legislative Standards. It also proposed the setting up of a Legislative Standards Committee which would provide oversight of compliance with this code.⁴⁶

As noted in Appendix 1, the Australian Capital Territory has produced the “Guide to writing an explanatory statement”, which contains comprehensive form and content requirements as part of an educative process for agencies.⁴⁷ This could provide a starting point for other reforms.

Conclusion

Despite the existence of many quality EMs submitted to parliamentary committees, there is no reason why a parliamentary committee should not expect, at all times, to be assisted with its scrutiny function by the provision of an EM which is fit for purpose. It should not have to draw shortcomings to the attention of the relevant agency which, after all, 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 not being routinely met and that EMs are not fulfilling their purpose as often as they should.

The surveyed evidence suggests that EMs produced by agencies do, in a majority of instances, enhance scrutiny of proposed legislation. However, the evidence also suggests there is a strong case to be made for the implementation of reforms to further improve the quality of EMs.

The author argues for the establishment of a legislative provision in every Australian jurisdiction setting out detailed content requirements for all EMs, as there is in Queensland and the Commonwealth. However, any provision stating that failure to comply with the requirements does not affect the validity or enforceability of the legislation 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 against their compliance with legislative requirement and, if they fail to do so, the power to halt the legislative making process until improvements are made.

Appendix 1 Sources of requirements for EMs in Australia¹⁰⁶

Jurisdiction	Source	Requirements	Sanction for non-compliance? ¹
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Jurisdiction	Source	Requirements	Sanction for non-compliance? ¹
Commonwealth	<p>Primary legislation:</p> <p>Department of Prime Minister and Cabinet Legislation Handbook.</p> <p>Legislation Circular No.7 of 2003.</p> <p>Office of Parliamentary Counsel Drafting Directions.</p>	<p>Contains detailed information on when an EM is required and its form and content.</p>	
	<p>Subsidiary legislation:</p> <p>Legislative Instruments Act 2003.</p>	<p>Section 26(1A) 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>Section 26(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:</p> <p>Manual for the preparation of legislation (Parliamentary Counsel’s Office, August 2000).</p> <p>Subsidiary legislation:</p> <p>As above.</p>	<p>No form and content requirements.</p>	
	<p>The Subordinate Legislation Act 1989, while not referring to EMs, requires the preparation of regulatory impact statements and accompanying submissions.</p>	<p>Schedule 2 contains detailed content requirements for regulatory impact statements.</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:</p> <p>The Charter of Human Rights and Responsibilities Act 2006</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>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</p>

Jurisdiction	Source	Requirements	Sanction for non-compliance? ¹ statutory provision.
Queensland	4 Practice Notes issued between 17 October 2005 and 10 December 2012 by the Scrutiny of Acts and Regulations Committee	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.	
	Subsidiary legislation: As above (4 Practice Notes).		
	Primary legislation: Legislative Standards Act 1992	Section 23 sets out the content of what an EM must contain. Reasons for the non-inclusion of required information must be explained.	Section 25 states that a failure to comply with the requirements does not affect the validity of the legislation.
	Queensland Cabinet Handbook	Page 107 refers to the requirements contained in the Legislative Standards Act 1992 as well as the Guidelines to the preparation of explanatory notes and the Queensland Legislation Handbook. This is a publication of the Queensland Premier's Department and contains prescriptive information on requirements for EMs in order to comply with the Legislative Standards Act 1992. The guide includes a template EM.	
	Guidelines to the preparation of explanatory notes		
South Australia	Subsidiary legislation: As above	As above (Legislative Standards Act 1992).	
	Primary legislation: None		

Jurisdiction	Source	Requirements	Sanction for non-compliance?1
Tasmania	Subsidiary legislation:		
	Subordinate Legislation Act 1978 and 2011 Cabinet Guide – Guide to Executive Council Processes	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.	
	Primary legislation:		
	None		
	Subsidiary legislation:		
	The Subordinate Legislation Act 1992 while not referring to EMs requires the preparation of regulatory impact statements and accompanying submissions. Various departmental guidelines referring to the relevant scrutiny committee’s requirements.	Schedule 2 contains detailed content requirements for regulatory impact statements.	There are a list of matters set out in Schedule 3 that do not require a regulatory impact statement.
Western Australia	Primary legislation:		
	None		
	Legislative Assembly: Standing Order 162(2)	No form or content requirements.	
	Legislative Council: Standing Order 121(3) (no form or content requirements).	No form or content requirements.	
Australian Capital Territory	Parliamentary Procedures Guide, page 4	No form or specific content requirements, though some commentary on the importance of an effective EM.	
	Subsidiary legislation: Premier’s Circular 2007/14: Subsidiary Legislation – Explanatory Memoranda.	Some content requirements	
	Primary legislation:		
	None		
	Guide to writing an	Detailed requirements	

Jurisdiction	Source	Requirements	Sanction for non-compliance? ¹
	<p>explanatory statement (a publication of the Standing Committee on Justice and Community Safety (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee))</p> <p>Subsidiary legislation: None</p> <p>Primary legislation: None</p>	<p>on form and content of an EM.</p>	
Northern Territory	<p>Legislation Handbook produced by the Cabinet Office within the Department of the Chief Minister</p> <p>Subsidiary legislation: None</p>	<p>Brief paragraph on form and content requirements with a template provided as an appendix.</p>	

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:
 - o bills;
 - o 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:
 - o 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);
 - o 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).

Notes

1. The author would like to thank Associate Professor Richard Herr for his invaluable input into the process of planning this paper as part of the Parliamentary Law, Practice and Procedure course conducted at the University of Tasmania in 2013 as well as his commentary on the full version of this paper referred to in note 5 below. Thanks are also extended to various parliamentary staff colleagues from Western Australia and other jurisdictions for their invaluable input, including all of those who responded to the survey.
2. The term 'proposed legislation' is used in this paper to refer to both primary and subsidiary legislation, despite the fact the latter is often subject to disallowance after it has come into force rather than beforehand.
3. Government systems that employ a separation of powers need a way to balance each of the branches. Checks and balances allow for a system based regulation that allows one branch to limit another. The scrutiny of the Executive by the Parliament is an important measure of checking the power of the Executive. While there is not a complete separation of powers in Australia owing to the fusion of the executive and legislative branches, the Executive's membership of the legislature subjects it to its control. Therefore, checks and balances remain.
4. These criticisms have been levelled in a variety of literature, including various parliamentary committee reports and academic papers, reference to which will be made in a dedicated section of this paper.
5. Due to word limit constraints, it has not been possible to include a summary of these views in this paper. The full version of this paper that was submitted as part of the Parliamentary Law, Practice and Procedure course is available on request from the author.
6. 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, p73.
7. 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.
8. United Kingdom, House of Commons, Procedure Committee, Explanatory Statements on Amendments, Fourth Special Report, 25 February 2013. See <http://www.parliament.uk/business/committees/committees-a-z/commons-select/procedure-committee/news/explanatory-statements-on-amendments/>. This definition was offered following the release of that committee's Fourth Special Report on explanatory statements on amendments.
9. A 'Measure' in Wales is primary legislation that is a lower category than an Act of the United Kingdom Parliament. It can do anything such an Act can do in relation to Wales.
10. United Kingdom, Welsh Assembly, Constitutional Affairs Committee, Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years, February 2011, pp27–28.
11. Op.cit., n7. See also p21 where it is noted that EMs are not issued for South Australian or Tasmanian bills (despite section 8B(3)(e) of the Acts Interpretation Act 1931 (Tasmania) providing that any explanatory note or memorandum may be referred to as an interpretation aid).
12. Commonwealth of Australia, House of Representatives, Standing Committee on Procedure, Maintenance of the Standing and Sessional Orders, First Report, p10.
13. 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.
14. 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.”

15. See <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jud-acc-ind/principles-jud-acc>.
16. Regina v. H (Appellant) (2003) (On Appeal from the Court of Appeal (Criminal Division)) Regina v. C (Appellant) (On Appeal from the Court of Appeal (Criminal Division)) (Conjoined Appeals), [2004] UKHL 3, at paragraph 14, accessible at <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040205/hc-1.htm>.
17. WA, Legislative Council, Joint Standing Committee on Delegated Legislation, Report 65, Explanatory Report in relation to the Legal Profession Conduct Amendment Rules 2013, 24 October 2013, p3.
18. Hon Barry House MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 19 November 2013, p6061.
19. There is no reference in the Acts Interpretation Act 1915 (SA).
20. 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 Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, 2011 Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report, April 2011, p5.
21. Department of the Prime Minister and Cabinet, Canberra, Legislation Handbook, May 2000.
22. 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.
23. Victoria, Scrutiny of Acts and Regulations Committee, 2011 Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report, p3.
24. WA, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, 2011 Australia-New Zealand Scrutiny of Legislation Conference Committee Activity Report, April 2011, p5.
25. Op.cit, n6, p69. This was one of the most comprehensive reviews of EMs that has been conducted by a parliamentary committee in Australia, conducting an in depth review of the standard of EMs for proposed primary legislation it has scrutinised and setting out the expectations of the Senate Committee of what an EM should address. The fact that the Senate Committee devoted an entire report focussing on this issue is telling about the concerns held over the quality of EMs.
26. Ibid.
27. Ibid., p75.
28. Ibid.
29. Ibid, p76. This would be a means of ensuring anything contained in proposed legislation that may offend its terms of reference are drawn to the attention of the committee in the EM.
30. It is notable that Stephen Argument makes a similar observation, with respect to EMs for delegated legislation, to the one made by the Senate Committee above about the reason for the poor quality of some EMs – that existing requirements are not being met – see Argument, Stephen, ‘The Poms can’t teach us nuthin’’, a paper presented to the Australia-New Zealand Scrutiny of Legislation Conference held in Canberra, July 2009, p5 and Argument, Stephen, ‘Straddling a barbed wire fence: reflections of a gamekeeper, turner poacher, turned gamekeeping poacher’, a paper presented to the Australia-New Zealand Scrutiny of Legislation Conference held in Wellington, July-August 2007, p72.
31. WA, Legislative Council, Joint Standing Committee on Delegated Legislation, Explanatory Report in relation to the Legal Profession Conduct Amendment Rules 2013, Report 65, 24 October 2013; WA, Legislative Council, Joint Standing Committee on Delegated Legislation; Supreme Court Amendment Rules 2013, Report 66, 24 October 2013.

32. This contains the requirements for an EM for subsidiary legislation submitted to the Delegated Legislation Committee for scrutiny.
33. See WA, Legislative Council, Joint Standing Committee on Delegated Legislation; Supreme Court Amendment Rules 2013, Report 66, 24 October 2013, pp6–7, 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 confirming it is for the legislature and not the courts to implement changes to the common law, which underlines the committee’s concern with the EM stating the amendments were neither unusual or contentious.
34. WA, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 70, Business Names (Commonwealth Powers) Bill 2011, 6 March 2012. Access the EM at:
<http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=3D6E13C34A8C4AE44825795800213EFC>.
35. WA, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 71, Education and Care Services National Law (WA) Bill 2011, 3 May 2012.
36. UK, House of Lords, European Union Committee, Report on 2012–2013, p17, paragraph 58.
37. UK, Welsh Assembly, Constitutional Affairs Committee, Inquiry into the Drafting of Welsh Government Measures: Lessons from the first three years, February 2011, p28. Welsh Government guidance on the drafting of EMs can be viewed at:
<http://wales.gov.uk/legislation/guidance/riacode/?lang=en>.
38. 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.
39. A recent initiative introduced in New Zealand (from 29 July 2013) is the legislative disclosure statement, which accompanies most Government Bills and Supplementary Order Papers setting out proposed amendments to a Bill.
40. The proposition referred to in question 8 in Appendix 2 is that which appears on page 1 in the introduction to this paper.
41. See <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/drafting-process/assets/guidelines-preparation-of-explanatory-notes.pdf>.
42. Op.cit, n6, p98.
43. All referred to in the 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, pp98–99.
44. 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, p19, which were referred to with approval by the Standing Committee on Uniform Legislation and Statutes Review of the Western Australian Parliament in its report on the Criminal Investigation (Covert Powers) Bill 2011, 6 March 2012, pp27–29. The arguments for and against the affirmative resolution as opposed to the disallowance procedure are well documented elsewhere and are not addressed in this paper.
45. See <https://www.gov.uk/good-law>.
46. The report is accessible at:
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf>.
47. The guide is accessible at:
http://www.parliament.act.gov.au/_data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf.