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The Law Making Process

by

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THE LEGISLATION-MAKING PROCESS IN THE NORTHERN TERRITORY

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My paper has nothing new to say, and no unique insights into weighty legal issues. It is a simple description of a process which largely governs our lives as lawyers, but about which there is very little knowledge. Whether the criminal justice system is serving the community or giving the community a serve, the debate would certainly be improved if the community knew how they got the legislation which regulates our behaviour.

The process I will describe relates to the experience of the Northern Territory. The Cabinet and Parliamentary processes elsewhere are similar in structure, except that the Territory, like Queensland, has a one-chamber Parliament, the Legislative Assembly.

1. THE PLAYERS

Before describing the process, I should introduce the main players:

- Attorney-General;
- Cabinet;
- Solicitor-General;
- Policy Unit of the Attorney-General's Department;
- Office of the Parliamentary Counsel; and
- The Community

Attorney-General

Attorney-General is the First Law Officer. Under the Law Officers Act, the Attorney-General shall, amongst other things:

- be the official legal adviser to the Territory and to the Executive Council;
- see to the administration of law and justice for the Territory; and
- advise the Territory on matters concerning Territory legislation including the drafting of legislation.¹

There is a common misconception that the Attorney-General is responsible for all Territory legislation. I use 'responsible' in the sense in which it is used under the Administrative Arrangements Order (AAO). The AAO allocates responsibility for the administration of the provisions of an Act or for an area of activity of government.² Under the current AAO, the Attorney-General is allocated responsibility for only 125 of the total of more than 280 Territory Acts. The Attorney-General's acts cover the areas of criminal law and procedure (but not police powers), commercial law (but not consumer protection), courts, corporations, victims of crime, censorship, property law, human rights, electronic transactions and regulation of the legal profession. The remaining 150-odd Acts are the responsibility of other Ministers.

For the Acts and areas of Government which are the responsibility of the Attorney-General under the AAOs, the Attorney-General decides what policy proposals in relation to those Acts or areas will be put to Cabinet, and one of the agencies within the Attorney-General's portfolio, prepares the necessary documentation to support the process. In addition to the Attorney-General's Department, the Anti Discrimination Commission, the Office of the Director of Public Prosecutions, the Office of Courts Administration are all separate agencies within the Attorney-General's portfolio.

This paper is directed towards the process adopted for Bills which are the responsibility of the Attorney-General. For the Acts and areas of Government which are the responsibility of another Minister, the Attorney-General bears only the

¹ section 6 Law Officers Act (Northern Territory)

² section 35 Interpretation Act (Northern Territory)

general duty to advise and comment on Territory legislation, including the drafting process. For example, the Attorney-General may comment on issues involving constitutional power, penalty levels or a potential legal difficulty that is evident on the face of the Bill. The Attorney-General does not have policy responsibility for the development of such legislation.

Cabinet

Ministers appointed by the Administrator together form Cabinet, which exercises the executive power delegated to the Ministers under the *Northern Territory (Self Government) Act (Cth)*.³ There are currently nine members of the Territory Cabinet. No new legislation or amendment to existing legislation can occur unless it is approved by Cabinet.

Solicitor-General

The Solicitor-General is the Attorney-General's counsel.⁴ At any time, the Attorney-General may request the Solicitor-General to advise him on a legislative proposal in relation to either his own portfolio area, or the portfolio area of any other Minister.

Policy Unit of the Attorney-General's Department

The Policy Unit of the Attorney-General's Department manages the Attorney-General's legislative portfolio and assists him to advise in relation to other legislation. The Unit relevantly consists of 9 legal policy officers (who are lawyers), 2 public policy officers and a number of support staff. The legal policy officers are largely senior, experienced lawyers, whose background brings a particular insight to the legal policy development process. Most of the policy lawyers have practised in an area of the law for a time before joining us, or alternatively, have other relevant experience.

³ sections 35 and 36 *Northern Territory (Self Government) Act 1978 (Cth)*

Office of the Parliamentary Counsel

The Office of the Parliamentary Counsel actually draft the words of all Bills presented to the Legislative Assembly. Drafting is done on the basis of Cabinet's approval of the policy initiative and upon instructions of the agency charged with implementing the decision of Cabinet. The Office of the Parliamentary Counsel is the administrative responsibility of the Chief Minister, not the Attorney-General. It consists of six drafters.

The Community

The community consists of individuals, community interest groups, professional bodies and peak organisations.

2. THE IDEA BECOMES A PROPOSAL

All legislation starts as an idea. The idea can come from an infinite variety of sources – the Attorney-General or another Minister, party policy, pressure from a community group, the media or public opinion, advice from Government departments, a Law Reform Committee Report, a discussion at a meeting of the Standing Committee of Attorneys-General, a letter from a constituent, representations from a peak body, the outcome of a judicial decision, the spontaneous brilliance of a policy lawyer or a discussion with the Attorney-General at the fruit and vegetable section of Palmerston Coles on a Saturday morning.

Regardless of where the idea came from, the Policy Unit of the Attorney-General's Department is generally asked to advise the Attorney-General:

- whether, in its view, the idea would provide an effective solution; and

⁴ section 14 Law Officers Act (Northern Territory)

- what are the options available for implementing the idea.

The Attorney-General examines that preliminary advice. If the Attorney-General decides to pursue the idea by means of legislation, he or she must put the matter, which has now become a proposal, to Cabinet.

3. THE PROPOSAL GOES THROUGH THE CABINET PROCESS

The cabinet process is governed by the Cabinet Handbook.⁵ All proposals requiring legislation must be presented to Cabinet in two stages. Firstly, approval must be sought to draft the Bill. When the Bill is drafted, approval must be sought to introduce the Bill into the Legislative Assembly.

Cabinet Approval to Draft

The Office of the Parliamentary Counsel cannot draft a Bill without obtaining the approval of Cabinet.

To obtain this approval, the Policy Unit of the Attorney-General's Department prepare a draft Cabinet Submission. That submission (called the first submission), will be no more than six pages long and will include, amongst other things:

- a brief summary of events leading up to the proposal;
- a consideration of the issues which presents a case for the proposal;
- a summary of all possible courses of action or options, together with reasons why one option should be preferred over another option;
- how the Minister expects the community to receive the proposal recommended;
- estimated cost of implementation;
- the possible effects of the proposal for Commonwealth, State and Local Government relations.

⁵ Cabinet Handbook, Northern Territory Government, March 1999

When the draft submission is completed, it is forwarded to the Attorney-General, to seek his or her approval to circulate the submission to other affected agencies for comment.

Circulation to, and Comments from, other Agencies

Before any submission can be placed before Cabinet, Cabinet requires that it be circulated to the three central agencies for comment: the Department of the Chief Minister, Northern Territory Treasury and the Attorney-General's Department. Each of these agencies gets the opportunity to tell Cabinet what it thinks of the proposal.

In relation to Bills which are the responsibility of other Ministers, this process allows the Attorney-General to discharge his or her duty to advise the Territory on matters concerning legislation as all Cabinet Submissions are examined by the Attorney-General's Department, usually by the Policy Unit at least initially, and commented upon.

Other affected agencies are also be given the opportunity to comment on a proposal. For example, a proposal that impacts upon the delivery of health services should be circulated to Territory Health Services for comment.

Cabinet Consideration

When a draft Cabinet Submission concerning legislation which it the responsibility of the Attorney-General has been circulated, it will be resubmitted to the Attorney-General to seek approval for the draft submission to be signed as a final submission, and lodged with Cabinet for future consideration. Before deciding to sign the submission, the Attorney-General will review the comments of other agencies. If there is vehement opposition from a particular agency, the Attorney-General may decide not to proceed with the proposal. Alternatively, before proceeding, the Attorney-General may direct the Department to conduct further consultations with the objecting agency, in order to resolve the objection.

If the Attorney-General signs the Cabinet Submission, it is lodged with the Cabinet Office and will be included in the Cabinet Business List for the next Cabinet meeting.

Cabinet's Decision

Cabinet will decide to accept or reject the proposal, or it may even modify the proposal in a way that is not canvassed in the submission. If the proposal is rejected, that is the end of the process.

If the proposal is accepted, Cabinet will approve the drafting of legislation to implement the proposal.

Drafting

When Cabinet approves drafting, if it concerns the Attorney-General's legislation, the Policy Unit of the Attorney-General's Department will prepare detailed drafting instructions on the way the general policy direction of Cabinet is to be embodied in legislation. The Cabinet decision alone is rarely sufficient for the Office of the Parliamentary Counsel to work from.

Then starts a process of consultation and negotiation between the Office of the Parliamentary Counsel and the Policy Unit of the Attorney-General's Department. The roles of each are complex and often overlapping. It often appears that there is an infinite variety of ways in which a Bill achieving the same end, can be drafted. The Policy Unit is responsible for seeing that the Bill embodies the policy approved by Cabinet. The Office of the Parliamentary Counsel are responsible for knowing the best way to embody that policy in legislative form.

The Office of the Parliamentary Counsel may also, from time to time, refer a draft Bill to the Policy Unit of the Attorney-General's Department, even though it does not involve legislation which is the responsibility of the Attorney-General eg. if legal advice is required during the drafting process, or a whole-of-government legal policy issue arises. For example, issues involving the appropriateness of penalty levels or

the nature of offence provisions may be referred. The Policy Unit of the Attorney-General's Department will then advise the Office of the Parliamentary Counsel and the instructing agency.

The Bill

When a Bill is completed to the satisfaction of the Office of the Parliamentary Counsel and the Policy Unit of the Attorney-General's Department, it must be prepared for introduction into the Legislative Assembly. A settled copy of the Bill is provided to the Policy Unit and the Unit prepares the Second Reading Speech, the Explanatory Memorandum and Committee Notes for the Bill.

A second Cabinet Submission is prepared, attaching the Bill and its accompanying documents, and seeking Cabinet's approval to introduce the Bill into the Legislative Assembly. That Cabinet Submission is circulated for comment in the same way as the earlier submission. Accordingly, agencies get not one, but two opportunities to convey their comments to Cabinet about a proposed law.

If Cabinet approves introduction of the Bill, the Bill will be printed in the form in which it will be introduced into the Legislative Assembly.

4. PARLIAMENTARY PROCESS – THE LEGISLATIVE ASSEMBLY

The Parliamentary process is governed by the Standing Orders of the Legislative Assembly of the Northern Territory.⁶

Government Bills are introduced by the Minister with responsibility for the Act. Bills which are the responsibility of the Attorney-General, are introduced by the Attorney-General.

⁶ Adopted as at 29 August 1985 as amended.

Bills can also be initiated by private members. A draft Bill is prepared by the Office of the Parliamentary Counsel, acting under instructions from the private member. The member introduces the Bill into the Assembly.

A Bill which is the responsibility of the Attorney-General is initiated in the Legislative Assembly when the Attorney-General gives notice. The Minister must give the Assembly notice of his or her intention to introduce a Bill, specifying the short title and serial number of the Bill and the day it will be presented, which is usually on the next sitting day.⁷ The Minister then signs the notice and hands it to the Clerk of the House.

At a subsequent sitting, the notice of motion will be called upon and the Minister will then move a motion to introduce the Bill. If the motion is agreed, the Minister will hand three copies of the Bill to the Clerk of the House who reads the short title of the Bill. This is known as the First Reading.⁸ The Minister then moves that the Bill be read a second time and delivers the second reading speech which outlines the principles of the Bill. The Bill then becomes a public document and is placed on the web site of the Department of the Chief Minister within 48 hours⁹.

After the second reading speech, the debate is adjourned and the next stage of the process cannot commence before the lapse of one month from the day on which the Bill was read a first time, unless the Bill is declared by the Speaker to be an urgent Bill.¹⁰ An urgent Bill is a Bill declared by the Speaker, upon application by the Chief Minister, to be an urgent Bill, if he is satisfied that the delay of one month could result in hardship being caused.

This requirement in the Standing Orders is a one month 'brake' on the process of law making, after the Bill has been made public, for all Bills that are not declared urgent. This enables all those outside Government to examine the Bill and, if necessary, make representations to the Attorney-General concerning the Bill.

⁷ Standing Order 173(1) and (2)

⁸ Standing Order 173(6), 175

⁹ www.nt.gov.au/dcm/legislat

¹⁰ Standing Order 178

After one month, the Second Reading Debate resumes. All members are given the opportunity to express their opinions about the principles of the Bill. For Bills which are the responsibility of the Attorney-General, the Shadow Attorney-General usually participates in the debate, and the Attorney-General responds to the Shadow Attorney-General's comments. Prior to the resumption of the debate, the Shadow Attorney-General is given a briefing and an opportunity to put questions to the public servants who have prepared the Bill, who are usually officers of the Policy Unit of the Attorney-General's Department. This assists the Shadow Attorney-General to prepare for the second reading debate.

At the conclusion of the second reading debate, a vote is taken on the question "that this Bill be read a second time". If the Legislative Assembly agrees, the Bill proceeds to either the Committee stage (if there are amendments to be considered) or directly to the third reading stage. If the Legislative Assembly disagrees, the Bill is defeated.

A Bill can be amended after it has been introduced into the Legislative Assembly. Amendments take place during the committee stage. Amendments may arise from consultations that have occurred since introduction and public release of the Bill, or from the floor of the Legislative Assembly if a matter is raised during the second reading debate.

If the Minister or any other Member wishes to amend the Bill, the Legislative Assembly resolves itself into the Committee of the Whole to deal with the Bill in detail. During this stage, the Speaker leaves the chair and the Chairman of Committees presides over the Committee. At the end of this stage, the Chairman reports the Bill to the Speaker, with or without amendments.

After a Bill has passed the second reading stage or the committee stage, a vote is taken on the question, "that the Bill be now read a third time". If it is agreed to, the Bill is passed and is forwarded to the Administrator for assent.

5. ASSENT

Every proposed law passed by the Legislative Assembly must be presented to the Administrator for assent.¹¹ Before giving his or her assent, the Administrator must declare that the proposed law is within the executive authority of the Ministers of the Territory.¹² For every Bill presented to the Administrator for assent, the Policy Unit of the Attorney-General's Department prepares an advice from the Attorney-General, stating that the Bill is within the powers described.

An Act assented to by the Administrator comes into operation on the day on which that assent is declared.¹³

¹¹ section 7(1) *Northern Territory (Self Government) Act 1978* (Cth)

¹² sections 7(2) and 35 *Northern Territory (Self Government) Act 1978* (Cth)

¹³ section 6 *Interpretation Act*