

1990

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

DIRECTOR OF PUBLIC PROSECUTIONS BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by the authority of
Mr Bernard Collaery MLA
Attorney-General)

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DIRECTOR OF PUBLIC PROSECUTIONS BILL 1990

OUTLINE

On 1 July 1990 the ACT Government acquires responsibility for the criminal law and the criminal justice system, apart from the administration of the Supreme Court. On the same day, modifications made to the Director of Public Prosecutions Act 1983 of the Commonwealth (The Commonwealth Act) to remove the prosecution of offences under Territory laws from its coverage, will come into effect. Before the transfer of responsibility the Commonwealth Director of Public Prosecutions (the Commonwealth DPP) prosecuted Territory offences under the Commonwealth Act.

The Director of Public Prosecutions Bill 1990 (the Bill) proposes legislation to replace the Commonwealth Act in relation to Territory offences. The Bill generally mirrors the Commonwealth Act and also shares its fundamental principles with corresponding State Acts.

The Director of Public Prosecutions (the DPP) is an independent statutory office responsible for prosecuting criminal offences in the name of the Crown. The statutory independence of the DPP means that he or she exercises the discretion of the office according to legal considerations and is seen to be free of political influence. All Australian jurisdictions, except South Australia and Western Australia, have established independent prosecuting authorities.

The Bill establishes the Office of the ACT DPP, describes the functions of the office, outlines the respective roles of the Attorney-General and the DPP in the prosecution process, confers necessary powers and discretions on the DPP and makes ancillary provisions for the administration of criminal justice in the Territory.

The DPP has the following principal powers and discretions:

- . prosecuting indictable and summary offences against laws of the Territory;
- . taking over and either continuing or ending summary prosecutions which someone else (other than the Attorney-General) has started;
- . exercising in his or her official name the powers of the Attorney-General connected with prosecutions, such as signing indictments, directing that proceedings against a person be ended and pursuing rights of appeal;
- . assisting the coroner at inquests or inquiries; and
- . taking civil remedies or recovering pecuniary penalties which are connected with a criminal prosecution.

The DPP also has a discretion to enter into an undertaking not to prosecute a person or not to use any evidence he or she might give against him or her. This discretion might be exercised, for example, where a minor participant in a crime agrees to co-operate and give evidence for the Crown.

Although the DPP benefits from statutory independence in the exercise of the powers and discretions of the office, the Attorney-General, as first law officer of the Crown, remains ultimately responsible for the administration of justice in the Territory. The Bill therefore provides a mechanism for the Attorney-General and the DPP to consult each other and for the Attorney-General to issue formal directions or guidelines to the DPP. These directions or guidelines deal with general prosecution policy issues: they may not specify how a particular prosecution is to be conducted.

The Bill preserves the powers and discretions of the Attorney-General relating to prosecutions. The Attorney-General may still exercise them personally. Apart from that, the DPP has general responsibility for conducting prosecutions, including supervising summary proceedings undertaken by other officers. To help the DPP discharge that function the Bill confers on the DPP a power to issue directions or guidelines to the police and other officers engaged in the investigation or prosecution of offences.

FINANCIAL CONSIDERATIONS

The Bill proposes legislation to support the prosecutions function in the Territory. It has no direct implications for Government expenditure or revenue.

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Clause Notes

Part I - PRELIMINARY

Clause 1: Short Title

Clause 1 is a formal provision which cites the eventual Act as being the Director of Public Prosecutions Act 1990.

Clause 2: Commencement.

Clause 2 specifies that the substantive provisions of the Act come into effect on a day to be notified by the Attorney-General in the Gazette.

Clause 3: Interpretation.

This clause defines the meaning of particular words or phrases as they are used in the Act.

PART II - OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Division 1 - Establishment and Control

Clauses 4 and 5 - Establishment and Control

Clauses 4 and 5 formally establishes the Office of the Director of Public Prosecutions, states that the Office comprises the Director and staff and specifies that the Director controls the office which has been created.

Division 2 - Functions and Powers of Director

Clause 6: Functions

This clause lists the functions of the DPP. The DPP's primary functions include: instituting and conducting prosecutions on indictment or summary prosecutions; assisting at coronial inquiries; recovering pecuniary penalties or seeking forfeitures; and taking, on behalf of the Territory or a Territory authority, civil remedies which are related to a criminal prosecution or the recovery or payment of a tax. Regulations made under clause 35 may add to the list of functions.

Clause 7: Prosecutions on indictment

Subclause 7(1) provides that the DPP may sign indictments in his or her official name (this is normally the Attorney-General's prerogative).

Subclauses 7(3) to 7(5) give the DPP an discretion to prosecute a person on indictment "ex officio" - that is, without the person having been first examined and committed for trial in the Magistrates Court. The Bill envisages the following circumstances: where the person involved agrees (subclause 7(3)); where the person has been examined but not committed for trial for the offence in question (paragraph 7(4)(a)); and where the person has been examined and the committal proceedings reveal evidence of a different indictable offence (paragraph 7(4)(b)).

Subclause 7(5) gives the DPP a general discretion to prosecute a person on indictment, bypassing the committal stage.

Subclause 7(6) gives the DPP the same powers as the Attorney-General to discontinue proceedings after a person has been committed for trial.

Subclause 7(7) authorises the DPP to issue a warrant to have a person discharged from custody exercising the power in subclause 7(6) to discontinue proceedings.

Clause 8: Taking over the conduct of General Proceedings.

Clause 8 confers on the DPP an overriding discretion to intervene and take over general proceedings which someone else (other than the Attorney-General) has started. The DPP may take over proceedings which the Attorney-General has started only if the Attorney-General has asked him or her to do so. Having taken over proceedings, the DPP may then either continue them, in his or her official name or in the name of the original parties, or bring them to an end. "General Proceedings" for the purposes of clause 8 are defined in clause 3 as proceedings which arise from the functions described in paragraphs 6(1)(a), (b), (c), (e), (f) or (g).

This important power enables the DPP to exercise a supervisory role over proceedings which other people (apart from the Attorney-General) may commence. Note that clause 33 expressly saves the existing rights of other officers and even private citizens to institute proceedings.

Clause 9 - Undertakings

Subclause 9(1) gives the DPP a discretion to indemnify a person against any self-incriminating answers, statement or disclosure he or she may make or document or other thing he or she may produce at applicable proceedings. This protection may also extend to any information, document or other thing obtained indirectly.

Subclause 9(2) provides that, where the DPP has given an undertaking, the relevant answer, statement, disclosure or

document etc. is not admissible in any civil or criminal proceedings, except in proceedings arising out of the falsity of the evidence which the person gave.

Subclause 9(3) defines "applicable proceedings" to mean: (i) a prosecution; (ii) a coronial inquest or inquiry; (iii) the recovery of a pecuniary penalty or proceedings for forfeiture; or (iv) civil proceedings for the enforcement or recovery of a tax liability or which are related to current or projected criminal proceedings.

Subclauses 9(4) and 9(5) make identical provision to subclauses 9(1) and (2) but in relation to "interstate proceedings" as opposed to proceedings within the Territory.

Subclause 9(6) defines "interstate proceedings" to mean (i) prosecutions or (ii) proceedings for the recovery of a pecuniary penalty or relating to a forfeiture under a law of the Commonwealth, a State or another Territory.

Subclauses 9(7) and 9(8) confers on the DPP a discretion to undertake not to prosecute a person for a specified offence or for particular acts or omissions which may constitute an offence.

Subclause 9(9) provides that an undertaking not to prosecute may be subject to such conditions (if any at all) which the DPP thinks appropriate.

Clause 10: Appeals

Clause 10 gives the DPP the same rights of appeal in relation to a prosecution or proceedings as the Attorney-General would have or, if the DPP has taken over proceedings, as the originator would have had. For these purposes, "right of appeal" includes a review or a rehearing under the Administrative Decisions (Judicial Review) Act 1989 or the Administrative Appeals Tribunal

Act 1989 or similar legislation, and are in addition to any other rights of appeal which the DPP may have or be given in future.

Clause 11: Representation of Territory and Territory authorities

Clause 11 provides that, when discharging his or her functions in relation to pecuniary penalties, forfeitures or civil remedies, the DPP may proceed in the name of the Territory or a Territory authority. This clause also provides that the DPP may act as counsel or solicitor for the Territory or a Territory authority.

Clause 12: Directions and Guidelines by Director

Clause 12 empowers the DPP to issue directions or guidelines regarding prosecutions or proceedings to the police, a person authorised under subsection 5(4) of the Government Solicitor Act 1989 to act for the Government Solicitor, or any other person involved in prosecutions or proceedings for forfeitures, the recovery of pecuniary penalties or for civil remedies. These directions or guidelines may be general or relate to the conduct of a particular case.

Where the DPP has issued directions or guidelines, he or she must give a copy to the Attorney-General as soon as possible and have them published in each annual report.

Clause 13: Provision of information to DPP

This clause provides that, where the DPP is about to take over or has taken over general proceedings started by someone else, that person is required to give the DPP a full brief of all the relevant information in that person's possession.

Clause 14: Police Assistance

This clause provides that, where the DPP is about to take over or has taken over a prosecution or where the DPP considers that a matter needs further investigation, the DPP may ask the Chief Police Officer for the help of the police. These requests must be in writing. The Chief Police Officer is obliged to comply with a request as far as practicable.

Clause 15: Obligation to inform court

Clause 15 obliges the DPP to inform the court as soon as practicable when he or she takes over a general proceeding which someone else has commenced. Failure to do so will not have any effect on the DPP's powers in relation to the proceeding.

Clause 16: Appearances by DPP

This clause provides that the DPP, in discharging his or her functions, may appear before a court in person or be represented:

- (i) by a member of his or her staff who is entitled to practise;
- (ii) by a person who is authorised to appear for the Government solicitor; or
- (iii) by any other person who is entitled to practise in that court.

Clause 17: Delegation

Clause 17 authorises the DPP to delegate any of his or her powers or functions to a staff member of the office. The relevant terms of delegation are in section 29B of the Interpretation Act 1967.

Clause 18: Additional powers

Clause 18 ensures that the DPP has all necessary powers to discharge the functions of the office.

Division 3 - Attorney-General

Clause 19: Consultation

Clause 19 gives the Attorney-General and the DPP a mutual right to consult each other about the performance or exercise of the DPP's powers or functions.

Clause 20: Directions and guidelines by Attorney-General

Clause 20 gives the Attorney-General a power to issue general directions or guidelines to the DPP regarding the discharge of the functions or the exercise of the powers of the office. This is the principal means by which the Government makes its prosecutions and criminal law policies known to the DPP.

To avoid compromising the statutory independence of the DPP, these guidelines must be general in nature and may not relate to how a specific case is to be conducted.

The Attorney-General is to consult the DPP before issuing directions or guidelines. Once they are issued, the Attorney-General is obliged first to have them published in the Gazette as soon as practicable and then to have them tabled in the Assembly within 15 sitting days of their being published in the Gazette.

Clause 21: Preservation of functions and powers

Clause 21 expressly preserves all the Attorney-General's powers and functions and makes it clear that he or she may still exercise them personally.

PART III - DIRECTOR AND MEMBERS OF THE STAFF OF THE OFFICE

Division 1 - Director

Clause 22: Appointment

Clause 22 deals with the appointment of the DPP. The Executive holds the discretion to appoint and has the power to specify the period of appointment (up to 7 years) and also the terms and conditions of appointment. The DPP must have been admitted as a practitioner in the Territory or in a State or another Territory for at least 5 years, unless the Commonwealth DPP is appointed as DPP, in which case that qualification does not apply. However, there is a corresponding qualification in subsection 18(2) of the Commonwealth Act.

Subclause 22(5) provides that the DPP must retire at the age of 65 years.

Clause 23: Remuneration and Allowances

Clause 23 provides that the DPP will be paid the remuneration and allowances specified in a relevant determination of a Remuneration Tribunal or, if there is no determination, as prescribed in the regulations. This provision does not apply if the Commonwealth DPP is appointed as DPP.

Clause 24: Leave of Absence

This clause gives the Attorney-General a discretion to grant leave of absence to the DPP. If the Commonwealth DPP is appointed as DPP, leave of absence will be granted under the Commonwealth Act and will be deemed to have been granted under the Territory legislation.

Clause 25: Preclusion from other employment

Clause 25 prohibits the DPP from practising his or her profession outside the duties of the office and also from engaging in paid employment outside the duties of the office without the prior consent of the Attorney-General.

This prohibition does not apply if the Commonwealth DPP has been appointed as DPP and is engaged in performing his Commonwealth functions.

Clause 26: Disclosure of interests

Clause 26 obliges the DPP to give the Attorney-General written notice of any direct or indirect financial interest he or she might have, or subsequently obtain, in a business or a corporation carrying on a business.

Clause 27: Resignation

This clause provides that the DPP may resign by writing to the Attorney-General.

Clause 28: Termination of appointment

Clause 28 sets out the grounds on which the Attorney-General may dismiss the DPP. Because the DPP is an independent statutory office, the incumbent may be dismissed only by showing cause.

Subclause 28(1) provides that the Attorney-General has a discretion to dismiss the DPP for misbehaviour or mental or physical infirmity.

Subclause 28(2) specifies that the Attorney-General must dismiss the DPP in any of the following circumstances:

- (i) the DPP becomes bankrupt or takes the benefit of any law relating to personal insolvency;
- (ii) is absent without leave for 14 consecutive days or for 28 days in any 12 months;
- (iii) engages in the practise of his or her profession outside the duties of the office;
- (iv) engages in paid employment outside the duties of the office without the consent of the Attorney-General; or
- (v) fails, without reasonable excuse, to disclose his or her financial interests as required in clause 26.

Subclause 28(3) provides that none of these grounds for dismissal applies to the Commonwealth DPP. The Commonwealth Act contains the relevant provisions.

Clause 29: Acting DPP

Subclause 29(1) and (2) provide that the Attorney-General may appoint a person who meets the eligibility requirements under clause 22 to act as DPP. That person may act as DPP for up to 1 months whenever the office is vacant for any reason.

Subclause 28(3) provides that the Commonwealth DPP is appointed as DPP the person appointed to act under the Commonwealth Act will take the place of the DPP during his or her absence.

Subclause 28(4) ensures that nothing which the acting DPP purports to do in the discharge of the functions of the office made invalid solely on the ground of a technical defect in his or her acting appointment.

Division 2 - Members of the staff

Clause 30: Staff

This clause specifies that the staff of the DPP's office are ACT public servants or, if the Commonwealth DPP is the DPP, persons employed under subsection 27(3) of the Commonwealth Act (which includes Commonwealth public servants, consultants and other temporary employees).

Clause 31: Consultants, etc

This clause authorises the DPP to engage suitably qualified persons to perform particular services as and when required, on terms and conditions which the DPP, with the approval of the Attorney-General, decides.

Clause 32: Other staffing arrangements

This clause allows the DPP to enter into an arrangement for the use of the staff or facilities of a unit of the Public Service or a Territory authority. This provision will give the DPP access to the resources of the Public Service to help him or her discharge functions of the office.

PART IV MISCELLANEOUS

Clause 33: Preservation of rights

Clause 33 expressly preserves any existing rights of a person (other than the Attorney-General) to institute summary prosecutions or similar criminal proceedings. The Attorney-General's powers and functions are preserved by clause 21.

Clause 34: Annual Report

Clause 34 obliges the DPP to produce an Annual Report as soon as practicable after the 30 June in each year and forward it to the Attorney-General. The Attorney-General is, in turn, obliged to have the Annual report tabled in the Assembly within 15 sitting days of receiving it.

Clause 35: Regulations

Clause 35 confers regulation making power on the Executive.