

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Constitution Alteration (Advisory Jurisdiction of
High Court) Bill 1983

EXPLANATORY MEMORANDUM

(Circulated by authority of the Hon. L.F. Bowen, Deputy
Prime Minister and Minister representing the Attorney-General)

OUTLINE

The purpose of the Bill is to enable the Commonwealth and State Governments and a Government of a self-governing Territory to obtain advisory opinions from the High Court on specified types of questions.

The Bill is so framed as to confine the jurisdiction to questions relating to provisions of enactments actually passed by a Commonwealth or State Parliament, or by a legislature of a self-governing Territory, to 'proposed enactments' which have passed both Houses (or in unicameral legislatures, the House) and are awaiting the Royal assent and to certain other constitutional or treaty questions that have actually arisen or are reasonably likely to arise.

The Commonwealth, State or Territory Government concerned may only seek an advisory opinion on the validity of an enactment or proposed enactment passed by its own Parliament or legislature.



NOTES ON CLAUSES

Clause 1 - This is a formal provision specifying the short title of the Act.

Clause 2 - Advisory Jurisdiction

This clause inserts a new provision in the Constitution, section 77A, which confers an advisory jurisdiction on the High Court.

Sub-Clause (1) enables the Commonwealth Government to obtain an opinion from the High Court on a number of specified matters. In formal terms a reference will be initiated by the Governor-General in Council.

The matters on which the Commonwealth Government may obtain an opinion are questions of law as to the validity of a provision or provisions of a Commonwealth Act or of a Bill that has been passed by both Houses and questions of law that the Governor-General in Council is of opinion have arisen or are reasonably likely to arise concerning:

- the interpretation of ss.57 (double dissolutions and joint sittings), 121 (admission of new States), 122 (territories), 123 (alteration of limits of States), 124 (formation of new States) and 128 (referendums);
- the interpretation or application of ss.44 or 45 (disqualification of members and Senators) but only with the consent, or at the request of, the relevant House of the Parliament; and

- the interpretation of any treaty and legislation to implement a treaty.

Sub-Clause (2) enables a State Government or a Government of a self-governing Territory to obtain an advisory opinion on any question of law as to -

- the validity of a provision or provisions of an Act or of a Bill that has been passed by the legislature of that State or Territory; and
- the 'manner and form' required for the passing of that State's or Territory's legislation (requirements as to 'manner and form' of legislation are imposed by State Constitutions).

Sub-Clause (3) enables the Government that makes a reference to specify facts or circumstances that are to be assumed by the High Court in dealing with the questions, thus ensuring that opinions are not given in a vacuum.

Sub-Clause (4) ensures that argument is heard in public, that reasons are made public and that the Attorneys-General of the Commonwealth and the States together with persons who, in the opinion of the High Court have sufficient interest in the determination of a question, have a right to be heard; the Attorney-General of a self-governing Territory is given a right to be heard on a matter referred by his Government and on questions involving the admission of new States (s.121) and the Territories power (s.122).

Sub-Clause (5) ensures that a court from which an advisory opinion is sought is constituted by at least five Justices.

Sub-Clause (6) enables a reference to be amended after it has been made.

Sub-Clause (7) defines various terms used in the provision. In particular, 'Parliament', in relation to a Territory, is defined in such a way as to take account of the different kinds of legislatures that may be consistent with self-government; 'proposed enactment' is defined in terms that require passage of a Bill through both Houses (or in a unicameral legislature through the House) before it can be the subject of a reference; however, a reference under sub-clause (2)(b), relating to the 'manner and form' required for the passing of State or Territory legislation may focus on a Bill in the form in which it is before the Parliament; 'treaty' is defined to include any international agreement between nation States; 'self-governing Territory' is defined in terms which limit the expression to a Territory in respect of which, apart from the Commonwealth's power under the Constitution, exclusive power to make laws for the Territory is vested in a fully elected Territory legislature (currently only the Northern Territory).

