

1993

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

COMMISSIONER FOR THE ENVIRONMENT BILL 1993

EXPLANATORY MEMORANDUM

**Circulated by Authority of the Minister for the Environment,
Land and Planning**

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COMMISSIONER FOR THE ENVIRONMENT BILL 1993**EXPLANATORY MEMORANDUM****Outline**

The Commissioner for the Environment Bill 1993 is a new Bill which provides the legislative base for the establishment of the Office of the Commissioner for the Environment. The key role of the Office will be to provide independent evaluation of the effectiveness of ACT environmental management by ACT Government Agencies, and produce written reports on its findings and the state of the ACT environment.

The legislation will give the Commissioner similar powers to the ACT Ombudsman. The proposed legislation will give the Commissioner the necessary powers and discretion in relation to the handling and investigation of complaints regarding management of the environment. It also outlines the due processes for the investigation of complaints by the Commissioner, including the ability to refer matters and make recommendations to relevant agencies and a requirement for agencies to respond within a specified period. Agencies will also be required to detail in their annual reports their responses to matters arising from an investigation by the Commissioner.

The Commissioner will be required to produce an annual report, a State of the Environment Report each year and Special reports on significant environmental issues affecting the ACT.

The Commissioner will be able to require agencies to provide information. Where information is not forthcoming for the preparation of a State of the Environment Report, the Commissioner can require staffing assistance for up to three months. The Bill makes provision for appropriate immunity for the Commissioner. The Ombudsman Bill makes the necessary consequential amendments to the Ombudsman Act 1989.

Financial Considerations

There are no revenue implications from the Bill. As stated in the 1992/93 Environmental Budget Paper (Supplementary Budget Paper No.2), funds of \$146,000 for 1992/93 were appropriated in the 1992/93 Budget, and the Environment Budget announced annual funding of \$149,000.

Further Details of the Bill are included in the Attachment.

ATTACHMENT

COMMISSIONER FOR THE ENVIRONMENT BILL

PART I - PRELIMINARYClauses 1-3

Part I consists of 3 Clauses, and covers formal matters relating to the enactment of the Bill by specifying the short title of the Bill, including commencement and definitions.

PART II - OFFICE OF COMMISSIONER FOR THE ENVIRONMENTClauses 4-11

Part II consists of eight Clauses which are similar to the relevant provisions in the Ombudsman Act 1989. It includes the necessary provisions for the appointment of the Commissioner. Part II also specifies the terms and conditions of employment for the position.

Clause 4

The Commissioner for the Environment will be appointed by instrument by the Minister for Environment, Land and Planning.

Clause 5

The Commissioner will be appointed for a period not exceeding 5 years, but can be reappointed.

Clause 6

Covers remuneration and allowances for the Commissioner which are determined by instrument, by the Minister.

Clause 7

Allows the Minister to grant the Commissioner a leave of absence with regard to the terms and conditions of employment.

Clause 8

Provides for written resignation by the Commissioner to the Minister.

Clause 9

This Clause specifies grounds on which the Commissioner can be removed or suspended from office which follow generally the philosophy of the provisions in the Ombudsman Act 1989. These include a request to the Executive by the Legislative Assembly for the removal of the Commissioner on the grounds of misbehaviour or physical or mental incapacity. The Executive may also suspend the Commissioner from office on the same grounds. It provides for the Commissioner's removal from office if the Commissioner becomes bankrupt.

The Executive has the right to instigate suspension of the Commissioner, and has the powers to suspend or remove the Commissioner from office. The Minister's responsibilities relate to the provision of information on the reasons for the suspension or request for removal from office. The time frame in which requests for suspension or removal of the Commissioner from office are also specified in this Clause which states that suspension from office does not affect the Commissioner's entitlement in regard to remuneration and allowances.

Clause 10

Provides for retirement on the grounds of physical or mental incapacity, with the consent of the Minister and Commissioner.

Clause 11

Provides for delegation by the Commissioner of part or all of his/her powers, to a public servant.

**PART III - FUNCTIONS AND POWERS OF THE COMMISSIONER FOR
THE ENVIRONMENT**

Clauses 12-18

Part III has seven Clauses and specifies the range of functions to be undertaken by the Commissioner in relation to investigation of complaints regarding the management of the environment by ACT Government agencies. The powers of the Commissioner in relation to collecting information for investigations are also covered,

Clause 12

The functions of the Commissioner are: to investigate complaints about the management of the environment by the Territory or a Territory authority; conduct investigations as directed by the Minister; and conduct investigation at his/her discretion into actions of an agency which may have a substantial impact on the Territory's environment. However, the Commissioner does not have the powers to investigate an action of a Judge or Master of the Supreme Court; the Ombudsman; a Magistrate or Coroner for the Territory; a Royal Commission under the *Royal Commissions Act 1991*; a Board of Inquiry under the *Inquiries Act 1991*; or a panel conducting an Inquiry under the *Land (Planning and Environment) Act 1991*.

Clause 13

Provides for complaints about the management of the environment of the Territory by the Territory or a Territory authority to be made to the Commissioner in a form approved by the Commissioner.

Clause 14

Provides for a discretion of the Commissioner not to investigate complaints. It will not be necessary for a person to demonstrate "sufficient interest" in the subject matter, recognising that all members of the community have an interest in effective environmental management. However, complaints which are considered vexatious, do not warrant further investigation, or are made more than twelve months after the complainant became aware of the action are sufficient reason to not investigate.

If a person makes a complaint to the Commissioner regarding action taken by an agency, but has not complained to that agency, the Commissioner may decide not to investigate. However, if the person has complained to the concerned agency, and they have not responded or taken adequate action, and the Commissioner believes the agency has had sufficient time to respond, or has not taken sufficient action, the Commissioner shall investigate.

If a person's complaint has resulted in a review by a court or tribunal constituted by or under a Territory law, the Commissioner will not investigate unless he/she is of the opinion that there are special reasons justifying an investigation.

In a situation where the Commissioner believes that a complaint could be heard by a court or tribunal under a Territory law, but the complainant has not exercised that right, the Commissioner can decide not to investigate if he/she believes it would in all circumstances be reasonable for the complainant to have exercised that right.

If prior or during an investigation of a complaint regarding action taken by an agency, the Commissioner concludes that there is another more appropriate administrative process for reviewing the complaint, the Commissioner may decide not to proceed with or continue the investigation. This includes where a complaint has been, or is to be reviewed through the other process, or the Commissioner believes it would be reasonable for the complainant to pursue the alternative course of review.

If a person makes a complaint on behalf of another person or persons, the provisions of this section relating to "the complainant", will apply to the person or persons who requested that the complaint be made.

When the Commissioner decides not to investigate a complaint, he/she will be required to provide the reasons for not investigating in the annual report.

Clause 15

If the Commissioner decides an investigation of a complaint is warranted, the Commissioner must inform the principal officer of the concerned agency before the investigation begins. The investigation will be conducted in private and in a manner which the Commissioner thinks is appropriate, including obtaining information from people and making inquiries as necessary.

It is not necessary for the complainant or any other person to appear before the Commissioner in relation to an investigation. The one exception to this is when the Commissioner's report on an investigation implicitly or explicitly criticises an agency or person. In this case the principal officer of the agency (or authorised representative), or the person (or representative approved by the Commissioner) must be given a chance to make a submission to the Commissioner orally or in writing, before the report is completed.

The Commissioner may discuss with the relevant Minister any matter concerning a particular case either before or after the investigation is completed. If requested by the responsible Minister, the Commissioner must consult with that Minister before forming a final opinion on the matter being investigated.

If the Commissioner comes to the opinion before or after completing the investigation, that an officer of the concerned agency is guilty of a breach of duty or misconduct, and that there is sufficient evidence to support this opinion, the Commissioner shall bring this to the notice of the appropriate person in the concerned Department or prescribed authority. In the case of a Department, if the officer is the principal officer and is also Head of Administration, evidence shall be brought to the notice of the responsible Minister of the Department. If the officer is the principal officer of the Department and is also an Associate Head of Administration, evidence shall be brought to the notice of the Head of Administration. The principal officer of the Department shall be notified if the case concerns an officer other than the principal officer of that Department. The same applies in the case of a prescribed authority. If the person is the principal officer, the evidence shall be brought to the notice of the responsible Minister of the authority. If the person is not the principal officer, the principal officer of the authority shall be notified.

Clause 16

When undertaking an investigation, the Commissioner or authorised representative, has the power to enter the premises of any agency (at a reasonable time of day) to carry out the investigation. This can include the inspection of relevant documents (except those covered under 17 (6)) held on the premises, subject to prior arrangement with the principal officer of the concerned agency.

Clause 17

If the Commissioner has reason to believe that an agency can provide information, documentation or other records relevant to the investigation, a written notice may be served on the head of the agency requiring the agency to supply the information within a certain period of time.

Where the Commissioner believes that an officer of an agency can provide the above information, but the Commissioner does not know the identity of that officer, the principal officer of the agency can be requested in writing to pursue the matter. The principal officer will be required to attend, or nominate a representative to attend a meeting at a given time with the Commissioner or his/her representative, to answer questions relevant to the investigation or to provide requested documentation relevant to the investigation.

Where documents are produced for the Commissioner, the Commissioner has the right to take possession of the documents, make copies or take extracts, and/or retain the documentation for as long as necessary to complete the investigation. While the information is in the possession of the Commissioner, a person who would be entitled to inspect the documents if they were not with the Commissioner, will still be allowed to inspect the documents at any reasonable time.

If the Commissioner believes that a person has information relevant to an investigation, the Commissioner can require, in writing, that the person attend a meeting at a given time and date, with the Commissioner or his/her representative, to answer questions relevant to the investigation.

The Minister responsible for the concerned agency can write to the Commissioner certifying that the disclosure of information to the Commissioner as requested would be contrary to the public interest. This can include information which discloses communication between a Minister and a Commonwealth, State or Territory Minister which if released would prejudice relations between jurisdictions. It also includes matters of deliberations or decisions of the Executive or of a Committee of the Executive. The Commissioner cannot require a person to provide information, documentation or answers to him/her on these matters.

However, a person will not be excused from providing information, documents or answering questions under this Act, on the grounds that doing so would contravene provisions of other Territory laws, would be contrary to public interest or might incriminate the person or make them liable to a penalty. This also applies to situations where the information would disclose legal advice provided to a Minister or agency. When a person provides the requested information, it cannot be used in evidence against that person in other legal proceedings. The person would also not be liable to any penalty under provisions of other Territory laws as a result of providing information requested under this Act. The exceptions are: when a person refuses to provide requested information, and the Commissioner makes an application to the Supreme Court requesting a direction for the persons to provide the information; and when proceedings are undertaken against a person for wilfully obstructing the Commissioner or authorised representative, or providing false or misleading information.

Clause 18

When an agency has failed to provide the Commissioner with data requested in relation to a State of the Environment Report, the Commissioner may request in writing staffing assistance and the agency head shall, where the assistance requested is for a period not exceeding three months, provide that assistance.

PART IV - REPORTS**Clauses 19-22**

Part IV consists of four Clauses which cover the three types of reports that the Commissioner is required to produce (State of the Environment, annual report, and special reports). It specifies the scope of these reports, and the timeframes in which the reports are to be produced to the Legislative Assembly by the Minister.

Clause 19

The Commissioner will be required to submit to the Minister, a State of the Environment Report by 31 August each year, reporting on the period 1 July to 30 June. The Minister will be required to present the Report to the Legislative Assembly. The State of the Environment Report will increase Government accountability for environmental outcomes.

The report will include the following:

- an assessment of the quality of the environment in the Territory including reference to impact on flora and fauna;
- an evaluation of the adequacy and appropriateness of existing practices and procedures for achieving acceptable environmental standards as prescribed by the Commissioner;
- an assessment of ambient air quality and water quality, noise, hazardous wastes, soil quality, site contamination and impact of waste;
- an assessment of the effectiveness of pollution control measures, planning and development controls, national standards, and the feasibility of national goals and other environment management tools that have been accepted by the Executive;
- any matters which the Minister specifies must be reported on; and
- matters which the Commissioner considers relevant to include.

Clause 20

The Commissioner will be required to submit an annual report to the Minister by 31 August each year covering the period 1 July to 30 June. The annual report must include information on the operations of the Commissioner's Office for the reporting period, including reasons for not investigating complaints. The Minister will present the report to the Legislative Assembly.

Clause 21

Requires the Commissioner if she/he has been requested by the Minister to conduct an inquiry, or has conducted an inquiry of his/her own volition on an issue of environmental significance, to prepare a special report for submission to the Minister within 28 days of completion.

Clause 22

Provides that when the Minister has received a report from the Commissioner, he/she must table the special report to the Legislative Assembly within 15 sitting days.

PART V - MISCELLANEOUS**Clauses 23-28**

Part V consists of six Clauses which provides for: agency annual reporting obligations under the Act; legal protection for the Commissioner from being sued; referral of matters to the Ombudsman; the powers of the Supreme Court in relation to the Commissioner; offences committed under the Act which a liable to penalty; and the making of regulations by the Executive in relation to the Act.

Clause 23

Provides that ACT agencies annual reports must provide details of: any request made under Section 18 of the Act; assistance provided in response to the request; investigations carried out by the Commissioner which related to the agency; recommendations made by the Commissioner which effect the agency; and the agency's action as a result of the recommendation.

Clause 24

Provides that the Commissioner, or a person to whom the Commissioner has delegated part or all powers, is not liable to an action, suit or legal proceeding in relation to duties performed in good faith in exercising powers under the Act. This also applies to persons acting under the Commissioner's direction or authority.

Clause 25

Allows for the Commissioner to refer complaints that fall within the jurisdiction of the Ombudsman, to the Ombudsman with relevant documents and information. This can be done regardless of whether the Commissioner has commenced an inquiry or not.

Clause 26

Provides that if a question arises between the Commissioner and a principal officer of an agency over the exercise of a power or function under this Act, then either of the parties can make an application to the Supreme Court for a determination on the question. The party making the application must inform the Minister responsible for the concerned agency of the reasons for the dispute, prior to making the application to the Supreme Court. The Supreme Court will decide which applications would be appropriately heard by it.

If the Commissioner requests a person to provide information, documentation, records or answer questions, and the request is refused, the Commissioner may make an application to the Supreme Court for an order to direct that person to provide the information within a certain period of time.

Clause 27

Provides that if a person wilfully obstructs, hinders or resist the Commissioner or his/her authorised representative in carrying out duties under this Act without reasonable excuse, they can be fined \$5,000, imprisoned for six months, or both. These penalties also apply to a person who knowingly makes a false statement or knowingly provides misleading information to the Commissioner or authorised representative.

Clause 28

Provides that the Executive is able to make regulations which are consistent with the requirements of this Act, or are necessary or convenient to be made for implementing or giving effect to this Act.