



OFFICE OF THE  
CHIEF PARLIAMENTARY COUNSEL

**GUIDE TO PREPARING AN  
EXPLANATORY MEMORANDUM  
AND TEMPLATE**

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# CHAPTER 1—INTRODUCTION

## 1.1 OVERVIEW

This guide has been prepared to assist instructors and drafters to prepare and settle the explanatory memorandum to a Bill. It contains:

- an explanation of the role of instructors and drafters;
- detailed instructions about how to write clause notes;
- examples of clause notes for common types of clauses;
- an explanation of the requirements of the Scrutiny of Acts and Regulations Committee (*SARC*);
- a glossary (see Attachment 1);
- a template for preparing the explanatory memorandum (see Attachment 4).

Each Bill is required to have an explanatory memorandum when it is introduced into Parliament. For Government Bills, the explanatory memorandum should be ready in time to be printed with the Cabinet Draft of the Bill.

The preparation and settlement of the explanatory memorandum is an important conclusion to drafting a Bill. The instructor should review the Bill and consider the operation of each clause. The drafter should check that each clause in the Bill actually does what the clause note describes. Any inconsistencies between what is intended and what has been drafted can be identified and addressed.

Instructors should prepare the explanatory memorandum with care. The explanatory memorandum can be an important aid to the interpretation of legislation.

## 1.2 PURPOSE OF AN EXPLANATORY MEMORANDUM

The primary purpose of the explanatory memorandum is to provide Members of Parliament and other readers of a Bill with a clear explanation of each clause of a Bill.

While the Bill is before Parliament, SARC will examine and use the explanatory memorandum when preparing reports on Bills. The explanatory memorandum is useful for preparing Ministers' briefings to be used when the Bill is being debated in Parliament.

If the Bill becomes an Act, the explanatory memorandum to the Bill may be used by courts, lawyers and the public to understand the Act. Section 35(b)(iii) of the **Interpretation of Legislation Act 1984** provides that the explanatory memorandum may be considered in interpreting an Act.

## **CHAPTER 2—PROCESS**

### **2.1 ROLE OF INSTRUCTORS AND DRAFTERS**

The instructor is responsible for preparing the explanatory memorandum and must use the Office of the Chief Parliamentary Counsel (*OCPC*) template (see Attachment 4). The instructor must provide the drafter with an electronic draft of the explanatory memorandum when the Bill is close to finalised and the clause numbering is close to settled.

The drafter is responsible for reviewing the explanatory memorandum. The drafter will proofread it and check each clause note for accuracy against each clause of the Bill. The drafter will make or advise the instructor of any necessary changes.

Once the explanatory memorandum is finalised, OCPC will arrange for it to be printed with the Bill. The explanatory memorandum and Bill are usually stapled or bound together and presented as one document.

### **2.2 TIME FRAMES**

The explanatory memorandum to a Government Bill must be provided to and settled by the drafter in time for it to be printed with the Cabinet Draft of the Bill. Where OCPC prepares Private Member's Bills, the drafter will discuss the need for an explanatory memorandum with the instructor.

Instructors should start preparing the explanatory memorandum to a Bill as early as possible. If the Bill is large, preparing the explanatory memorandum will be a considerable task.

If the Bill changes over the course of drafting, the instructor will need to adjust the content and numbering in the explanatory memorandum. If changes are made to the Bill at a late stage, the drafter will adjust the content and numbering.

The drafter will settle the explanatory memorandum as soon as possible. The time will depend on the size of the explanatory memorandum and the number of changes required.

## **2.3 FURTHER CHANGES TO THE EXPLANATORY MEMORANDUM**

If House amendments are made to a Bill during its passage through Parliament, changes may have to be made to the explanatory memorandum.

The drafter will usually make these changes because they will often need to be made as quickly as possible. However, if time permits, the drafter will ask the instructor to prepare the changes.

## CHAPTER 3—CONTENT OF EXPLANATORY MEMORANDUM

### 3.1 WHAT IS A CLAUSE NOTE?

The explanatory memorandum must contain a description (clause note) of **each** clause of the Bill. The purpose of a clause note is to explain the purpose or intended effect of the relevant clause. It does not add to or vary the meaning of a clause. Clause notes should use neutral and objective language. They should not contain material that is more appropriately included in the second reading speech.

The explanatory memorandum must have a clause note for each clause of the Bill because the Bill is debated in Parliament clause by clause. An explanation of the purpose and intended effect of each clause assists Members of Parliament to understand the Bill. The explanation may be short, or it may require several paragraphs.

### 3.2 WHAT INFORMATION SHOULD A CLAUSE NOTE CONTAIN?

#### 3.2.1 Generally

The information provided in a clause note should enable Members of Parliament, SARC, courts, lawyers and the public to make sense of the meaning, intended effect and the purpose of the clause.

A clause note must be accurate. However, the text of a clause should not be copied and pasted into the clause note. A clause note should explain the intended effect and purpose of the clause. It **should not** simply:

- **repeat** the clause;
- **paraphrase** the clause;
- **truncate** the clause.

A clause note **should** explain:

- the **purpose** of the clause;
- the **intended effect** of the clause;
- the **reason** why the clause has been included in the Bill (particularly where the clause raises issues of concern to SARC (see Chapter 5 for more detail)).

An exception to this is clause notes that describe the purposes of a Bill. It is acceptable for these clause notes to paraphrase the purpose clause of the Bill.

This does not mean that the clause note needs to be lengthy. Depending on the content of the clause and the context, a short statement about intention or purpose may suffice. In other instances, a clause note will require a longer explanation.

Clause notes must correctly reflect the meaning of the clause and not mislead. In particular, it is important to identify accurately when a clause grants a power or right, imposes a liability or duty, or sets out conditions or requirements. For example:

- if a clause provides a person with the power to delegate **certain** functions, the clause note must not state the person can delegate **all** of their functions;
- if the clause provides a person **may** do a particular thing, the explanatory memorandum must not state that the person **must** do that thing;
- if a clause **limits** the conditions on which employees must be employed, the clause note must not state the clause simply provides a **power** to employ.

### Examples

Unhelpful	Helpful
<p>Clause X sets out the timeframe for making an application for review.</p>	<p>Clause X sets out the timeframe for making an application for review of a decision under clause X. The time provided is X days to allow sufficient time to prepare applications.</p>
<p>Clause 4 repeals a redundant reference in the purposes of the Principal Act.</p>	<p>Clause 4 repeals a redundant reference in the purposes of the Principal Act. Section 1(c) of the Principal Act currently provides that one of the purposes of the Principal Act is to make fresh provision with respect to the manner of dealing with certain contempts of court. The Principal Act originally provided that only the Attorney-General could initiate proceedings in relation to contempt. The relevant section was repealed by the <b>Public Prosecutions (Amendment) Act 1999</b>. Therefore the remaining reference in section 1(c) of the Principal Act is now redundant and will be removed by the Bill. This clause also amends section 1(e) of the Principal Act to replace a reference to the Committee for Public Prosecutions, which the Bill abolishes, with a reference to the Director's Committee.<sup>1</sup></p>

<sup>1</sup> Explanatory memorandum to the Public Prosecutions Amendment Bill 2011.



### 3.2.2 Clauses that relate to one another

If a clause interacts with or affects another clause in the Bill, this should be explained and set out in the clause notes. In an amending Bill, if the amendments affect each other, or if newly inserted sections interact with other newly inserted or existing sections, this should also be explained. This is particularly important where the clauses that affect each other are not consecutively numbered in the Bill.

## 3.3 COMMON TYPES OF CLAUSE NOTES

### 3.3.1 General note and clause notes for purpose clauses

The explanatory memorandum may contain a general note preceding the individual clause notes. A general note usually details the reasons for, and events that led to, the Bill. Alternatively, it may simply provide an overview of the contents of the Bill.

If the explanatory memorandum does not contain a general note, the first clause note should relate to the purpose clause of the Bill and detail out those purposes. The clause note for a purpose clause should **not** just state that "Clause 1 sets out the main purposes of the Bill".

An exception to this is if the purposes have already been mentioned in the general note. In that case, there is no need for repetition. The existence of the general note does not prevent the inclusion of a detailed clause note for the purpose clause.

#### Examples

Explanatory memorandum with general clause note
<p style="text-align: center;"><b>Civil Procedure Amendment Bill 2012</b></p> <p style="text-align: center;"><b>Introduction Print</b></p> <p style="text-align: center;"><b>EXPLANATORY MEMORANDUM</b></p> <p style="text-align: center;"><b>General</b></p> <p>The Civil Procedure Amendment Bill 2012 amends the <b>Civil Procedure Act 2010</b> to introduce specific powers and discretions for the courts in relation to costs and expert evidence, to amend and create greater flexibility in the overarching obligations and proper basis certification requirements and to make other technical amendments.</p>

The Bill aims to reduce costs and delays for persons involved in civil litigation in Victoria, and improve the effectiveness of the civil justice system. The Bill builds on the foundation established by the **Civil Procedure Act 2010** in seeking to give judges and magistrates a clear legislative mandate to proactively manage cases in a manner that will promote the just, efficient, timely and cost-effective resolution of the real issues in dispute in a civil proceeding.

#### Clause Notes

#### PART 1—PRELIMINARY

Clause 1 sets out the main purposes of the Bill, which are to amend the **Civil Procedure Act 2010** to provide further powers for the courts in relation to costs and expert evidence, to amend the overarching obligations and proper basis certification requirements, to make other technical amendments and to consequentially amend the **Accident Compensation Act 1985** in relation to legal costs orders under that Act.<sup>2</sup>

#### Explanatory memorandum without general clause note

## Dental Hospital Land Bill 2011

### Introduction Print

#### EXPLANATORY MEMORANDUM

#### Clause Notes

#### PART 1—PRELIMINARY

Clause 1 sets out the purposes of the Bill. The main purposes of the Bill are to revoke the permanent reservation of the former Dental Hospital and Dental School site in Parkville to facilitate the construction of the Victorian Comprehensive Cancer Centre (the Centre) on the site and to make consequential amendments to the **Royal Melbourne Hospital Act 1935**.<sup>3</sup>

### 3.3.2 Commencement provisions

The clause note for the commencement clause (usually clause 2) must explain the commencement scheme.

The usual commencement provision for a Bill provides for it to come into operation by proclamation on a specified day or days with a forced commencement date that is within 12 months of the date on which the Bill was introduced to the Parliament. As this is the established practice, only a brief explanation is required.

<sup>2</sup> Explanatory memorandum to the Civil Procedure Amendment Bill 2012.

<sup>3</sup> Explanatory memorandum to the Dental Hospital Land Bill 2011.

## Example

<b>Commencement by proclamation with forced commencement date <u>within</u> 12 months of introduction to the Parliament</b>
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Clause 2 is the commencement provision, which provides for the Bill to come into operation on a day or days to be proclaimed, or on 1 December 2012 if not proclaimed before that date.
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For clause notes for clauses where the commencement could occur more than 12 months after the Bill is introduced to the Parliament, where there is no forced commencement date or where provisions have retrospective operation, see Chapter 5.

## 3.4 DEFINITIONS

The clause note for a definitions clause in a Bill for a Principal Act (*Principal Bill*) or for a clause in a Bill for an amending Act (*amending Bill*) that inserts, amends or repeals definitions within an existing definitions section need not explain the intention of each new definition.

This is because definitions generally do not contain substantive material. Definitions generally only stipulate meaning: the purpose of defining a term is to allow other, substantive provisions to refer to matters, things or concepts in a concise way.

However, if any new definitions or changes to existing definitions are significant or key to the operation of substantive provisions, the clause note should explain the purpose or intended effect of the relevant definitions or changes. For example, it may be appropriate for a clause note to:

- state which other clauses the definition is relevant to or used in;
- if the definition includes matters, things or concepts that are not usually considered part of the term or whose presence is counter-intuitive, explain the reason for the inclusion;
- if relevant, provide examples of the kinds of matters, things or concepts that the definition is intended to include;
- if the definition is being amended, specify the difference between the old meaning and the new meaning, and the reason for the change.

Also, if a definition is repealed, the clause note should briefly explain why it is no longer needed (usually because it is redundant or the sections that used the term are also repealed).

## Examples

<b>Explanatory memorandum to a Principal Bill</b>	
Clause 3	<p>defines various words and expressions used in the Bill.</p> <p>The definitions of <i>accused</i>, <i>legal practitioner</i> and <i>trial judge</i> adopt the meaning used in the <b>Criminal Procedure Act 2009</b>.</p> <p><i>Alternative offence</i> is defined to mean an offence in respect of which the jury may, in accordance with any Act or any other law, find the accused guilty if the jury is not satisfied that the accused is guilty of the offence charged. For example, if the accused is charged with murder, the jury may find the accused guilty of manslaughter. This definition is relevant to Parts 3 and 6 of the Bill, which relate to the jury direction request provisions and post-offence conduct directions, respectively.</p> <p><i>Defence</i> is defined to include an exception, exemption, proviso, excuse or qualification to an offence, whether or not it accompanies any description of the offence in an enactment. This is a broad definition designed to avoid arguments about whether something is a defence or not. This is important for the operation of Part 3 of the Bill, which requires the parties to identify the directions they want in respect of any defences.<sup>4</sup></p>

<b>Explanatory memorandum to an amending Bill</b>	
Clause 3	<p>sets out a definition of <i>prescribed owner</i> for inclusion in section 3(1) of the <b>Plant Biosecurity Act 2010</b>.<sup>5</sup></p>

## 3.5 APPLICATION OR ADOPTION OF NON-VICTORIAN LAWS

If the purpose of a Bill is to adopt or apply a non-Victorian law (such as a national scheme or a law of another jurisdiction) in Victoria, there will be two explanatory memoranda printed with the Bill.

For the Victorian Bill, an explanatory memorandum containing the clause notes for the provisions that adopt or apply the scheme in Victoria is printed with the Bill. The general clause note for the explanatory memorandum to the Victorian Bill should contain a statement explaining the purpose of the Bill, being to adopt or apply the scheme in Victoria.

Additionally, SARC requires the explanatory material for the Victorian Bill to contain an explanation about the impact of the **Charter of Human Rights and Responsibilities Act 2006** (*Charter Act*) on the scheme (see Chapter 5 for more detail). This explanation is usually included in the Statement of Compatibility (see SARC's Practice Note for more detail).

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<sup>4</sup> Explanatory memorandum to the Jury Directions Bill 2012.

<sup>5</sup> Explanatory memorandum to the Plant Biosecurity Bill 2013.

For the non-Victorian law, an explanatory memorandum containing the clause notes for the adopted or applied provisions is printed as an annexure to the Bill. The jurisdiction that prepared the adopted or applied provisions prepares these clause notes.

# CHAPTER 4—CLAUSE NOTES FOR AMENDING CLAUSES

## 4.1 GENERALLY

In clause notes for clauses that amend existing Acts, instructors should very briefly set out what the provision being amended currently provides for, followed by an explanation of the effect of the change.

There is no need to repeat the technical operation of each clause of the Bill. The precise way in which the clause amends a section will be evident from the face of the clause.

The drafting instructions for an amending Bill should identify the provision to be amended, the reason for the amendment and its intended effect. Instructors should draw on this material when preparing these clause notes.

### Examples

Unhelpful	Helpful
Clause X amends section Y of the ABC Act by inserting the words "quick brown".	Clause X amends section Y of the ABC Act, which currently provides for the registration of all foxes. The purpose of the amendment is to limit the class of foxes to be registered to quick brown foxes because quick brown foxes are peskier than regular foxes.

## 4.2 INSERTING PARTS, DIVISIONS, SUBDIVISIONS, SECTIONS AND OTHER PROVISIONS

If a clause note is for a clause that inserts a provision or provisions (multiple new sections may be inserted via a new Part, Division or Subdivision) into an Act, each new provision should be explained separately.

There are many possible insertions. For example, a clause may insert a Part, Division, Subdivision or section. Alternatively, it may insert a provision within a section, such as a definition, subsection or paragraph.

When preparing clause notes for these types of clauses, we recommend starting the clause notes with a short sentence outlining the insertion. For example:

- "Clause X inserts new sections A to C in the Principal Act to provide for...";
- "Clause X inserts new Part Y in the Principal Act, which contains new sections A to F. New sections A to F provide for...".

If only one new section is inserted, the next sentence should provide an explanation of the purpose and intended effect of the section. If more than one section is inserted, there should be a separate paragraph explaining the purpose and intended effect of each new section.

### Examples

<b>Clause note for clause inserting a single new section</b>	
Clause 11	inserts new section 44A into the <b>Confiscation Act 1997</b> to empower the Minister or a person prescribed for the purposes of section 44(1) to issue a certificate of disposal. Such a certificate is proof that the property has been disposed of in accordance with section 44 in the absence of evidence to the contrary.  This will avoid the need for the Minister or a prescribed person to give evidence in person of this fact in relevant cases where a person makes a post-forfeiture exclusion application under section 40A, 49 or 51... <sup>6</sup>

<b>Clause note for clause inserting multiple new sections</b>	
Clause 5	inserts new sections 19A to 19C in the <b>Public Health and Wellbeing Act 2008</b> .  New section 19A of the <b>Public Health and Wellbeing Act 2008</b> enables the Secretary body corporate to delegate to employees any power, duty or function of the Secretary body corporate under that Act, regulations made under that Act or any other Act or regulations.  Presently the Secretary may delegate powers, duties and functions of the Secretary body corporate in accordance with...  New section 19B enables the Secretary body corporate to be a committee of management under the <b>Crown Land (Reserves) Act 1978</b> ...  New section 19C grants the Secretary body corporate powers in relation to intellectual property... <sup>7</sup>

<sup>6</sup> Explanatory memorandum to the Justice Legislation Amendment (Miscellaneous) Bill 2013.

<sup>7</sup> Explanatory memorandum to the Health and Human Services Legislation Amendment Bill 2010.

## 4.3 SUBSTITUTING PARTS, DIVISIONS, SUBDIVISIONS, SECTIONS AND OTHER PROVISIONS

An amending Act may provide that a provision is substituted by another provision. The effect of substituting is to repeal the provision that is currently in an Act and insert a new provision in its place.

An amending Act may substitute a Part, Division, Subdivision or section. Alternatively, it may substitute a provision within a section, such as a definition, subsection or paragraph. Sometimes, an amending Act will substitute one provision and insert new provisions at the same time.

A clause note for a clause that will substitute one provision for another should briefly state what is being substituted and then explain the purpose and intended effect of the change.

We recommend starting clause notes for these types of clauses with the following formulation or similar (depending on the substitution):

- "Clause X substitutes section Y of the Principal Act to provide for...";
- "Clause X substitutes Part Y of the Principal Act, which contains new sections A to C. New section A provides for...";
- "Clause X substitutes section Y and inserts new section Z in the Principal Act. New section Y provides for...".

Similar to the approach for insertions, if only one section is substituted, an explanation of the purpose and intended effect of the section should follow. If more than one section is substituted or inserted, a separate paragraph for each substituted or new section explaining the purpose and intended effect of the section should follow.

### Examples

Unhelpful	Helpful
Clause X substitutes section Y of ABC Act.	Clause 12 substitutes section 25(1) of the <b>Births, Deaths and Marriages Registration Act 1996</b> to prescribe the application process for an adult to change his or her name... <sup>8</sup>

<sup>8</sup> Explanatory memorandum to the Courts and Other Justice Legislation Amendment Bill 2013.



## 4.4 REPEALING PARTS, DIVISIONS, SUBDIVISIONS, SECTIONS AND OTHER PROVISIONS

A clause note for a clause that repeals a Part, Division, Subdivision, section or other provision must specify the reason for the repeal.

There are many types of repeals. For example, a clause may repeal a Part, Division, Subdivision or section. Alternatively, it may repeal a provision within a section, such as a definition, subsection or paragraph.

We recommend starting clause notes for these types of clauses with the following formulation or similar (depending on the repeal):

- "Clause X repeals section Y of the Principal Act, which provides for... Section Y is unnecessary due to...";
- "Clause X repeals Part Y of the Principal Act, which sets out... Part Y is unnecessary because...".

Similar to the approach for insertions and substitutions, an explanation of the purpose and intended effect of the repeal should follow.

### Examples

Unhelpful	Helpful
Clause X repeals section Y of the ABC Act.	Clause 9 repeals section 13 of the Principal Act, which provides for an approval of premises to automatically expire after 5 years.  Section 13 is unnecessary as there is already provision for cancellation of an approval of premises in the event that premises are no longer satisfactory for the operation of a children's service (section 14). <sup>9</sup>

<sup>9</sup> Explanatory Memorandum to the Children's Services Amendment Bill 2011.

## 4.5 SUBSTITUTING, INSERTING AND OMITTING WORDS IN OR FROM A PROVISION

A clause note for a clause that amends a provision in an Act by substituting, inserting or omitting individual words should not:

- merely state that a section is being amended;
- simply describe the words that are being changed.

The text of a clause note will vary depending on the amendment in the clause. It is very important for the clause note for this type of amendment to explain the intended effect of the amended provision.

### Examples

Unhelpful	Helpful
Clause X substitutes the words "ABC" with the words "DEF" in section Y of the Principal Act.	Clause 18 amends section 32 of the Principal Act to enable a Senior Crown Prosecutor to be re-appointed for a period not exceeding 10 years if the Senior Crown Prosecutor is entitled at the re-appointment date to a pension if the Senior Crown Prosecutor resigns or retires. <sup>10</sup>

## 4.6 INSERTING, AMENDING, SUBSTITUTING AND REPEALING HEADINGS

Section 36 of the **Interpretation of Legislation Act 1984** provides that headings for Parts, Divisions, Subdivisions, Schedules and sections form part of the statute. They may be inserted for the first time, substituted, amended or repealed. They may be amended to reflect newly inserted content. Alternatively, new Division or Subdivision headings can be inserted to divide an existing Part or Division.

The clause note for a clause that makes this kind of amendment should briefly explain the purpose of it, even if the amendment is technical or consequential.

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<sup>10</sup> Explanatory memorandum to the Public Prosecutions Amendment Bill 2011.

## Examples

Unhelpful	Helpful
Clause X inserts a new heading for Division A of the Principal Act.	Clause 38 inserts a new Division heading at the beginning of Part 5.8, as one of several that create a Division structure in that Part. The heading to Division 1 is "Appointment of Authorised Officers". <sup>11</sup>

## 4.7 STATUTE LAW REVISION AMENDMENTS

Statute law revision amendments correct certain kinds of obvious, straightforward errors in existing Acts. Clause notes for these amendments are discussed further in Chapter 5.

## 4.8 AUTOMATIC REPEAL PROVISIONS

Most amending Bills contain clauses that provide for the automatic repeal of the amending Act. We recommend the following formulation for clause notes for these clauses:

"Clause 72 provides for the automatic repeal of this amending Act on [*insert appropriate information*]. The repeal of this Act does not affect in any way the continuing operation of the amendments made by this Act (see section 15(1) of the **Interpretation of Legislation Act 1984**)."

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<sup>11</sup> Explanatory memorandum to the Education and Training Reform Amendment (Skills) Bill 2010.

## CHAPTER 5—SARC REQUIREMENTS AND CLAUSE NOTES FOR SPECIFIC CLAUSES

### 5.1 ROLE OF SARC

SARC is a Joint Investigatory Committee that examines all Bills introduced to Parliament (it also examines regulations and has other functions). SARC reports to Parliament on any provisions in Bills that raise issues of concern (see 5.2 below).

If SARC is concerned about a provision in a Bill, or is dissatisfied with the explanation for a provision in a Bill provided in the second reading speech, Statement of Compatibility or explanatory memorandum, it may write to the Minister about the matter and comment on it to Parliament in the Alert Digests.<sup>12</sup> The Minister's response to this letter will also be published in the Alert Digests.

To assist SARC, sufficient explanatory material should be included in the explanatory memorandum, second reading speech or Statement of Compatibility.

A discussion of clause notes for clauses that engage SARC's terms of reference and other common clauses is set out below (see 5.3–5.5).

### 5.2 SARC'S REQUIREMENTS

SARC has published a Practice Note<sup>13</sup> to advise legislation officers of its expectations of the information that should be provided to Parliament about provisions in Bills that engage its terms of reference.

Of particular concern to SARC are provisions in Bills which test or invoke SARC's terms of reference under section 17 of the **Parliamentary Committees Act 2003**. SARC expects to see an explanation as to the reason and justification for those provisions being inserted in a Bill.

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<sup>12</sup> The Alert Digests can be found online at the following address:  
<http://www.parliament.vic.gov.au/sarc/publications#alerts>

<sup>13</sup> The Practice Note can be found online at the following address:  
[http://www.parliament.vic.gov.au/images/stories/committees/sarc/practice\\_notes/26-05-14\\_practice\\_notes.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/practice_notes/26-05-14_practice_notes.pdf)

Provisions that SARC expects to see explained fully in the explanatory memorandum include provisions containing the following matters:

- retrospective provisions;
- wide delegations of functions and powers, including sub-delegations;
- an open-ended commencement (without a forced commencement date) or a commencement date more than 12 months from the time the Bill was introduced to the Parliament (see 5.3 below);
- powers of arrest, detention and deprivation of liberty;
- search and seizure powers without a judicial warrant;
- creation of strict or absolute liability offences;
- reversal of the onus of proof for criminal offences (or civil penalty offences);
- abridgment of the right to silence or privilege against self-incrimination;
- restrictions on freedom of communication, assembly, movement, association, or religion, or conscience issues;
- infringement of the right to vote;
- denial of, or a failure to advise of, judicial or merits review of administrative decisions;
- denial or abridgment of the principle of a "fair trial" or any principles of natural justice;
- acquisition of property without adequate compensation;
- privacy of information and health records matters;
- inappropriate delegation of legislative power (for example, allowing regulations to alter an Act);
- statute law revision amendments (see 5.4 below);
- infringements of human rights in the Charter Act (may overlap with some of the above matters);
- the interaction between the Charter Act and the application of non-Victorian law in Victoria.

Additionally, SARC requires explanatory material to not be so brief as to be unhelpful. Where a clause deletes or substitutes a word or a few words there needs to be adequate explanation in order to understand the purpose of the amendment. It is insufficient for a clause note to simply state that a certain word has been deleted. Similarly, if a clause repeals an Act or any provision of an Act, there needs to be an adequate explanation about the effect of the repeal (and, if relevant, a reference to any replacement provisions).

## 5.3 COMMENCEMENT PROVISIONS

The clause note for the commencement clause must explain the commencement scheme.

As noted above at 3.3.2, the usual commencement provision for a Bill provides for it to come into operation by proclamation on a specified day or days with a forced commencement date that is within 12 months of the date on which the Bill was introduced to the Parliament.

If the forced commencement date is more than 12 months after the Bill was introduced to the Parliament, the clause note must explain why such a long period before commencement is required. Delayed commencement in excess of 12 months is of concern to SARC and the Parliament will be informed why it is necessary.

Similarly, if clauses are to commence on a particular date (not by proclamation) and that date is more than 12 months after the Bill was introduced to the Parliament, the clause note must explain why such a long period before commencement is required.

If a clause is to commence by proclamation without an automatic commencement date, the clause note must explain why it is to commence that way. This can occur in Bills enacting or modifying national schemes.

A detailed explanation is also required if any provision is to have a retrospective commencement and operation. The explanation should state why it is necessary for the provision to be retrospective, the reason a specific retrospective date has been chosen and whether the retrospectivity will adversely affect any person.

### Examples

<b>Commencement by proclamation with forced commencement date <u>more than 12 months from introduction to the Parliament</u></b>	
Clause 2	sets out when the provisions of the Bill come into operation.  Subclause (1) provides that, subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.  Subclause (2) provides that, if a provision of this Act does not come into operation before 1 September 2012, then it comes into operation on that day.  The forced commencement date in subsection (2) is due to the fact that under the <b>Gambling Regulation Act 2003</b> , the new structure of the gaming industry will not commence until 2012. As many of the provisions in this Bill relate to the new structure of the gaming industry, those provisions cannot come into operation until that time. <sup>14</sup>

<sup>14</sup> Explanatory memorandum to the Gambling Regulation Amendment (Licensing) Bill 2010.

<b>Retrospective commencement</b>	
Clause 2	provides that Part 1, Divisions 3 and 4 of Part 3 and Part 4 come into operation on the day on which the Act receives Royal Assent. Division 3 of Part 2, which relates to validation of certain bail justice acts and decisions is taken to have commenced on 1 August 2013. The retrospective operation of this Division will minimise any disruption to the administration of the justice system and protect the relevant bail justices from having their acts and decisions unnecessarily called into question. All remaining provisions come into operation on a day or days to be proclaimed or on 1 October 2014, whichever is earliest. <sup>15</sup>

## 5.4 STATUTE LAW REVISION AMENDMENTS

Statute law revision amendments correct certain kinds of obvious, straightforward errors in existing Acts. No substantive change to the law is made. For example, statute law revision amendments correct typographical, spelling and grammatical errors or update references to Department names, Acts or sections of Acts.

Despite the technical nature of a statute law revision amendment, a clause note for a clause that makes statute law revision amendment should not simply refer to the clause as "making statute law revision amendments". It should explain the purpose and effect of the amendment.

If the clause note uses the term "statute law revision" it should explain what that term means. The term "statute law revision" is a technical term used by departments and drafters, and would not be meaningful to the public.

### Examples

The example in the left column is unhelpful. The example in the right column refers to an item in a schedule (rather than to a clause number) and explains the purpose and effect of the statute law revision amendments made in that item.

<b>Unhelpful</b>	<b>Helpful</b>
Clause X is of a statute law revision nature.	Item 2 <b>Accident Towing Services Act 2007</b> This item amends section 3(1) to repeal the definitions of <i>towing depot manager accreditation</i> and <i>towing operator accreditation</i> because they are not in correct alphabetical order. These 2 definitions should appear after all the definitions beginning with the words "tow truck".

<sup>15</sup> Explanatory memorandum to the Courts and Other Justice Legislation Amendment Bill 2013.

	This item also reinserts those same definitions in section 3(1) and, relying on section 39A of the <b>Interpretation of Legislation Act 1984</b> , the definitions will be inserted in the correct order. <sup>16</sup>
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## 5.5 SECTION 85 PROVISIONS

Sometimes a provision in a Bill expressly provides that it is the intention of a section to alter or vary section 85 of the **Constitution Act 1975**.

Where one of these provisions is included in a Bill, the Member of Parliament who introduces the Bill (or a person acting on his or her behalf) must make an accompanying statement to the Legislative Council and Legislative Assembly setting out the reasons for altering or varying section 85. The statement is usually contained in the second reading speech for the Bill.

The clause note for the clause containing the section 85 provision does not need to repeat the reasons set out in the statement, but it should refer to the express intention to alter or vary section 85.

### Examples

<b>Explanatory memorandum to a Principal Bill</b>	
Clause 231	expresses that it is the intention of clauses 187, 188 and 189 to alter or vary section 85 of the <b>Constitution Act 1975</b> . Section 85 sets out the powers and the jurisdiction of the Supreme Court of Victoria. <sup>17</sup>
<b>Explanatory memorandum to an amending Bill</b>	
Clause 7	provides that it is the intention of section 109 of the <b>Police Integrity Act 2008</b> , as it applies after the commencement of clause 5, to alter or vary section 85 of the <b>Constitution Act 1975</b> . <sup>18</sup>

<sup>16</sup> Explanatory memorandum to the Statute Law Revision Bill 2012.

<sup>17</sup> Explanatory Memorandum to the Major Crime (Investigative Powers) And Other Acts Amendment Bill 2008.

<sup>18</sup> Explanatory Memorandum to the Australian Consumer Law and Fair Trading Bill 2011.



## CHAPTER 6—STYLE

### 6.1 DOT POINTS

Dot points must not be used **instead** of clause note numbering in the explanatory memorandum. However, it may be helpful to use dot points **within** clause notes.

When setting out a list of points within a clause note, dot points may be used instead of extra numbering (for example, if there is a list of five points, use dot points rather than 1, 2, 3, 4, 5 or a, b, c, d, e). Numbering within a clause note that does not correspond to the numbering in the clause is confusing.

Dot points can assist:

- to break up long paragraphs of text;
- in setting out a list (for example, where a clause provides a list of materials to accompany an application or the objectives, functions or powers of a body);
- in setting out a list of purposes in the clause note to the purpose provision;
- to highlight key points and different elements of complex clauses.

#### Examples

Not preferred	Preferred
<p>Clause X inserts section Y in the Principal Act. Section Y requires an applicant to include the following information in an application:</p> <ol style="list-style-type: none"><li>1. the applicant's name, address and date of birth;</li><li>2. a list of all pets the applicant owns.</li></ol>	<p>Clause 7 inserts a new section 233E(2) to provide an exemption from duty on an application for registration or transfer of registration of a motor vehicle used for social, domestic or pleasure purposes. The application for registration or transfer of registration must be in the name of a person who—</p> <ul style="list-style-type: none"><li>• is assessed under Part 2 of Chapter 4 of the Military Rehabilitation and Compensation Act 2004 of the Commonwealth as a person who has suffered an impairment resulting from one or more service injuries or diseases, the degree of which constitutes 40 impairment points or more; and</li></ul>

	<ul style="list-style-type: none"> <li>operates no other vehicle currently registered without fee as an incapacitated war veteran's vehicle in accordance with regulations made under the <b>Road Safety Act 1986</b>.</li> </ul> <p>This extends the motor vehicle duty exemption available to incapacitated war veterans to those veterans who are compensated under the Military Rehabilitation and Compensation Act 2004 of the Commonwealth. This scheme provides medical treatment and compensation for members and former members of the Australian Defence Force, their dependents and other eligible persons for injury, disease or death that occurred on or after 1 July 2004.<sup>19</sup></p>
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## 6.2 REFERENCES TO LEGISLATION

The clause notes should refer to legislation in the same way that the Bill does. If the Bill refers to the "Principal Act" the clause note should use the same terminology. If the Bill refers to an Act by its short title, the clause note should do the same. Referring to an Act as "the Act" is to be avoided.

Victorian Acts are referred to by their short title and year and are bolded. Acts from other jurisdictions are also referred to by their short title, but they are not bolded and the jurisdiction is specified. For example:

- the "**Local Government Act 1989**", not "The Local Government Act";
- the "Income Tax Assessment Act 1997 of the Commonwealth", not "**Income Tax Assessment Act 1997**".

Where there are a number of references to the same Act throughout the clause notes, the short title of the Act need not be repeated every time. The first reference should be to the short title of the Act and immediately following that reference an abbreviation can be nominated in brackets. Each subsequent reference to that Act can be to that abbreviation. We recommend the following formulation:

- "The Bill makes a number of amendments to the **Foxes Act 1958** (referred to as the "Principal Act" in this explanatory memorandum) and to the **Quick Brown Fox Act 2010** (referred to as the "QBF Act" in this explanatory memorandum)".

<sup>19</sup> Adapted from the explanatory memorandum to the State Taxation Acts Amendment Bill 2012.

## 6.3 REFERENCES TO SECTION NUMBERS AND CLAUSE NUMBERS

Clause notes should use the same style as the Bill to refer to section numbers and clause numbers. For example, if the Bill refers to "section 61(1)", then the clause note should refer to "section 61(1)". The clause note should not refer to "subsection 61(1)" or to "subsection (1) in section 61".

Victorian Acts and Bills use a "forward referencing" style. This means that they refer to provisions by the larger unit of division. The basic units of division for an Act are the section, subsection, paragraph and subparagraph. The basic units of division for a Bill are the clause, subclause, paragraph and subparagraph. In an Act, this means referring to a section rather than a subsection (for example, "section 61(1)" and not "subsection 61(1)"). In a Bill this means referring to a clause rather than a subclause (for example, "clause 61(1)" and not "subclause 61(1)"). The same pattern should be followed for references to paragraphs and subparagraphs.

### Examples

<b>Incorrect</b>	<b>Correct</b>
Subsection 60(1)	Section 60(1)
Subclause 1(1)	Clause 1(1)
Subsection (1) of section 60	Section 60(1)
Paragraph (1)(a)	Subsection (1)(a)
Paragraph (1)(a)	Subclause (1)(a)
Subparagraph (a)(i)	Paragraph (a)(i)

A reference within the text of a larger division to a smaller division should simply refer to the smaller division. For example, if the text of section 1 needs to refer to individual subsections within that section, it is correct to refer to "subsection (1)" and not "section 1(1)". Likewise, if the text of a subsection needs to refer to individual paragraphs within that subsection, it is correct to say "paragraph (a)" and not "subsection (1)(a)".

Similarly, in a clause note it is correct to refer to individual subclauses within a clause, or the individual paragraphs within a subclause.

## Examples

<b>Forward referencing</b>	
Clause 16	amends section 57I(1)(d) of the Duties Act 2000 to omit "more than \$130 000 but". This amendment ensures that a transferee who purchases a home for no more than \$600 000 will receive the duty reduction available under section 57JA of that Act. <sup>20</sup>

<b>References to subclauses within a clause</b>	
Clause 8	<p>amends section 81B of the <b>Constitution Act 1975</b> to make the Chief Justice responsible for engaging reserve Judges to undertake the duties of Judge of the Court.</p> <p>Subclauses (1), (2) and (3) amend section 81B of the <b>Constitution Act 1975</b> to make the Chief Justice the officer who engages reserve Judges, rather than the Attorney-General. The Chief Justice may engage a reserve Judge to undertake the duties of a Judge of the Court. Subclause (3)(b) also makes amendments to provide that the Chief Justice may not revoke, amend or vary an engagement under section 81B without the consent of the reserve Judge.</p> <p>Subclause (4) inserts new subsections (4) and (5) into section 81B of the <b>Constitution Act 1975</b>.</p> <p>New subsection (4) of section 81B provides that the engagement of a reserve Judge cannot exceed 6 months from the date that the engagement commences.<sup>21</sup></p>

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<sup>20</sup> Explanatory Memorandum to the State Tax Laws Amendment (Budget and Other Measures) Bill 2013.

<sup>21</sup> Explanatory Memorandum to the Courts Legislation Amendment (Judicial Officers) Bill 2013.

## ***Attachment 1***

### **GLOSSARY**

<b>Term</b>	<b>Explanation</b>
Amending Bill	A Bill for an amending Act
Charter Act	<b>Charter of Human Rights and Responsibilities Act 2006</b>
OCPC	Office of the Chief Parliamentary Counsel
Principal Bill	A Bill for a Principal Act
SARC	Scrutiny of Acts and Regulations Committee

## Attachment 2

### CLAUSE NOTE CHECKLIST

Things to check	Checked ✓
<p>Does the clause note accurately describe the intended effect of the clause?</p> <p>Is the clause note doing more than simply paraphrasing the clause?</p> <p>If the clause note is for an amending Bill, does it refer to the section number of the provision being amended?</p> <p>Has the numbering been updated to reflect late changes to the numbering in the Bill?</p> <p>Have all cross-references to clause numbers in clause notes been checked?</p> <p>Are all references to Victorian Acts in bold font (for example, the <b>Water Act 1989</b>) and correct?</p> <p>Are all references to sections or clauses in the forward referencing style?</p> <p>Are any proper names of statutory authorities, other bodies, documents and Acts referred to correct?</p> <p>If using abbreviations of official titles, have they been defined?</p> <p>Are the dot points (if any) used appropriately?</p> <p>In an amending Bill, does each clause note refer to whether the clause is inserting, substituting or repealing? (for example, Clause 5 inserts, Clause 89 substitutes, Clause 15 repeals)</p> <p>In an amending Bill, does each clause note refer to the section and name of the Act being amended?</p>	

### ***Attachment 3***

## **SARC PRACTICE NOTE**

The Practice Note can be found online at the following address:

[http://www.parliament.vic.gov.au/images/stories/committees/sarc/practice\\_notes/26-05-14\\_practice\\_notes.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/practice_notes/26-05-14_practice_notes.pdf)



26-05-14\_practice\_n  
otes.pdf

***Attachment 4***

**OCPC EXPLANATORY MEMORANDUM TEMPLATE**



ExMem Template  
Final.docx