

ATTORNEY-GENERAL BILL 1998

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The objectives of this legislation are to enshrine in statute the powers, functions and responsibilities of the Attorney-General.

Reasons for the objectives and how they will be achieved

The 1989 Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Fitzgerald Report) raised concerns about the independence of the Attorney-General.

The Fitzgerald Report noted that the Attorney-General, as first law officer, has extensive powers and discretions which are intended to be exercised in the public interest. These include functions in the prosecution and discontinuance of criminal proceedings, and the provision of legal advice to government. The Fitzgerald Report concluded that the proper performance of such functions is dependent upon impartiality and freedom from party political influences.

The Fitzgerald Report recommended the Electoral and Administrative Review Commission (EARC) implement and supervise reforms recommended by that Report, including re-establishment of the independence of the Office of Attorney-General.

The EARC Report on Review of Independence of the Attorney-General was tabled in the Legislative Assembly on 15 July 1993. Included in EARC's recommendations was the enactment of legislation to specify the powers, functions and responsibilities of the Attorney-General in the form of the draft Bill attached to the EARC Report.

The Parliamentary Committee for Electoral and Administrative Review (PCEAR) considered the EARC Report, and concluded that the

Attorney-General Bill recommended by EARC should not be adopted at that time.

However, concern has been expressed in the years following the PCEAR Report in relation to the need for the Attorney-General to exercise the powers of first law officer of the Crown independently of executive government.

This Bill represents a significant step towards guaranteeing that independence, and ensuring public confidence in the office of Attorney-General.

Administrative cost to Government of implementation

Nil

Fundamental legislative principles

The Bill is consistent with fundamental legislative principles.

Section 4(3)(a) of the *Legislative Standards Act 1992* sets out the fundamental legislative principle that legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Whilst the Bill contains a list of the powers of the Attorney-General, it does not attempt to exhaustively codify those powers. This intent is reflected in clause 7(3)(b), which provides that decisions made in exercise of the specified powers of the Attorney-General are not decisions of an administrative character made under an enactment merely because of inclusion in the Bill.

Rather, the authority for the exercise of the powers will continue to be the common law or the applicable statute. The rights of review that presently apply to the relevant decision will continue to be available.

Courts have traditionally been reluctant to review decisions made in the exercise of prerogative power, including decisions of the Attorney-General, because they are not matters appropriate for judicial determination. For example, the High Court in *Jago v District Court of New South Wales* (1989) 168 CLR 23 held that it was not desirable for the court to become

involved in decisions about the commencement of prosecutions because the court has ultimate responsibility for determining guilt or innocence.

The Bill does not alter the amenability of decisions of the Attorney-General to judicial review.

Part 4 of the Bill imposes obligations on the Attorney-General to report to the Parliament when the Attorney-General refuses or fails to grant a fiat to enable a person to bring proceedings to enforce or protect a public right, and when the Attorney-General exercises independent prosecutorial powers.

Consultation

EARC and the PCEAR called for public submissions in relation to the review of the independence of the Attorney-General. The PCEAR held public hearings as part of its review of the EARC Report.

A copy of the draft Bill produced by EARC was also circulated to the Bar Association of Queensland, the Queensland Law Society, the judiciary, the Queensland Law Reform Commission and other stakeholders prior to the introduction of this Bill.

NOTES ON PROVISIONS

Clause 1 sets out the short title of the Act.

Clause 2 provides for the commencement of the Act.

Clause 3 establishes the office of Attorney-General and provides which Minister is to be Attorney-General.

Clause 4 provides that the Attorney-General is the first law officer of the State.

Clause 5 sets out the principal functions of the Attorney-General as the State's first law officer.

Clause 6 provides that the Attorney-General has the necessary power to fulfil the functions of the office of Attorney-General and that the

Attorney-General may conduct litigation on behalf of various entities.

Clause 7 outlines the specific powers of the Attorney-General that are recognised at common law and under various statutes. The listing of powers in this clause is not intended to operate as a code. A power conferred under another Act will continue to be exercised under that Act. A power recognised at common law will continue to be exercised under the common law.

Clause 7(2) provides that the Attorney-General is not able to direct the Director of Public Prosecutions to exercise the Attorney-General's prosecutorial powers. This clause recognises that the prosecutorial powers of the Attorney-General and the Director of Public Prosecutions are to be exercised independently.

Clause 7(3)(a) clarifies that the Attorney-General is not able to grant immunities from prosecution for prospective acts or omissions. This reflects the position at common law.

Clause 7(3)(b) provides that the inclusion of the powers of the Attorney-General in this Act does not by itself result in a decision in the exercise of those powers being a decision of an administrative character under an enactment. This makes it clear that the Bill does not alter the amenability of decisions of the Attorney-General to judicial review.

Clause 8 preserves the Attorney-General's functions, powers and prerogatives that existed at common law and equity and by tradition or usage. This clause recognises that the Act does not contain an exhaustive list of the existing powers and prerogatives of the Attorney-General, and that the common law may in future recognise additional powers and prerogatives to meet changing circumstances in the law.

Clause 9 clarifies that the Attorney-General retains the functions given to that office by other statutes, and the exercise of those powers is not limited in any way by this Act.

Clause 10 imposes an obligation on the Attorney-General to report to Parliament if the Attorney-General refuses to grant a fiat to a person to bring an action to enforce or protect a public right. These actions are generally known as relator actions.

Clause 11 imposes an obligation on the Attorney-General to report to

Parliament if the Attorney-General exercises a prosecutorial discretion to enter a nolle prosequi or to present an indictment. The obligation to report does not arise until the proceedings involving the person are concluded by an acquittal, expiry of the relevant appeal period, determination of an appeal or the prosecution otherwise ends.

The Attorney-General's report must set out the circumstances and reasons for the decision to exercise the prosecutorial power.

Clause 12 provides that service on the Attorney-General may be effected by the giving the document to the chief executive.

Clause 13 enables the Governor in Council to make regulations under this Act.