

1992

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

LAW OFFICER BILL 1992

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Attorney-General**

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Background

The Self-Government Act provides for there to be an ACT Executive [section 36] which is responsible for governing the Territory [section 37]. The Executive comprises a Chief Minister who is elected by the Assembly [section 40] and up to 4 other Ministers appointed by the Chief Minister [section 41].

Section 43 provides for the Chief Minister to allocate the Executive's responsibilities amongst the Ministers, including him or herself. In doing so the Chief Minister has adopted the practice of designating one of the Ministers as "Attorney-General".

The office of Attorney-General originated in medieval England, where the Attorney was the officer appointed to represent the King in Court. Because the Attorney-General was the chief law officer of the Crown, he or she could exercise a number of inherent or prerogative powers, functions and privileges including:

- granting a fiat to allow a private citizen to enforce a public right;
- providing legal advice to the Government;
- instituting legal proceedings on behalf of the Crown.

In other states and territories the Attorney-General is appointed by the Governor or Administrator, a representative of the Crown. The different arrangement for the appointment of the ACT's Attorney-General has led to concern that the powers traditionally exercisable by Attorneys-General may not be exercisable by the ACT Attorney. This concern is based on the view that the traditional or common law powers of the Attorneys-General are vested in them by virtue of their appointment by the Crown or the Crown representative.

It can be argued the method of appointment of the ACT Attorney-General does not limit the common law powers which the Attorney may exercise. On this argument the ACT Attorney-General is, by virtue of his or her responsibility for the administration of law and justice, the chief legal representative of the Crown in right of the Territory and, as such, is vested with all the powers appropriate to that function. However, this view has been questioned by Higgins J in recent proceedings before the Supreme Court [*Olseal v ACT* - transcript 15 May 1992]. In argument His Honour stated he doubted the ACT Attorney-General had power to grant the fiat.

The Bill will remove any doubts over the matter.

Explanation of Bill

The bill confirms the functions and powers of the Attorney-General and ensures the ACT Attorney may exercise powers which are consistent with those of all other Australian Attorneys-General.

Clause 1 sets out the Bill's short title.

Clause 2 is a definition clause. It sets out that references in the Bill to the Attorney-General are to the Minister to whom the Chief Minister has allocated that title, or to the Minister who administers the Bill.

This clause has been included so that if there is no Attorney-General there can be no doubt that a Minister has the powers of an Attorney-General.

Clause 3 states the Attorney-General is the Territory's first law officer.

Clause 4 sets out the Attorney-General's functions of being the Territory's and its officers' legal advisor and representative. It also provides the Attorney-General with power to do anything that is necessary or convenient to perform these functions. For example, this will empower the Attorney-General to appear in a court even if the Attorney-General does not have the qualifications that would otherwise be necessary to allow him or her to do so.

Clause 5 sets out that the Attorney-General has the traditional powers, privileges, duties and prerogatives of the Attorneys-General of the States. Some of these are dealt with in the preceding clauses the remainder are generally accepted as being:

- (a) The Attorney-General is primarily responsible for providing legal advice to the Government and the Assembly;
- (b) The Attorney-General is head of the bar and has precedence over all Queen's Counsel; and
- (c) The Attorney-General may:
 - (i) file a criminal information or indictment ex officio;
 - (ii) enter a nolle prosequi on any indictment [a nolle prosequi brings a prosecution to an end, but does not prevent a fresh prosecution from being brought];
 - (iii) grant immunities from prosecution;
 - (iv) enforce charitable or public trusts;
 - (v) bring proceedings to enforce and protect public rights;
 - (vi) grant a fiat to enable a private citizen who would not otherwise have standing to bring proceedings to enforce a charitable or public trust or to bring proceedings to enforce and protect public rights;
 - (vii) challenge the constitutional validity of any Commonwealth or State legislation which affects the public interest in the A.C.T.;
 - (viii) appear as amicus curiae [friend of the court] in appropriate cases. When the Attorney-General appears amicus curiae he or she appears to assist the court in a non-partisan way;
 - (ix) advise the Executive on judicial appointments;

- (x) institute proceedings for contempt when it is in the public interest to do so; and
- (xi) apply for judicial review to correct an error by a court or Tribunal.

Consequential Amendments

Clause 6 amends the *Audit Act 1989* so that the Auditor-General may ask the Attorney-General for advice as to the Auditor-General's powers, functions and duties, and the Attorney must provide the Auditor-General with written advice. In the past, the Auditor-General asked the Chief Minister for such advice, but as the Attorney-General is the principal legal adviser for the Territory, it is felt that the Attorney should provide this advice.

Clause 7 amends the *Legal Practitioners Act 1970*, confirming that the Attorney-General has precedence in Territory courts. This amendment also deletes references to the Solicitor-General and to 'her Majesty's Counsel for the Commonwealth'. The amended section provides, among other things, that subject to the rights of precedence of the Attorney-General, Her Majesty's Counsel for the Territory have precedence over other barristers and solicitors and precedence amongst themselves according to the respective dates of their appointment.

Clause 8 gives the ACT Executive the power to make regulations to give effect to the Bill. No regulations are under consideration. However, clause 4(1)(f) allows for regulations to provide the Attorney-General with functions in addition to those set out in the clause.

Financial impact statement

This Bill will have no impact on Government revenue or expenditure.