Guidelines for the preparation of explanatory notes

Overview

The preparation and use of explanatory notes is an important part of the legislative process. Explanatory notes need to be clear, precise and informative as they are used to:

- inform Cabinet decision making;
- contribute to informed debate in Parliament;
- ensure effective Parliamentary scrutiny of bills and subordinate legislation;
- assist in the interpretation of legislation, including by practitioners, lawyers and courts;
- make legislation more accessible by assisting people to understand the effect on their rights and obligations imposed by legislation; and
- inform public discussion about legislation, including whether the legislation has sufficient regard to rights and liberties of individuals and democratic principles.

Explanatory notes are required at key times in the development of legislation and are prepared for the purposes of accompanying:

- the Authority to Introduce a Bill submission to Cabinet;
- the Bill on its introduction into Parliament (as required under section 22 of the Legislative Standards Act 1992 (the LSA));
- any amendments during consideration in detail of the Bill;
- an Authority to Forward Significant Subordinate Legislation submission to Cabinet; and
- all subordinate legislation that is tabled in Parliament (as required under section 22 of the LSA).

Under section 93 of the Parliament of Queensland 2001, portfolio committees are responsible for examining each Bill and item of subordinate legislation in its portfolio area to consider the policy to be given effect by the legislation, the application of fundamental legislative principles and the lawfulness of subordinate legislation. In addition, the responsibilities of portfolio committees include monitoring the operation of explanatory notes. Clearly drafted and informative explanatory notes should also assist portfolio committees in carrying out their functions.

In addition, section 22 of the LSA requires that when subordinate legislation is tabled in Parliament, it must be accompanied by an explanatory note prepared under the authority of the responsible Minister.

The former SLC has recommended that explanatory notes should be drafted in ‘plain English’ style, should not use archaic or anachronistic language and that, saying too
much is preferred to saying too little if it is not possible to adequately address an issue in brief. 1 These guidelines provide further detail on the preparation of explanatory notes.

Content of explanatory notes

The LSA sets out the requirements for what to include in explanatory notes for Bills (section 23) and for subordinate legislation (section 24). Sections 23 and 24 of the LSA provide the framework for explanatory notes and are set out as headings in the following templates:

- Template 1 - Explanatory notes for Bills; and
- Template 2 - Explanatory notes for subordinate legislation.

Agency officers should adopt these templates for explanatory notes and be guided by the notes and examples under each heading. Note that Template 2 should be used for both significant subordinate legislation and other types of subordinate legislation. Footnotes to the relevant resources are also included for assistance.

Please note that the brief examples only provide a starting point for preparing the document. Agency officers should also refer to recent explanatory notes on the Office of the Queensland Parliamentary Counsel website (http://www.legislation.qld.gov.au) for examples of how to approach particular parts of the document.

As sections 23 and 24 of the LSA provide for similar requirements in some sections, some of the points in relation to Bills apply equally to subordinate legislation – these are cross-referenced in the subordinate legislation template.

In instances where amendments to a Bill are intended to be moved by the Minister sponsoring the Bill during the consideration in detail stage, agency officers must prepare supplementary explanatory notes for the Minister to table in Parliament. The explanatory notes for amendments to be moved during consideration in detail should include information under the following headings:

- The title of the Bill;
- Objectives of the amendments;
- Consultation; and
- Notes on provisions.

It may be necessary for the Minister sponsoring the Bill to correct any error or inaccuracy in the explanatory notes. The Minister does this by tabling in Parliament an erratum that ensures the explanatory notes reflect the content of the Bill. The erratum should include information under the following headings:

- The title of the Bill;
- Reason for Erratum; and
- Notes on Provisions.

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Regulatory Assessment Statement

The Statutory Instruments Act 1992 (SIA) requires that a Regulatory Impact Statement is prepared for significant subordinate legislation if it will impose appreciable costs on the community or a part of the community. The Regulatory Assessment Statement (RAS) system has been designed to incorporate the requirements of the SIA and impose additional requirements which are applicable across all significant regulatory proposals whether included in primary or subordinate legislation. A RAS is designed to ensure that the costs and benefits associated with the making of legislation and alternatives to regulation are fully assessed.

There is a requirement in section 24(3) of the LSA in regard to significant subordinate legislation that the explanatory notes must be accompanied by the regulatory impact statement prepared for the subordinate legislation. There is currently no equivalent requirement for an explanatory note for a bill. As a RAS will be the regulatory impact statement instrument used to satisfy the requirements of both the SIA and the LSA, it is considered that the explanatory notes for significant subordinate legislation must be accompanied by the RAS.

In the case of a bill, if the RAS has been endorsed by Cabinet for public release, it may also be appropriate to include reference to the contents of the RAS in the explanatory notes for a bill. For example, in relation to the costs and benefits of government implementation.

The Regulatory Review Branch in Queensland Treasury provides an advisory role to agencies on the RAS system.

Formatting, printing and delivery

In relation to explanatory notes for Bills, Goprint formats the explanatory notes. This process requires agency officers to approve the proofs including faxing and phoning through required changes. Goprint then prints the required copies of explanatory notes and provides these to SDS for delivery to Parliament House. In some cases it may be necessary for an agency to print the explanatory notes for delivery to Parliament House when there is insufficient time for Goprint to do so.

In relation to explanatory notes for subordinate legislation, the Office of the Queensland Parliamentary Counsel (OQPC) formats the explanatory notes and provides it to the agency when the subordinate legislation is to be made. After the subordinate legislation is made, OQPC inserts the subordinate legislation number and provides the explanatory notes to Goprint for printing. Goprint then provides the printed copies to SDS for delivery to Parliament House.
Further resources

There are a number of resources listed below to assist agency officers in the preparation of explanatory notes.

*Legislative Standards Act 1992*  

*Statutory Instruments Act 1992*  

Queensland Cabinet Handbook  

The Queensland Legislation Handbook  

Auditor-General of Queensland, Report to Parliament No.6 of 2009, Providing the information required to make good regulation, A performance management systems audit  


2007 Council of Australian Governments - *Principles of Best Practice Regulation*  
[Insert name of Bill]²

Explanatory Notes

Short title

Notes:

This is a requirement under section 23(1)(a) of the Legislative Standards Act 1992 (LSA). The short title of the Bill is set out in the draft Bill.

Example:

The short title of the Bill is the [insert title].

Policy objectives and the reasons for them

Notes:

Section 23(1)(b) of the LSA requires a brief statement of the policy objectives of the Bill and the reasons for them. When preparing this statement, give adequate reasons for the policy objectives as the reasons have been considered by the former Scrutiny of Legislation Committee (SLC) to be as important as the policy objectives themselves.³

Example:⁴

The objectives of the Bill are to:

1. establish an independent body to deal with ###
2. ensure the independent body deals with matters in a way that is ###

The Queensland Government announced its intention to create a new independent body following a review by the Department of ###. The review arose out of long standing

² Note: Include a document Header that contains the full name of the Bill and a document Footer that includes page numbers.

³ Appendix 5.6 – Comments by the Scrutiny of Legislation Committee, Auditor-General of Queensland, Report to Parliament No.6 of 2009, Providing the information required to make good regulation, A performance management systems audit

⁴ The examples used in this template are an adaptation of the explanatory notes for the Queensland Civil and Administrative Tribunal Bill 2009 prepared by the Department of Justice and Attorney-General which received favourable comments from the Scrutiny of Legislation Committee.
concerns about ### and the consequent confusion for users and the cost to government…

**Achievement of policy objectives**

*Notes:*

Section 23(1)(c) of the LSA requires a brief statement of the way the policy objectives will be achieved by the Bill and why this approach is reasonable and appropriate.

When preparing this statement:

- present a justification for the approach adopted in the bill and how it will achieve the policy objectives;
- state why this way of achieving the objectives is reasonable and appropriate – it is not adequate to simply state that ‘it is reasonable and appropriate’; and
- explain why the government action is effective and proportional to the issue being addressed.

*Example:*

To achieve its objectives, the Bill will establish the independent body and set out its functions and powers.

The Bill will achieve its objective of ### by:
- requiring the independent body to ###
- requiring ###

The Bill will achieve its objective of ### by:
- requiring ###
- requiring ###

**Alternative ways of achieving policy objectives**

*Notes:*

Section 23(1)(d) of the LSA requires, if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives and why the alternative was not adopted.

When preparing this statement:

- explain the range of feasible policy options that have been considered, including self-regulatory, co-regulatory and non-regulatory approaches, and the benefits and costs of each option where appropriate; and
- explain why legislation generates the greatest net benefit for the community.

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5 Appendix 5.6, Auditor-General’s Report No 6 of 2009
6 Appendix 5.6, Auditor-General’s Report No 6 of 2009
7 Principle 8, COAG Principles of Best Practice Regulation
8 Principle 2, COAG Principles of Best Practice Regulation
9 Principle 3, COAG Principles of Best Practice Regulation
Example:

The Department of ### released a discussion paper/public benefit test for public consultation seeking comment on a range of options for reform. Options other than [the recommended option] canvassed were:

• ###
• ###

**Explain the costs and benefits of pursuing the preferred and alternative options**

Consultation confirmed that the majority of stakeholders supported/did not support Option 1 due to the following reasons:

• ###
• ###

The majority of stakeholders supported/did not support Option 2 for the following reasons:

• ###
• ###

**Estimated cost for government implementation**

**Notes:**

Section 23(1)(e) of the LSA requires a brief assessment of the administrative cost to government of implementing the Bill, including staffing and program costs but not the cost of developing the Bill.

The Auditor-General has noted that if Parliament is not provided with useful information on the costs to government, it may not be able to fully judge whether the benefits of the proposed regulatory solution outweigh the costs.\(^\text{10}\) Furthermore, full costing information may be hidden within existing budgets and skew the real economic implications for the State and stakeholders.\(^\text{11}\) It is not considered necessary to include a dollar amount when setting out the costs but rather to fully describe the types of costs and how these will be funded.

When preparing this assessment:

- present more than a simple assertion as even if there are no costs to government, an analysis should be provided;\(^\text{12}\)
- consider the risk of absorbing costs into existing agency budgets due to the possibility that current programs and services may need to be reduced - examples of these types of costs include:
  - training of staff to implement new regulations;
  - lost revenue from the disposal of assets;
  - advertising of changes in land use as a result of regulation changes;
  - inspection and compliance costs;
  - maintenance and depreciation costs of acquired/transferred assets.\(^\text{13}\)

\(^{10}\) p.30, Auditor-General’s Report No 6 of 2009
\(^{11}\) p.29, Auditor-General’s Report No 6 of 2009
\(^{12}\) Appendix 5.6, Auditor-General’s Report No 6 of 2009
Example:

The State Government will incur an additional cost in the implementation and support of the independent body. One off funding has been provided to support the establishment of the independent body. This funding has been focussed on the development of legislation, and the implementation of technology, business processes, communication and structural arrangements.

The additional support costs associated with these elements will be funded through the realignment of existing resources.

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**Consistency with fundamental legislative principles**

**Notes:**

Section 23(1)(f) of the LSA requires a brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.

It is for the Parliament to determine whether legislation has ‘sufficient regard’ to rights and liberties of individuals and the institution of Parliament. Explanatory notes should provide comprehensive information to assist in the Parliament’s determination in this matter.

Portfolio committees assess all Bills for compliance with fundamental legislative principles. and report to Parliament on any concerns. The former SLC has stated that it regards this aspect of the explanatory notes as being of great importance especially as it informs members of Parliament of issues affecting individuals’ rights and liberties and the institution of Parliament, and can also assist in the subsequent interpretation of the legislation.\(^{14}\)

Also note that a function of the Office of the Queensland Parliamentary Counsel is to advise Ministers, government entities and Members of Parliament on the application of fundamental legislative principles.\(^ {15}\)

For detailed and up-to-date discussion of the fundamental legislative principles, refer to:

- section 7 of “The Queensland Legislative Handbook”; and
- comments made by relevant portfolio committees regarding fundamental legislative principles when reporting on bills.

When preparing this assessment:

- a possible breach of fundamental legislative principles should be addressed even where the breach is perceived as justified;\(^ {16}\)
- there should be more than a simple assertion that the legislation is ‘consistent with fundamental legislative principles’ unless it is very clear that it is;\(^ {17}\)

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\(^{13}\) p.30, Auditor-General’s Report No 6 of 2009

\(^{14}\) p.9, Scrutiny of Legislation Committee Report

\(^{15}\) Section 7, *Legislative Standards Act 1992*

\(^{16}\) Appendix 5.6, Auditor-General’s Report No 6 of 2009

\(^{17}\) Appendix 5.6, Auditor-General’s Report No 6 of 2009
if an issue, such as retrospective provisions or Henry VIII clauses, has been included in the legislation, this should be raised as a fundamental legislative principle issue;\textsuperscript{18} and

the legislation does not need to exhibit strict compliance with fundamental legislative principles, but rather it needs to have ‘sufficient regard’ to them. Note that explanatory or justifying information should be provided to indicate why the proposed provision would have ‘sufficient regard’ to the fundamental legislative principles.\textsuperscript{19}

\textbf{Example:}

The Bill is generally consistent with fundamental legislative principles. Potential breaches of fundamental legislative principles are addressed below.

\textbf{Legislation should be consistent with the principles of natural justice - Legislative Standards Act 1992, section 4(3)(b)}

Clause ### (insert description of clause)

Clause ### of the Bill potentially breaches the principle of natural justice that a decision should not be made that will deprive a person of some right, interest or legitimate expectation of a benefit without the person being given an adequate opportunity to be heard by the decision-maker. [### rationale justifying potential breach]

\textbf{Consultation}

\textbf{Notes:}

Section 23(1)(g) of the LSA requires a brief statement of the extent to which consultation was carried out in relation to the Bill. This part of the notes should focus on consultation with community stakeholders and organisations independent of government. Although it is an important part of the development of the Bill to consult with government departments and agencies it is not considered necessary to refer to government stakeholders in the explanatory notes. Consultation issues in relation to government stakeholders should have been comprehensively addressed in the preceding submissions to Cabinet.

When preparing this statement:

- consider that, in principle, consultation should occur with affected key stakeholders at all stages of the regulatory cycle – the explanatory notes should explain how consultation has occurred and if not, why not;\textsuperscript{20}
- the groups or persons consulted should be suitably identified (preferably by means of a list);\textsuperscript{21} and
- additional information about the consultation process may be required depending on the nature and importance of the bill – this might include:
  - the form of consultation;
  - a summary of the views expressed;

\textsuperscript{18} Appendix 5.6, Auditor-General’s Report No 6 of 2009
\textsuperscript{19} Appendix 5.6, Auditor-General’s Report No 6 of 2009
\textsuperscript{20} Principle 7, COAG Principles of Best Practice Regulation
\textsuperscript{21} Appendix 5.6, Auditor-General’s Report No 6 of 2009
the resultant impact of the consultative process on the content of the bill; and
if no consultation occurred, the reasons for that.  

Example:

The independent expert panel in its development of the stage one report sought comment from a broad range of stakeholders on the following issues ###. The panel also sought comment on ###.

Stakeholders consulted are listed in appendix ### to the panel’s stage one report. The panel’s recommendations about ### were informed by stakeholder submissions.

The panel in its stage two report further refined its recommendations about the structure of the legislation required to implement ### and the specific provisions required in the bills. This report was released publicly in ###.

The Government accepted the recommendations of the panel’s stage one and stage two reports and authorised the preparation of a draft Bill in accordance with those recommendations to facilitate further consultation.

An exposure draft of the Bill was released for targeted public consultation in ### together with an exposure draft of the ###. Stakeholders were invited to provide comment. Briefings were also provided to key stakeholders to receive verbal feedback and to facilitate more informed written feedback.

Consistency with legislation of other jurisdictions

Notes:

Section 23(1)(i) of the LSA requires explanatory notes to state if the Bill is substantially uniform or complementary with legislation of the Commonwealth or another State, and if so, provide a brief explanation of the legislative scheme.

When preparing this section:
- if applicable, include background information relevant to the development of the national scheme e.g. an intergovernmental agreement23; and consider whether a comparison table of the different legislation would assist.

Example:

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another state. However, other jurisdictions, including the Commonwealth, New South Wales and Tasmania have announced proposed reforms which are generally consistent with Queensland’s reforms, including ###.

The introduction of new legislation in Queensland will align with the majority of other jurisdictions (the Commonwealth, New South Wales, Victoria, Tasmania and the Northern Territory) which have existing legislative safeguards regarding ###.

22 Appendix 5.6, Auditor-General’s Report No 6 of 2009
23 p.16, Scrutiny of Legislation Committee Report
Consideration of proposals for the development of uniform principles will continue at a national level, but the introduction of the Bill will provide Queensland with a legislative basis for ### in advance of the national agenda.

**Reasons for non-inclusion of information**

*Notes:*

Section 23(2) of the LSA requires reasons to be provided for the non-inclusion of information required under section 23(1) of the LSA. This section may be deleted if it is not applicable.

The former SLC has noted some instances where the requirements of section 23(1) were ignored without providing any reasons for doing so. Ensure that adequate reasons are provided for instances where information is not included.

*[Insert page break – then to include Notes on provisions section]*
Notes on provisions

Chapter [insert number]

Part [insert number]

Clause [insert number] [insert explanation]

Schedule [insert number]

[Insert explanation]

Notes:

Section 23(1)(h) of the LSA requires a simple explanation of the purpose and intended operation of each clause of the Bill. This section should set out the explanations under the relevant chapter, part and schedule headings.

The former SLC has stated that the explanations of each clause in the Bill is important for enhancing Parliamentary debate on the Bill and is of particular significance in the subsequent interpretation of individual clauses once the Bill has passed into law.24

Although the explanation of many of the clauses in the Bill may consist of a paraphrase or word-for-word repetition of it, there will always be some clauses in the Bill that require a more comprehensive explanation25. It is noted, however, that the former SLC has advised that repetition of the clause would rarely assist an informed determination by the Parliament of whether a provision has ‘sufficient regard’ to the rights and liberties of individuals or the institution of Parliament.

When preparing the explanations of each clause:

- note that care should be taken that any paraphrasing does not change the meaning or intent of the legislation;
- consider explaining the aim of the amendments e.g. whether the amendments:
  - are for clarification;
  - are designed to solve a particular problem,
  - are for the purposes of consistency with other provisions;
  - will impose greater or lesser obligations on people or organisations;
- consider explaining any relevant background to the clause e.g.
  - whether the particular approach was influenced in the course of consultation with a section of the community;
  - whether the change arises from the recommendation of a report;
- consider whether a proper understanding of the Bill requires an explanation of how the Bill relates to current legislation e.g. the Bill may amend, repeal or re-enact legislation - include a table of comparative provisions between clauses of the Bill and corresponding legislation where appropriate26;

24 p.13, Scrutiny of Legislation Committee Report
25 p.13, Scrutiny of Legislation Committee Report
26 p.14, Scrutiny of Legislation Committee Report
- ensure that explanations of the clauses are not inconsistent with the terms of the clause itself\(^{27}\); and
- ensure that explanations of the clauses are not incomplete or misleading by failing to mention or to adequately explain some relevant fact or background\(^{28}\).

Example:

**Notes On Provisions**

**Part 1 Preliminary**

Clause 1 states that, when enacted, the Bill will be cited as the ###.

Clause 2 states that the Bill is intended to commence on a day fixed by proclamation.

Clause 3 is a new provision which details the main objects of this Act recognising the principle that ###.

Clause 4 provides that the dictionary in the schedule defines particular words used in this Act.

Clause 5 provides for the definition of ###. This concept has been derived from relevant standards to determine when an entity is controlled, either directly or indirectly, by a parent entity.

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\(^{27}\) p.14, Scrutiny of Legislation Committee Report

\(^{28}\) p.14, Scrutiny of Legislation Committee Report
Note: Section 22 of the Legislative Standards Act 1992 requires that when subordinate legislation is tabled in Parliament, it must be accompanied by an explanatory note prepared under the authority of the responsible Minister.

[Insert name of subordinate legislation]

Explanatory notes for SL ### No. ###

made under the

[Insert name/s of Act]

General Outline

Short title

Notes:

Section 24(1)(a) of the LSA requires the inclusion of the legislation’s short title.

Details of the number given to the legislation in the Queensland Subordinate Legislation Series are obtained by the Office of the Queensland Parliamentary Counsel from Executive Council Secretariat, Department of the Premier and Cabinet.

Authorising law

Notes:

Section 24(1)(b) of the LSA requires the inclusion of the provision of the Act or subordinate legislation under which the legislation was made (the authorising law).

Subordinate legislation must be based on a head of power set out in the authorising law and should not exceed the scope of authorisation of that law or other applicable laws.

Example:

Section 223 of the ### Act 1994 and sections 39 and 40 of the ### Act 2000.
Policy objectives and the reasons for them

Notes:

Section 24(1)(c) of the LSA requires a brief statement of the policy objectives of the legislation and the reasons for them.

Refer to the points in Template 1 for section 23(1)(b) of the LSA.

Achievement of policy objectives

Notes:

Section 24(1)(d) of the LSA requires a brief statement of the way the policy objectives will be achieved by the legislation and why this approach is reasonable and appropriate.

Refer to the points above in Template 1 for section 23(1)(c) of the LSA.

Consistency with policy objectives of authorising law

Notes:

Section 24(1)(e) of the LSA requires a brief explanation of how the legislation is consistent with the policy objectives of the authorising law.

Consider the objectives of the authorising law and how the legislation is consistent with those objectives.

Example:

The amendment regulation is consistent with the main objects of the [insert name of Act], that is to ensure the ###.

Inconsistency with policy objectives of other legislation

Notes:

If the legislation is inconsistent with the policy objectives of other legislation, section 24(1)(f) of the LSA requires a brief explanation of the relationship with the other legislation; and a brief statement of the reasons for the inconsistency.

If applicable, consider the objectives of other relevant legislation and how the legislation is inconsistent with the objectives of that legislation.

Example:

The regulation is consistent with the policy objectives of other legislation. It provides for ### consistent with other State laws relating to ###.
Alternative ways of achieving policy objectives

Notes:

Section 24(1)(g) of the LSA requires, if appropriate, a brief statement of any reasonable alternative way of achieving the policy objectives (including the option of not making subordinate legislation) and why the alternative was not adopted.

Refer to the points in Template 1 for section 23(1)(d) of the LSA.

Benefits and costs of implementation

Notes:

Section 24(1)(h) of the LSA requires a brief assessment of the benefits and costs of implementing the legislation that—
(i) if practicable and appropriate, quantifies the benefits and costs; and
(ii) includes a comparison of the benefits and costs with the benefits and costs of any reasonable alternative way of achieving the policy objectives stated.

Refer to the points in Template 1 for section 23(1)(e) of the LSA.

Consistency with fundamental legislative principles

Notes:

Section 24(1)(i) of the LSA requires a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.

Refer to the points in Template 1 for section 23(1)(f) of the LSA.

Also give consideration to the threshold question of why the use of subordinate legislation is justified as opposed to using primary legislation. In considering this question it is relevant to have regard to the extent that the subordinate legislation may affect the rights and liberties of individuals and the extent that it may erode the institution of Parliament.

Note that portfolio committees may report to Parliament on subordinate legislation that they have considered and that committees can recommend to Parliament that a piece of subordinate legislation be disallowed under section 50 of the Statutory Instruments Act 1992.

Consultation

Notes:

Section 24(2) of the LSA requires that the explanatory note must also include discussion on consultation undertaken including a brief statement of the way consultation was carried out, an outline of the results of consultation, and an explanation of changes made to the legislation because of the consultation.
If no consultation occurred reasons must be provided for this.

Refer to the points in Template 1 for section 23(1)(g) of the LSA.

**Reasons for non-inclusion of information [delete if not applicable]**

**Notes:**

Section 24(4) of the LSA requires that if for any reason the explanatory note does not include the abovementioned information, the explanatory note must state the reason for non-inclusion.

Refer to the points in Template 1 for section 23(2) of the LSA.

Also note that:

- section 24(3) of the LSA requires that for significant subordinate legislation, the explanatory note must be accompanied by the regulatory impact statement; and
- section 24(5) of the LSA provides that information is taken to be included in the explanatory note where it is included in the Regulatory Impact Statement and referred to in the explanatory note.